

Contents

Preface	xxiii
Acknowledgments	xxxix
Special Appreciation	xxxiii
1 Introduction	1
2 Medical Malpractice and Tort Reform in the United States	13
2.1 Evaluation of the Current U.S. Medical Malpractice Tort System	15
2.1.1 Executive Summary	15
2.1.2 A Reality Check	15
2.1.2.1 Background	15
2.1.2.2 A Review of Objective Studies	15
References	21
For Further Reading	22
3 Avoiding Problems with Qui Tam, HIPAA, and Other Disciplinary Actions	27
3.1 Introduction	27
3.2 Avoiding Whistle-Blower (Qui Tam) Suits	27
3.2.1 What Is a Whistle-Blower?	28
3.3 What Is Qui Tam?	28
3.3.1 The False Claims Act	28
3.3.1.1 Professional Journal Advertisements to Attract Clients	29
3.4 Qui Tam Adverse Publicity	30
3.4.1 Published Story #1	30
3.4.2 Published Story #2	31
3.4.3 Are You in Violation of the FCA?	31
3.4.4 Who Usually Initiates the Investigation?	33
3.4.5 What Should the Physician Do When She/He Finds out She/He Is a Target of Investigation?	33
3.4.5.1 What Should You Do in Case You Are Audited?	34
3.5 Medical Group Harmony: Increase Satisfaction in Your Office and Decreases Qui Tam and Whistle-Blower Activity	35
3.5.1 Physician Compensation	35
3.5.2 Strategic Planning	36
3.5.3 Reduce Risks in Partnering with a Hospital	36
3.5.3.1 Physician/Hospital Partnerships or Joint Ventures	36

3.5.4	Would a Physician Extender Be Part of the Problem or Solution?	37
3.5.4.1	First the Upside of a Physician Extender	37
3.5.4.2	Now, the Downside to Physician Extenders	39
3.5.4.3	Preventive Actions	40
3.6	What Is Necessary for a Successful Physician/PA Team?	41
3.6.1	Hospitalists	41
3.6.2	The Obstetrics' Laborist	42
3.7	Avoiding Problems with HIPAA	44
3.7.1	HIPAA Basics	44
3.7.2	HIPAA Privacy Rule	45
3.7.2.1	What Is the Privacy Rule?	45
3.7.2.2	Why Was This Regulation Needed?	46
3.7.2.3	What Does This Regulation Require an Average Physician Provider or Health Plan to Do?	46
3.7.3	HIPAA FAQ's	46
3.7.4	Helpful HIPAA Hints	50
3.7.5	What the Practicing Physician Should Know about Medical Record Copying Costs and the HIPAA Privacy Rule	60
3.7.5.1	Modification to Medical Records Copying Charges Policies	60
3.7.6	A Note of Caution on the Effect of HIPAA on Clinical Research Performed Either in Hospital or in Physicians' Private Office or Clinic	61
3.8	Conclusions	61
3.8.1	Physician Ethical Misconduct with Resultant Disciplinary Proceedings	61
3.8.1.1	What Situations Will Most Likely Result in Charges of Misconduct?	62
3.8.1.2	Preventive Moves	63
3.8.1.3	Proactive Actions	64
3.8.1.4	Good Office Procedures	65
	References	65

4 Maritime Medical Malpractice 67

4.1	Introduction	67
4.2	Alleging, Proving, and Defending Claims of Medical Malpractice under Maritime Law—By Leigh McMillan, J.D., LL.M.	67
4.2.1	Executive Summary: How Ships' Physicians Are at Medical Malpractice Risk	67
4.2.2	What Should a Potential Ship's Physician Look for Prior to Signing on?	68
4.2.2.1	Physicians Employed by Cruise Ships	68
4.2.2.2	The Professional Duty Owed by the Physician	72

