

Best Practices: Tips for Obtaining a 2-622 Physician Report for a Medical Malpractice Case

by **Rebecca E. Neubauer**

In Illinois, in order to file a lawsuit against a health care professional or provider, you are required to file a report authored by a physician, pursuant to 735 ILCS 5/2-622. In the report, the physician must conclude that, based on their review of the medical records, there “is a reasonable and meritorious cause for filing of such action.” The failure to do so will result in a 2-619 motion to dismiss. See 735 ILCS 5/2-622(g). This procedural hurdle was put in place to prevent and reduce the filing of frivolous lawsuits. See *Cutler v. N.W. Suburban Community Hosp., Inc.*, 939 N.E.2d 1032, 1042 (Ill. App. 2d Dist. 2010).

The physician writing the report must: 1) be licensed to practice medicine in all of its branches; 2) be knowledgeable in the relevant issues involved in the particular action; 3) practice/teach—or have practiced/taught within the last six (6) years—in the same area of health care or medicine that is at issue in the particular action; and 4) be qualified by experience or demonstrated competency in the subject of this case. See 735 ILCS 5/2-622(a)(1).

Once you are hired to represent the client and you are in possession of all of the relevant medical records, you must retain a consulting expert physician to review the case and opine whether there is a “meritorious basis for filing the case.” This is a different threshold than what an expert physician is required to say in 213(f)(3) disclosures. In this article, we will discuss some tips for where to find physicians, what type of physicians to retain, how to avoid pitfalls, and what the report should contain.

I. Where to Find a Consulting Physician

Expert Finding Services. There are many companies you can retain that assist lawyers in finding experts to do just this. There is an added cost, as you are paying for convenience. There are local and nationwide services. Be clear especially with the nationwide companies what you are seeking and make sure they are aware of the Illinois requirements as it varies state to state.

Settlement and Jury Verdict Reporters. Subscriptions to these newsletters are helpful for an array of reasons, and finding successful experts is one prominent aspect. Most reporters list both sides’ experts, the expert’s specialty and location. Beware that just because there was a high verdict does not mean the expert did a great job at trial. Reach out to the lawyers and ask them about their experience.

Listserve. Similarly, listservs are great resources for numerous aspects of practicing law, and sharing experts is one benefit to subscribing to a listserv. Decalogue has a listserv for its members. Additionally, Illinois Trial Lawyers Association (“ITLA”) has a medical malpractice specific listserv as does American Association of Justice (“AAJ”).

Cold Calling/E-mailing “Recognized” Physicians or Facilities. Do research to find out which Centers or Departments are highly regarded for the area of medicine your case concerns. For example: if your case concerns asthma, reach out to the doctors at National Jewish Health. You may have success at a preeminent center by emailing all of the doctors in a specific department that you are looking for an expert, and that, based on your research, you believe that they would fit the bill. Certain physicians will respond positively to being sought.

Authors of Medical Literature. On the same note, find medical literature that supports your theory of the case. Reach out to the authors and explain why they would find reviewing your case interesting. Further, while investigating what the literature said at the time of the occurrence, make note of authors that appear in multiple articles. It could be particularly beneficial to reach out to these authors.

Reach Out to Your Client’s Treating Physician(s). It is always good practice to reach out to your client’s treating physicians and get their opinion on standard of care and causation (especially if they are the same practice area as the defendant or if your client now sees the preeminent doctor in its field). If your client’s treating physician gives a hint that he supports the case, you can see if they would be willing to review the case and advocate for the patient. More often than not, treating physicians avoid giving standard of care opinions, but if the opportunity arises, it can be very successful at trial.

II. What Type of Consultant to Retain

Make Sure Your Consultant’s Specialty Matches the Defendant’s. While it is not a requirement, it is best practice that your consultant match your defendant’s specialty. Make sure your consultant has passed the same boards as the defendant. If you want to retain the same consultant to be your testifying expert witness, you definitely want the specialty to match.

Under or Overqualified. Be sure not to hold your expert to a higher standard by having a consultant who has significantly less or more training and experience than the defendants. Additionally, since cases are often brought to suit much after the occurrence, make sure your expert’s training was complete at the time of the occurrence.

Different Certifications. Make sure your expert maintains the same certifications as your defendant’s, if it is relevant to the case.

Similar Practice. Sometimes matching specialty is not enough. Is your defendant an internist with a private practice or is your defendant an internist who only practices in a hospital setting? Be sure that your consultant has similar experience practicing as your defendant and that your consultant is familiar with the treatment at issue.

