



WHAT YOU CAN EXPECT WHEN YOU BECOME AN EXPERT

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If you have ever been served with a subpoena (read “Greetings”) compelling you to give fact testimony at a deposition or trial, your testimony will be limited to your factual observations of your patient. (In some jurisdictions, you may be asked about any opinions you held during the treatment.) As a fact witness, you are not entitled to be paid for time testifying and your schedule may not be accommodated. But if you are an expert witness, you can expect to be treated differently and more will be expected of you.

Brain injury specialists are key to brain injury litigation. As a brain injury specialist, you are in a unique position to educate jurors, opposing counsel, courts, and insurance companies about a brain injury’s impact on a plaintiff’s future education, medical, living and employment needs as well as the person’s life expectancy and state of consciousness. Without your expertise, jurors would be left to speculate about the nature of a brain injury, its cause(s) and sequelae in a particular case. Court determined are the only witnesses who are allowed to give opinion testimony as long as the testimony is within the expert’s education, training and experience and is stated in terms that meet the jurisdictions standard of proof. When you become an expert witness, you should expect that your opinions will be challenged, your background scrutinized and your work criticized.

You can anticipate that despite your well-earned reputation as a brain injury specialist, opposing counsel will challenge your credentials, experience, education, method analysis, past presentations, prior testimony, published research articles, previous work for counsel and prior inconsistent opinions and statements in an effort to diffuse your expert opinion(s).

Before you agree to be a testifying expert, there are several things you should do. When contacted, find out the names of all the parties, insurers, attorneys and law firms to ensure you have no conflicts. Learn what legal issues you are to address. Ask whether or not you will be examining the injured party.

If you have no conflicts and are willing to address the legal issues, send the retaining office your written fee contract containing your fee schedule, cancellation policy, retainer terms, payment schedule and the person or company responsible for paying you. Do not agree to a contingent fee arrangement or take a lien against the case. You should expect to defend your compensation arrangement no matter the (hourly or flat) rate is; justify your billing accuracy by maintaining records of what you reviewed and wrote as you invoice for your time.

Unlike an fact witness, you should expect to be given all of the discovery materials including to the claimant’s entire medical records both preceding and after the incident plus depositions, Answers to Interrogatories, the Complaint, Admissions, photographs, videos (including Day in the Life) and opposing parties’ expert witness disclosures. Review all of the materials.

Understand, that as you review the materials and prepare your expert report or disclosure and for testimony, any and all communications between you and those who retained you are

discoverable by the opposition because your work is usually not considered privileged or otherwise protected from disclosure. This includes electronic communications.

You will be expected by most state jurisdictions and federal courts to provide a list of cases where you have testified (whether at deposition or trial) for last 4-5 years. Additionally, anticipate that opposing counsel will question you about all cases in which you served as an expert, whether or not you gave testimony. Opposing counsel will look for prior inconsistent statements and opinions in previous testimony, reports, public presentations and published research. Anticipate that opposing counsel will ask how often you are retained by the plaintiff as compared to the defense, in an effort to demonstrate your lack objectivity.

While you do your expert review and draft your expert report, keep in mind the legal questions you have been retained to answer. The questions may include the following: Is the plaintiff's brain injury likely permanent? What is his likely diagnosis? Did the defendant(s) deviate from the standard of care? Did the defendant(s)' negligence likely cause plaintiff's brain injury? Will the plaintiff likely require future medical care and, if so, what are the treatments, their frequency and duration? Does the plaintiff's brain injury likely affect his/her ability to return to work, or school? If the person with a brain injury is a minor, does the brain injury likely cause a loss of vocational potential, earning capacity and/or educational opportunity. Does the plaintiff's brain injury likely affect his/her life expectancy? Does the plaintiff likely feel pain? What is plaintiff's level of awareness, e.g., is she "minimally conscious"? Once you understand the questions to be answered, your opinions must meet certain legal standards including the Daubert case.

