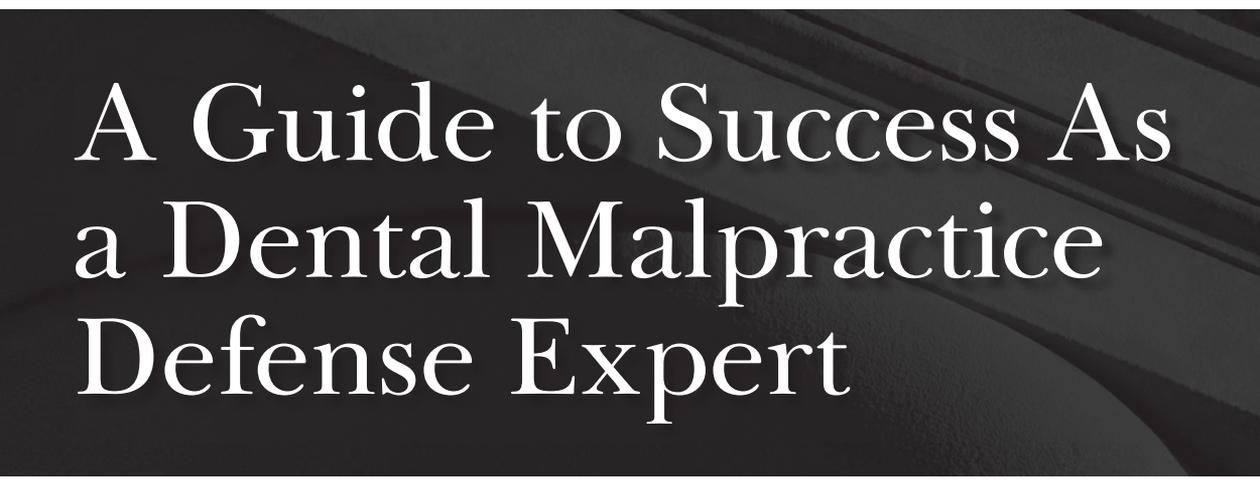
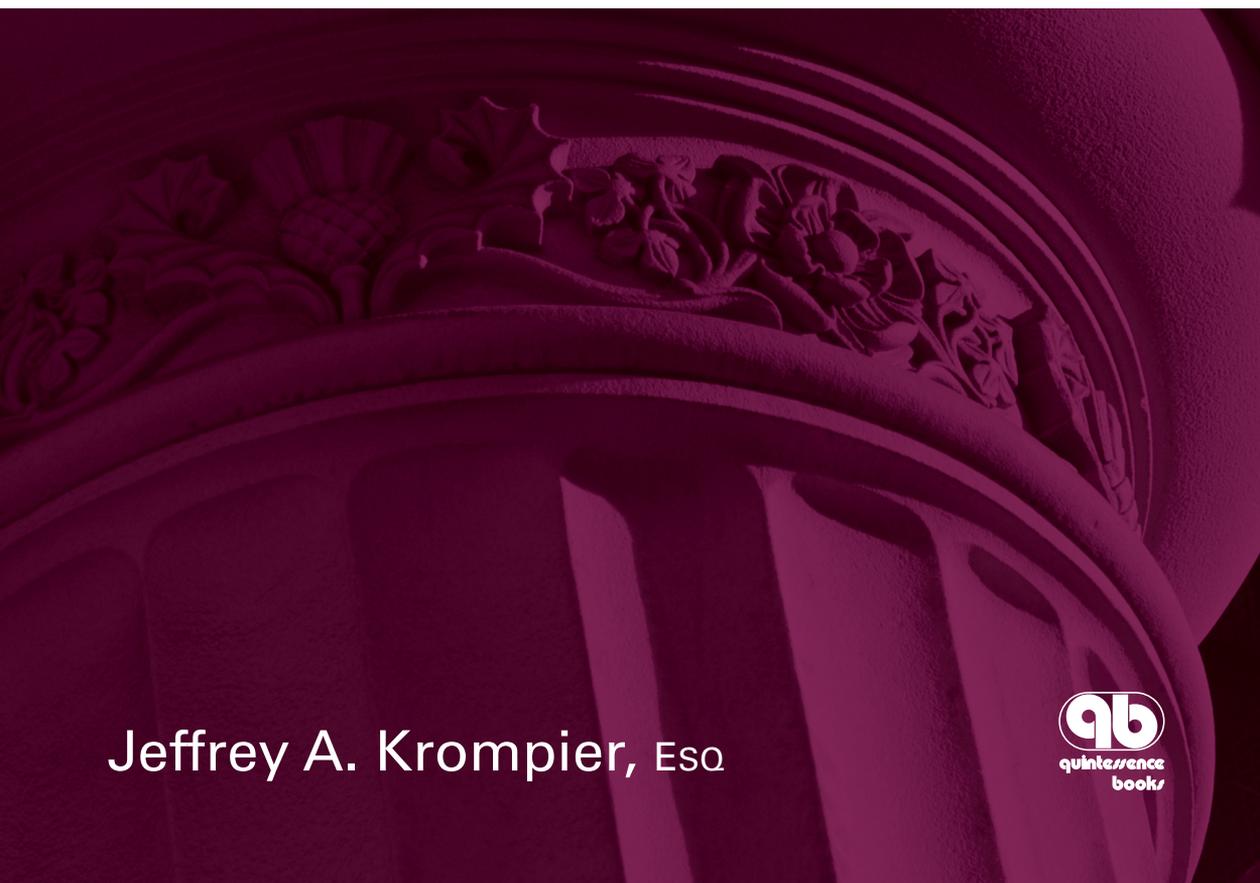