4.2.2.3	A Seaman's Claim for "Failure to Provide Prompt and Adequate Treatment" under the Jones Act	73
4.2.2.4	Defenses to Claims of Negligent Treatment	75
References		78

5 Defensive Moves and Strategies to Avoid Medical Malpractice Suits in Primary Medical Care and Specialty Practice **83**

5.1	Introduction	83
5.2	The Most Common Causes of Medical Malpractice Lawsuits	83
5.2.1	Preventable Ob-Gyn Errors in Primary-Care Medicine	83
5.2.1.1	Insertion of IUD into Pregnant Patient	84
5.2.1.2	Failure to Test for Fetal Abnormality	84
5.2.1.3	Failure to Inform Mother of Potential for Birth Defects	84
5.2.1.4	Failure to Appropriately Treat Maternal Illness	85
5.2.1.5	Using the Wrong Antibiotic in Pregnancy	85
5.2.1.6	Failure to Diagnose Gestational Diabetes	86
5.2.2	Preventable Errors in Surgery	86
5.2.2.1	Errors in Surgery Leading to Liability Payments	87
5.2.2.2	Delayed Surgery is Associated with High Mortality from Acute Abdomen in ICUs	87
5.2.3	Preventable Anesthesia Morbidity and Mortality	88
5.2.4	Preventable Imaging Errors	89
5.2.4.1	Prevention of Mammography Errors	89
5.2.5	Preventable Errors in Neurology	90
5.2.6	Orthopedic Medical Malpractice: An Attorney's Perspective	90
5.2.7	Many Errors in Gastroenterology Can Be Prevented by Prudent Patient Selection, Sedation, and Proper Indications for Endoscopic Procedures	91
5.2.7.1	The Missed Cancer Rate with Screening Colonoscopies	91
5.2.7.2	Poor Colonoscopic Technique Is Also Blamed for Colon Cancer Missed Rates in Colonoscopy	91
5.2.7.3	ERCP	92
5.2.8	Problems with Conscious Sedation Performed by Interventional Specialists—Cardiologists, Radiologists, Gastroenterologists, and Others	93
5.2.9	Preventable Lab Errors	94
5.2.9.1	Dangerous Lab Errors	94
5.3	Important Points to Remember	95
5.4	Summary and Conclusion	97
5.5	Preventable Hospital Inpatient Errors Applicable to All Specialists	98
5.6	Proactive Strategies	98
References		99

6	Proactive Strategies to Reduce Malpractice Risks in Primary Medical and Surgical Practices	101
6.1	Introduction	101
6.2	Patient Complaints Are Linked to Physician Malpractice Risk	102
6.3	What Have We Learned about Physician–Patient Relationships and Communication Problems?	104
6.4	The Dying Patient	105
6.5	Knowing What to Do During the Last Hours	105
6.6	Terms You Should Know	106
6.7	Death Notification Guidelines	107
6.8	Diagnostic Errors as a Source of Dissatisfaction and Malpractice Suits	109
6.9	The Key to Good Patient Management	110
6.9.1	Avoid These Common Denominators of Medical Malpractice Litigation	112
6.10	Avoidable Post-Hospital-Discharge Errors	112
6.10.1	Adverse Drug Events (ADEs) Are Almost as Common Among Outpatients and They Have Important Litigation Consequences	112
6.11	Low Adherence and Noncompliance of Patients to Treatment	113
6.11.1	Impact of Medication Nonadherence	113
6.12	Additional Preventive Move to Avert Malpractice Claims	116
6.12.1	The Problem of Obtaining Truly Informed Consent	117
6.13	Informed Consent in Intensive Care and Cardiac Care Units	118
6.13.1	Informed Consent Potential Problems with Attending Physician House Staff	119
6.13.2	Potential Solutions to the Problems with Informed Consent, Ades, and Nonadherence	119
6.14	Summary Points	120
6.15	Treatment with Strong Analgesics: Points to Remember	122
6.16	Medical Malpractice Impact of Medication Nonadherence	124
6.17	Summary and Conclusion Points	124
6.17.1	Prevention of Adverse Drug Events and Common Medical Errors	124
6.17.2	Summary Points	125
6.18	Be Alert to the Second Epidemic of ADEs in Hospitals and Nursing Homes	125
6.19	Be Alert to ADEs in Office Patients	126
6.20	Prescriber’s Rule of Thumb: Start Low and Go Slow; Rarely Be the First or the Last to Use a Drug	128
6.21	Addendum to Patient Compliance and Nonadherence	129
	References	131
	For Further Reading	132

