
GENERAL COUNSEL NOTE

September 2008

From time to time, Vanderbilt faculty and staff may be asked to serve as an expert witness in civil or criminal cases. At trial, an expert witness is needed to introduce scientific, technical or other specialized knowledge into evidence to assist the trier of fact. A witness may be qualified as an expert based on his or her specialized knowledge, skill, experience, training, or education, and may render an opinion based on that expertise. In Tennessee, a trial court may consider the following factors in determining the reliability of an expert testimony: (1) whether the scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.¹

By virtue of your established credentials, you are an "expert." You cannot be compelled against your wishes to be an expert witness, however. The Tennessee Court of Appeals has ruled that a treating physician cannot be forced to give expert opinions regarding a patient who brings suit. The Court wrote:

In the instant case, we note that Dr. Moore and Dr. Lawrence were not listed as expert witnesses by either party. They were simply party defendants who are "experts" by nature of their chosen field. Under the facts of the instant case, we do not find that their expertise is subject to compulsion. As a result, we find that the trial court did not err when it refused to compel Dr. Moore and Dr. Lawrence to answer questions outside the realm of their own actions and opinions that they expected to render at trial.²

The plaintiffs' bar would like to see that ruling overturned, but as of now you are protected from being forced in a deposition to give an opinion that you do not wish to give. For instance, you, as a treating physician or expert in another field, can simply decline to answer a question of whether another health care provider or professional violated the standard of care.

However, in the event that you are approached by an attorney to serve as an expert witness, and you want to do so, know that there are two types of experts. A consulting expert is engaged to review the record/file and assist that party in assessing the case or preparing for trial, but who is not necessarily expected to testify at trial. A testifying expert is retained by a party in a lawsuit to give opinions from the stand at trial. The rules regarding the discoverability of an expert's opinion are governed by the rules of the court in which the case is being tried, so it is important to ask the attorney requesting your expert testimony for information regarding the applicable rules before you make a decision in what capacity you may wish to become an expert. Sometimes, an attorney may engage you as a consulting expert and then if you have favorable opinions, may convert the engagement into a testifying expert engagement.

Before agreeing to become an expert witness in any type of lawsuit or legal proceeding, there are

¹ *McDaniel vs. CSX Transp, Inc.*, 955 S.W.2d 257

² *Lewis v. Brooks*, 66 S.W.3d 883 (Tenn. Ct. App. 2001)

many factors to be considered. First, before agreeing to serve as an expert, you should ask to review the pleadings in the lawsuit (at least the Complaint and Answer) and any other relevant material, including any deposition testimony by others. Relying only on the description of the case and the merits of a claim by the attorney who would like to engage your services may not give a complete picture of the issues at hand. Before you agree to serve, you should also get the full name of the case, the attorneys involved on both sides, the names of experts, if known, on both sides, and the nature of the claim.

Assessing this information will help you determine whether you are willing and able to provide the expertise requested and whether you are comfortable rendering an opinion that supports their position in the case. Your expertise and credibility are at issue when you testify as an expert, and your testimony should be able to withstand the rigors of a thorough cross-examination. Additionally, an expert opinion must be based on sound facts and information. Mere speculation or an opinion that is not founded on reliable information, principles or methods may not be considered competent evidence. The court may require you as the expert to disclose the underlying facts or data supporting the basis for the expert's opinion, so it is important to be able to cite or produce such material if required to do so.

Another important consideration in deciding whether or not to serve as an expert witness is whether your involvement in the case poses any conflict of interest under Vanderbilt Conflict of Interest (COI) policies. You should review the relevant COI policies,³ discuss with your supervisor whether this engagement is acceptable under the COI and outside consultation policies, and make the appropriate disclosures. In addition, you should consult the Office of Risk and Insurance Management to determine whether serving as an expert may conflict with a current Vanderbilt claim or case Vanderbilt is defending, whether there is an actual or perceived conflict with the attorneys involved in the case, and whether there are any other facts you should be aware of, for instance, if the patient at issue was ever treated at Vanderbilt. This helps to identify possible problems with conflicting or damaging testimony by you as the expert re: the standard of care or similar issues. While not prohibited, it is also inadvisable and potentially embarrassing or damaging to have two Vanderbilt faculty or staff members serving as experts on opposite sides of a case.

Other considerations before agreeing to become an expert include how much time and effort you are willing to commit and whether you are willing, if required, to attend the trial to provide live testimony at trial. The litigation process is a lengthy one, but there are certain periods of time in which you will need to spend time on the matter – initial review of the records; a meeting or telephone conference with the engaging attorney about your opinions; review of a draft expert statement containing your opinions; preparation for your deposition; review of the transcript; preparation for trial; and attending and testifying at trial. You should clearly convey time limitations to the attorney who seeks to engage you as an expert.

Also of increasing importance is that, no matter how one tries to present as an independent expert and not as a representative of Vanderbilt, you almost assuredly will be questioned as to what Vanderbilt's policies, standards and practices are. This can be problematic, as in recent cases that have unnecessarily involved Vanderbilt in objecting to production of its policies and procedures in cases in which Vanderbilt has no other involvement. This is very time consuming, expensive and

³ Policies for both Staff and Faculty can be found at: <http://www.vanderbilt.edu/compliance>

may unnecessarily involve you or Vanderbilt in a negative or controversial situation that you did not anticipate.

You also should be aware that with electronic search capability, attorneys are far more savvy at picking up on your published articles, prior testimony, inconsistencies, presentations and the like. This may come back to haunt the unprepared expert. You should maintain a copy of all your testimony, publications, depositions or expert opinions disclosures, to be sure you are consistent and not contradictory, especially when testifying as to standard of care issues.

Finally, your fees as an expert, including reasonable costs for travel and lodging, should be discussed and agreed upon before you agree to become an expert so there is no misunderstanding what your changes will be.

We encourage you to contact the Office of General Counsel and/or the Office of Risk and Insurance Management prior to your engagement as an expert to help determine if there are outstanding issues you should consider.

This Note is for informational and educational purposes only.
It states general propositions and is not intended to
and should not be viewed as legal advice from
the Office of the General Counsel.