Defense From Within



A Guide to Success As
a Dental Malpractice
Defense Expert



Jeffrey A. Krompier, Esq



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Malpractice Defense Expert



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Dedication

To my wife, Cee-Cee, for encouraging me to write the book she knew I could; our children, Justin and Alyssa, for their constant support; and my late in-laws, Vera and Al Conti, for their continuous motivation. 28

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LAW AND



JUSTICE

Preface

There is no end in sight to the frequency with which dental care providers become lawsuit targets in our litigious society. While politicians, practitioners, insurance companies, and trial attorneys debate the nation's "malpractice crisis," suits continue to be filed. Legislation has yet to universally curtail baseless malpractice suits or grossly excessive monetary verdicts. Public fact-finding committees and investigative bodies, charged with the responsibility of pursuing a solution, may never achieve a global remedy. However, there is another approach. You can impact the malpractice environment in a tangible and positive fashion. While the debate over tort reform continues, individual case success, defined from the defendant's perspective as a "no cause" verdict, can be realized if you are willing to assist the malpractice defense bar as an expert witness.

For 30 years I have defended medical, dental, podiatric, and chiropractic care providers accused, some justly and some not, of malpractice. As a result, I have come to learn that in many instances a lawsuit filed on behalf of an aggrieved patient will rise or fall on the relative success or failure of the liability expert retained to testify as to whether the defendant practitioner complied with or deviated from the standard of care. Although the surrounding cast of witnesses certainly is important, the cornerstone of a litigant's malpractice case often is the liability expert. Ultimately, a jury's decision as to whether a practitioner



complied with or departed from the standard of care will almost always be based on expert testimony.

In nearly every malpractice lawsuit, a liability expert is retained by the patient's lawyer to assist in the suit's prosecution. With rare exception, a malpractice matter will never see the inside of a courtroom without such an expert. Consequently, practitioners are hired as experts on behalf of plaintiffs to assist in the identification of facts and issues that will serve as the basis for the advancement of claims against a defendant practitioner, the crafting of the Complaint, and the matter's ultimate resolution by service as a trial witness.