7	Proactive Strategies to Reduce Malpractice Risks in Psychiatry	139
7.1	Introduction	139
7.2	Preventable Psychiatry Errors	140
7.2.1	Failure to Provide a Comprehensive Evaluation and Safety Plan for Suicidal Patients	140
7.2.1.1	Proactive Strategies	140
7.2.2	Failure to Ensure a Safe Environment for Psychotic or Suicidal Inpatients	141
7.2.2.1	Proactive Strategies	141
7.2.3	Failure to Warn and Protect Others from Potentially Violent Patients	142
7.2.3.1	Proactive Strategies	142
7.2.4	Failure to Inform Patients about Side-Effect Risk	144
7.2.4.1	Proactive Strategies	144
7.2.5	Failure to Follow Appropriate Procedures When Away from Your Practice	144
7.2.5.1	Proactive Strategies	144
	References	145

8	What You Must Know about Managed-Care Snares and Punitive Damages	147
8.1	Managed-Care Liability Suits and Punitive Damages	147
8.1.1	Introduction	147
8.2	Judicial and Legislative Changes Portend More Frequent Litigation against Managed-Care Organizations	149
8.3	Liability and Punitive Damages in Managed-Care Medical Malpractice Suits	149
8.4	The MCO, However, May Be Liable for Patients Who Reasonably Expect to Look to the MCO Rather Than the Individual Physicians	152
8.5	The Same Punitive Damages Rationale May Be Followed by Medical Malpractice Attorneys in Claims Against MCOs with the Physician Placed in the Middle of These Dangerous Waters	154
8.6	Ethics of Medical Practice under Managed Care	157
8.7	Physician Temptations of Managed Care: Bonuses and Rewards; Now Emulated by Medicare	158
8.8	July 2007, the Start of Medicare Pay for Performance (P4P)	159
8.8.1	Pay-for-Performance Financial Terms to Understand	160
8.9	Electronic Medical Record Systems Now Necessary	160
8.9.1	Down Sides of P4P	162
8.9.2	Summary and Conclusions	163

8.10	The MCO Physician Is under Unusual Stresses and Greater Risks	164
8.11	Addendum: Managed-Care Readings	165
	References	168
	For Further Reading	170

9 How to Avert or Deal with a Potential Medical Malpractice Suit: Strategies of Averting Medical Malpractice 171

9.1	Introduction	171
9.2	Theory and Principles of Medical Malpractice Management	172
9.2.1	Definition of Medical Risk Management	172
9.2.2	Methods of Risk Management	172
9.2.3	The Physician–Patient Encounter	173
9.2.3.1	Patient Communication	173
9.2.3.2	Principles of Physician–Patient Communication	174
9.2.3.3	Closure in the Patient Encounter	174
9.2.3.4	The Companion’s Role in the Physician–Patient Encounter	174
9.2.4	The Practical Aspects of Risk Management	175
9.2.4.1	Physicians Must Be Proactive in Detecting Sources of Problems	176
9.2.4.2	Risk Management Documentation Techniques	177
9.2.4.3	New Studies Perceived by Patients as Standard of Medical Care	178
9.2.5	Handling Stress Is Part of Dealing with a Medical Malpractice Claim	179
9.2.5.1	The Summons	179
9.2.5.2	The Stress of an Impending Medical Malpractice Suit	179
9.2.5.3	The Discovery Period	180
9.2.5.4	Aftermath of a Medical Malpractice Suit	180
9.3	The Apology Movement	181
9.3.1	Thoughts on the Apology Movement	182
9.3.2	Negligence of Your Physician Replacement	183
9.4	Your Malpractice Insurance Policy	183
9.4.1	Computerized Medical Records—Will They Be the Solution or Add to the Problem of Medical Malpractice Risks?	183
9.5	Five Suggestions on New Technology	186
9.6	Fear of Lawsuits against Hospitals and Doctors’ Offices/Practices That Share Data	186
	References	187