Your expert opinions to the above questions must be scientifically based on valid research, utilize science accepted by your peers and substantiated by peer review articles. In order to meet a Daubert challenge, you will be expected to assist the attorney by identifying supportive research literature. We often see Daubert challenges to new diagnostic tests (such as QEEG and DTI) and causal relationship between certain medical conditions and brain injuries. Be aware that all your work and opinions in the matter will be for naught if there is a successful Daubert challenge to your methodology.

You must state your opinions in terms that meet the applicable standard of proof. When you become a designated expert witness, you must know the applicable expert witness opinion standard of proof. Unless you are involved in a criminal proceeding (where the proof standard is "beyond a reasonable doubt"), the civil standard will be "preponderance of the evidence". Legal standard of proof differs from scientific proof. Your opinions need not be stated with 100% certainty (or +/- one standard deviation). Your opinions do have to be expressed as "more probable than not", "greater than 50% likelihood", "more likely than not", "with a reasonable degree of [medical/scientific] certainty [or probability]". If you fail to state your opinions using the jurisdiction's standard of proof or fail to understand how the standard is applied, your opinion testimony may be precluded.

As the majority opinion in a Nebraska case pointed out, an expert need state his/her opinion with absolute certainty: "it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for [a]

disability. Absolute certainty is not required. Medical diagnosis is not that exact a science." *Sanchez v. Derby*, 433 N.W.2d 523, 230 Neb. 782 (Neb. 1989) In *Sanchez v Derby*, the plaintiff suffered a traumatic brain injury in a 1982 motor vehicle accident. At the request of her attorney and neurologist, the plaintiff was referred to a board-certified neuropsychologist for evaluation. The neuropsychologist interviewed and tested the plaintiff, reviewed her medical records. If the expert's opinion were excluded as to the cause of the plaintiff's head injury, the jury could not award damages because there would be no causal connection between the plaintiff's brain injury and the motor vehicle crash. The testimony offered by the neuropsychologist was as follows:

Most probable causes (sic) of this behavioral change is either (1) a combination of a post-traumatic stress disorder and a reaction to chronic pain, in a previously marginal personality, or (2) an organic affective disorder secondary to mild subcortical brain injury (around the orbital frontal areas) which can occur in such accidents such as this. While it is possible at this time to state firmly that one of these causes is indeed the most probable cause of her problems..., it is not possible to choose between them at present."

Sanchez makes clear the expert must say that the plaintiff's current condition was likely caused by the motor vehicle accident. (Be forewarned that the dissenting Judge would have excluded the brain injury expert's opinion because the expert stated there were two alternative likely causes and one was not more probable than the other.) Though most courts will recognize well-qualified brain injury professionals as experts, their opinion testimony must meet the legal criteria or it may be inadmissible. You can expect guidance from the attorney about the legal standard of proof but it is the expert's responsibility to state opinions that meet the requirement. It is then the professional's responsibility, with the guidance of the attorney, to present expert testimony that meets the legal criteria.

You can anticipate that despite your well-earned reputation as a brain injury specialist, opposing counsel will challenge your credentials, experience, education, method analysis, past presentations, prior testimony, published research articles, previous work for counsel and prior inconsistent opinions and statements in an effort to diffuse your expert opinion(s). As long as you know what is expected of you once you are an expert witness, you will meet these challenges with a renewed sense of intellectual curiosity and the professional satisfaction that you are meeting an important goal of your profession to educate the public about brain.

ABOUT THE AUTHOR

Kenneth I. Kolpan, P.C. has worked as a lawyer in the field of traumatic brain injury and other catastrophic injuries for over 30 years. He is the principal and founder of the firm, Kenneth I. Kolpan, located in Boston, Massachusetts. He has handled cases in the trial courts of Massachusetts (both state and Federal) and has represented individuals with brain injuries in Nevada, New Jersey, Ohio and elsewhere. He is Past President of the Brain Injury Association of Massachusetts, a member of the Board of Directors and its Executive Committee. Mr. Kolpan has made numerous national and international presentations to attorneys, medical providers, brain injury programs and survivors on the legal rights of persons with brain injury.