Without practitioners to participate as experts for patients, malpractice actions would stall and the crisis stemming from the sheer number of such suits, escalating verdicts, skyrocketing malpractice insurance premiums, and in some instances, the absence of available insurance altogether would largely disappear. That having been said, however, there is no noticeable shortage of practitioners available to plaintiffs in malpractice matters, and many are well-credentialed, compelling courtroom witnesses. Although defendants and the defense bar have attracted equally capable practitioners to expert service, more of you need to and frankly should want to participate.

Indeed, there are relatively few practitioners in most geographic areas who are available for defense expert work and even fewer who are "good" at it. Over the years, the need for quality malpractice defense experts has persisted. As a result, defense attorneys find themselves repeatedly using the same individuals when circumstances might dictate the need for "new blood." Although retention of the same expert from case to case may have some limited advantages, overusing an expert can prove a liability. Defense attorneys would much prefer to have a long list of available and capable experts in every given dental specialty from which to choose, but that is rarely the case.

While universal tort reform would likely prove beneficial to patient care providers, parallel advantages can be realized when quality practitioners devote their energies to service as defense experts. No matter the approach, the purpose is to protect these vulnerable professionals from the "lottery" mentality fueling frivolous lawsuits without arbitrarily twice harming patients with legitimate claims already injured by bad dentistry.

Aggressively defended malpractice suits, enhanced by well-credentialed and experienced practitioners who are capable of functioning in the legal arena, will increase the likelihood of a defense verdict at trial and send a powerful message to prospective plaintiffs. By offering themselves as defense experts where they should do so—where the merits of the case warrant—practitioners become part of the solution. Individual lawsuit success enhanced by such service could have a rippling effect. It would give patients and their attorneys pause before unnecessary suits are filed and prompt new thinking by those who might sue when no suit should be contemplated. Thus, serving as a malpractice defense expert will not only benefit individual colleagues, but such service has the potential long-term impact of helping to stem the tide of malpractice lawsuits, albeit on a case-by-case basis.

While providing a much-needed (and appreciated) service to the profession at large, those of you who participate as malpractice defense experts will also enjoy personal and professional rewards. Expert work allows for examination of innumerable practice-related issues. It forces you to stay current on many topics and serves to educate in an exciting way. In the process, of course the liability expert also realizes monetary gains from defense service. In most disciplines, the professional practice has evolved in such a way that the lucrative dollars once enjoyed by those dedicated to healing have become more elusive, and as the profession moves forward, the economics of practicing have become somewhat discouraging. One may blame managed care, spiraling malpractice premiums, relinquishment of certain services, or any combination of these or other factors. Simply stated, the future may not be as financially bright as was the past. Accordingly, it may be wise to consider the economic benefits of service as a defense expert in your specialty.

Certainly, the mutual gains to be realized by both you and the process in which you participate are important enough to warrant serious thought. Of course, as with any new challenge, the threshold question arises: “Should I do this?” Only you can answer that question. But “How do I do this?” That one I’ll handle.





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Jury's Perspective

Having reviewed those qualities that will make you a welcome addition to any defense team and therefore someone whom attorneys will retain, you must also appreciate that there are certain qualities to which juries generally respond and which therefore are worth discussing. Some of what is addressed below may overlap with values already reviewed; the importance of those qualities cannot be overstated. Because a significant percentage of malpractice lawsuits are resolved by trial, a malpractice expert should expect to appear before a jury, rendering the following discussion extremely relevant.

Presentation

Preparation, preparation, preparation. Without question, an effective presentation at trial requires effective preparation before trial. Although this may seem all too obvious and perhaps terribly simplistic, the importance of preparation cannot be stressed enough. Just because you previously reviewed the materials after agreeing to serve as a liability expert does not mean that you are prepared to testify in court. Just because you once understood the details of the case does not mean that you still understand them months (if not years) later. Just because you authored a well-crafted expert report does not mean that you

Although headings need not be used in the report, at a minimum there are certain recognizable components of a properly prepared initial expert report:

- Documents reviewed
- Facts
- Issues
- Opinions
- Foundation for opinions
- Ultimate conclusion

Let's analyze each.