How to Handle Health Care Professionals Who Are Not Doctors? A dentist must author a report against a dentist. The same goes for a podiatrist. With regard to nonphysicians, this area is counterintuitive. In Illinois, if the physician report concerns a health professional other than a doctor (nurses, respiratory therapists, APNs, CRNAs), the report must still be written by a medical doctor. You will need to disclose an additional expert at trial who matches specialties; in some cases, it is helpful to retain both experts from the start.

Conflict of Interest. Make sure that your consultant does not know the defendant. This is especially pertinent if the practice area is small and your consultant practices in the same city. Watch out for large practice groups who employ numerous doctors in the same field. You do not want to ask a doctor to testify against his coworker.

Illinois vs. Out of State. Having an expert who practices in Illinois is a plus for many reasons. Generally speaking, your costs will be less and your expert will be more accessible. That being said, it is difficult to find an Illinois doctor to testify against another Illinois doctor. If you are set on having an in-state expert, do not get discouraged if you are turned down by the first few calls.

III. How to Send Your Consultant the Medical Records

All Communication with Experts is Discoverable. If you disclose your consulting physician as your trial expert, all communication will be discoverable (and your opponent will certainly ask for it before your expert's deposition)! Keep this in mind when corresponding with your expert.

Think About What Records Are Sent and When. It is best practice to send your consultant all of the relevant medical records. You want your consultant to have the entire picture of the pre- and post-occurrence events, so they are not looking at the occurrence in a vacuum. You want to make sure this incident truly played a role in the injury and overall picture. However, in order to maintain objectivity, it can be important to strategically leave out records especially in a wrongful death case. More on that below.

Send the Records in an Organized Manner. Time is money; especially your consulting physician's time. Ask your expert how they prefer the records: electronically vs. paper copies. In an effort to make the case as easy for your expert to review (and keep your litigation costs down), send the records in chronological order and separated by provider. If the records are voluminous, ask your consultant if they would like certain records pulled (operative report, discharge report, prescriptions). Radiology can be difficult to your expert. Talk to your consultant about what programs they use to view radiology on their computer.

Avoid Sending Your Consultant a Written Summary. Back to discoverability, written summaries will cause problems for you at trial if you disclose your consultant as your expert. Written summaries will undoubtedly leave out things that the defense will claim were crucial or placed inherent bias in your consultant's mind from the start. It is best practice to tell your expert the facts of the case and your working theory over the telephone rather than putting it in writing for the other side to use against you.

IV. How to Maintain Objectivity

Avoid Telling Your Consultant if you Represent the Plaintiff or Defendant. This is a great way to maintain objectivity from your consultant. The defense will certainly raise the issue that your consultant knew you represented the injured party and that resulted in a bad outcome if an attorney was reaching out to a doctor to review the case. Try to avoid this if possible. Another reason is that many consultants prefer to only testify for one side as opposed to the other. This is a good way to flush out consultants with a separate agenda.

Avoid Telling Your Consultant the End of the Story. This is crucial in wrongful death cases when you have the autopsy. Remember that the defendants did not have the benefit of retrospect when treating the plaintiff. You want your consultant to be in as similar a position as the defendants (recognizing the fact that it will have some sense of retrospect analysis irrespective of what you do). If you tell your expert the cause of death before they conduct their review, you will hear about it from the defense at trial.

V. What the Physician Report Must Contain

Specific Threshold Language. The consultant must write in his report that "there is a reasonable and meritorious basis for filing the case." Again, this is a lower threshold than an expert giving the opinion that the physicians deviated from the standard of care.

List All Defendants. The consultant must explicitly write the names of all defendants. This includes subsidiaries and practice groups. If you are alleging a healthcare provider did something wrong, their name should be in the report. Many times, your consultant will want to leave this up to the attorney. Push your expert to explicitly tell you who acted wrongfully, what should have been done instead, and why that would have made a difference in the outcome. See 735 ILCS 5/2-622(b).

Res Ipsa. If your complaint is based on a theory of "res ipsa loquitur," your consulting physician must state that within the report. See 735 ILCS 5/2-622(c).

Failure to Inform. If your complaint is based on a theory of "informed consent," your consulting physician must state that a reasonable health care professional would have informed the patient of the consequences of the procedure. See 735 ILCS 5/2-622(e).

If You Cannot Get a Report before the Statute of Limitations. If you do not have the medical records before the statute is going to run, or you cannot find an expert in time to author this report, the lawyer can file suit, without the report, with the appropriate affidavit. You will have 90 days from the time the records are obtained to file the report, or 90 days from filing the complaint. See 735 ILCS 5/2-622(a)(2-3).

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