Documents reviewed

The report, in the form of a letter addressed to the retaining attorney, should initially acknowledge receipt of the documents supplied by identifying them. Although some experts (experienced and inexperienced alike) may recite only a partial list or state that various documents have been furnished for review, it is preferable that each item be listed. If the materials reviewed were supplied by counsel at various points in time (and even if they were not), a report listing all documents furnished will be of help if and when that expert is deposed and asked to identify the materials reviewed in the formulation of his or her opinions as contained in the initial report. It also will be of immense benefit at trial, when a similar question is posed. If you do not know or cannot easily and quickly provide the answer, it will suggest that you are neither thorough nor in command of the materials. Although the expert can always refer back to retaining counsel's transmittal letters, testimony regarding this subject then becomes disjointed. Avoid this simply by itemizing the documents in the report.

Facts

The next section should recite the salient facts. Although the facts may be gleaned from multiple records and documents, with occasional exception it is not necessary to identify in the report the source of each fact. A chronologic narrative based on an understanding of the facts as revealed by the various materials is best. Although some experts provide a summary of the facts as contained in each key document, this is not the

preferred approach. Nor is it recommended that the report's length be extended by including superfluous facts irrelevant to the issues in dispute.

Issues

The very reason you have been retained is to address the issues raised by the litigation. If you are a liability expert, it is expected that you will here identify the claims that stem from the treatment provided by the defendant practitioner. Alleged acts of commission and omission should be noted. At times, a plaintiff will advance a lack of informed consent claim, asserting that the defendant failed to completely disclose the material risks of or the reasonable alternatives to the subject treatment. Generally speaking, a jury will decide whether material risks or viable treatment options were withheld and, if so, whether the reasonably prudent patient in the plaintiff's position would have consented to the treatment if disclosure was complete. Where an informed consent issue exists, the expert must identify it.

As with the other portions of the report, this section is best written in paragraph form. An outline or listing format may be appropriate in certain situations, but this should be the exception, not the rule, in report drafting.

By the time a defense expert is retained, the specific deviations allegedly attributable to the defendant have already been identified in the plaintiff's liability expert report. As a liability expert, you must address each and every deviation cited by the plaintiff's expert. Omitting an issue can prove disastrous because it may preclude you from offering opinion testimony about that point at trial.

If you have been retained exclusively as a causation or damages expert, these guidelines are equally applicable. Although the issues in such circumstances are different, your approach to report construction should not be. In this report section, you should always address each and every issue.

Opinions

Here is where you should fully offer your opinions about all of the issues. Completely analyze the disputed matters and offer your conclusions regarding each issue. In doing so, however, resist the temptation to write too much. Say just enough to adequately explain yourself without becoming repetitive, meandering, or

Issues

You should always address each and every issue cited in the plaintiff's expert report in your written report.

be accomplished. You generally can do so only with the judge's permission and only for good reason. If your testimony involves the use of a trial exhibit, the court likely will allow you to stand in front of the jury box so that the jurors can readily view the exhibit while you testify about it. As previously discussed, enlargements of patient records, anatomical drawings, models, and computer-based presentations are often used at trial. Their use in conjunction with your testimony can serve as a valid reason for you to leave the witness stand. The result may well be a less staid presentation and a more relaxed performance.

No matter the location from which you testify, always remember to connect with each juror on an individual basis. This topic has already been addressed in significant detail. It bears repeating, however, that you should consider your audience and, given its rather small size, speak to and look into the eyes of each jury member during the course of your testimony. Forge an alliance with the jurors on a person-to-person basis, and look for a physical reaction from each individual with whom you have connected. A subtle smile or head nod may be an encouraging sign.

Testimony

The malpractice case itself obviously will dictate the substance of your trial testimony. Fashioned by the nature of the plaintiff's claims, your role as an expert was defined at the time of your retention. You may have given expression to that role by crafting an expert report and perhaps by testifying at a deposition. The journey that began at the time you first reviewed file materials will commonly conclude with your courtroom appearance.

This of course assumes that your opinions have some basis in the science of your practice discipline. If not, adverse counsel may request a formal hearing before a judge to explore the issue by asking you questions about your opinions and their foundation. Here is where the concept of evidence-based dentistry has real application. The expert's opinions must be an expression of and based on recognized scientific principles. Opinions that reflect only the individual thinking of an expert without foundation in the science of that expert's profession should not and will not be permitted. A successful challenge to an expert's opinions, based on the lack of a true recognized scientific foun-

Voir dire

Expect to be asked questions about your education, training, and professional experience. Opposing counsel may try to discredit you as unqualified during what is called *voir dire*.

dation for those opinions, will prevent that expert from ever testifying at trial.

When there is no such challenge, you may offer your opinions at trial only after being qualified by the trial judge as an expert in your field. Consequently, direct examination will begin with questions about your professional credentials. Although qualification as an expert may vary slightly from jurisdiction to jurisdiction, at a minimum, you will have to testify about your education, training, and professional experience. Opposing counsel then will be given an opportunity to conduct limited “voir dire,” ie, elicit testimony about your background in an effort to establish that you lack the requisite credentials to be considered an expert. Even capable voir dire, however, rarely will preclude an expert from testifying. It is for this reason that some attorneys disfavor conducting voir dire and will wait until substantive cross-examination to ask credentials-related questions.

If voir dire does elicit testimony that permits a legitimate challenge to the witness’s qualifications as an expert, something has gone terribly awry. (Perhaps the retaining lawyer hired the wrong expert or the expert somehow miscommunicated his credentials at the time he was retained, either of which should have been detected long before trial.) The liability expert often is the linchpin of a malpractice trial, and if the court refuses to permit an expert to testify, that party’s case likely will be irreparably damaged. Even if other experts are available, an attorney never wants to present a witness to the jury only to have the judge reject the witness as unqualified. The negative psychologic effect of such a development is not easily overcome.

Even if an expert witness is allowed to testify, voir dire can serve to impair that expert’s credibility by revealing weaknesses in his or her credentials, such as the absence of (1) professional honors or awards, (2) board certification, (3) hospital departmental or committee positions, (4) academic appointments, or (5) relevant publications and presentations. As further examples, you could be confronted with the following facts: (1) you were denied admission to certain dental schools; (2) you never participated in a relevant training program; (3) your hospital privileges were temporarily suspended; or (4) you only devote a portion of your professional time to seeing patients clinically. Questions of this type should be anticipated, and all potential weaknesses in your presentation should be discussed with the retaining lawyer before the day you take the stand so that plans can be fashioned to minimize the impact of such potential negative testimony.

Public Service

By its very designation, this type of credential is defined by jurors in a most positive way. Therefore, if you have served the public in some fashion, your CV should reflect it. For example, if you participate in school-sponsored programs, mention it. As a dentist, if you have appeared at a local elementary school to educate youngsters about the importance of oral hygiene and regular dental visits, mention it on your CV. Again, your public-mindedness will be well received by jurors.

Media Appearances

Invited guest appearances on television and radio programs are also worth including on your CV. If you hosted such programs, all the better. With the proliferation of cable TV and radio talk shows, there are great opportunities for practitioners to publicly address issues relevant to their practice area. If you have done so, it should be reflected on your CV. Your participation in such programming suggests that you have been selected because you are particularly capable. Such appearances will promote the perception that you are a distinguished member of your profession. They further reveal that you are good or at least experienced at public speaking and are eloquent or charismatic. It makes sense to surmise that producers have hired you for these qualities.