10 What to Do and Not to Do in a Pending or Ongoing Malpractice Suit 189

10.1	What Not to Do If and When You Are Notified about a Malpractice Action	189
10.2	What Should You Do?	189

10.3	Questions to Answer for Your Attorney	190
10.3.1	Did You Adhere to Good Charting Criteria?	190
10.3.2	Did You Adhere to Documentation Do's and Don'ts?	191
10.4	Warnings	191
10.5	Preventive Moves	192
10.6	Deviations from Clinical Practice Guidelines and the Standard of Medical Care	192
10.6.1	Examples of Published Nonadherence to Medical Guidelines by Physicians	192
10.6.1.1	Example 1	192
10.6.1.2	Example 2	193
10.6.1.3	Example 3	193
10.6.2	Reasons Why Physicians Do Not Adhere to CPGs and the Standards of Care?	193
10.6.3	Ten Preventive Moves	195
10.7	Miscellaneous Preventive Protection Methods Used by Physicians against Medical Malpractice Litigation Threats	196
10.7.1	Going Bare	196
10.7.2	Asset Protection	196
10.7.3	Medical Malpractice Insurance	198
10.8	Why Be Ethical?	198
	References	199

11 Alternate Dispute Resolution as an Alternative to Medical Malpractice Litigation: Alternate Dispute Resolution, Mediation, and Other Options for the Defendant Physician **201**

11.1	Your Options as a Physician Defendant	201
11.2	Litigation Focus Groups	202
11.2.1	Mock Trials	202
11.2.2	The Mock Jury: The Mock Jury Graduates from Law School	202
11.3	Tort Reforms	203
11.4	Alternative Dispute Resolution	204
11.4.1	Terms in Use in ADR	204
11.5	Alternate Dispute Resolution Definitions	205
11.6	How Mediation/ADR Works and Saves Time and Money	206
11.7	Who Decides on ADR?	207
11.8	Why Litigate the Case in Court?	208
11.9	Should Your Malpractice Attorney Suggest or Decide on ADR?	208
11.10	The Two-Track Model	209
11.11	Attorney Fees in the Two-Track System	209
11.12	National Practitioner Data Bank	210
11.13	Summary of Points Made in the Peer-Reviewed Literature	212
	References	214

12	Caveats on Testifying Physicians—Attorney Relationships	215
12.1	Introduction	215
12.2	Attorney’s Initial Relationship with the Potential Medical Expert	216
12.2.1	What Background and Characteristics Is the Potential Retaining Attorney Looking for in You?	217
12.3	Rules of Thumb on Accepting Cases	218
12.4	My Advice to You on Advertising	233
12.5	My Advice to You on Unsolicited Letters to Attorneys for Referrals	233
12.6	Summary of My Advice to You on Expert Directories	234
12.7	<i>Verbum sat sapienti</i> —A Word to the Wise	235
12.7.1	The DWP Syndrome	235
12.7.2	E-mail Scams	241
12.7.2.1	Example of Attorneys Fishing for Favorable Opinions	242
13	How Physicians Can Be Investigated Prior to Trial: Investigating the Medical Expert Witness	247
13.1	Investigating the Testifying Physician: <i>Forewarned Is Forearmed</i>	247
13.1.1	Introduction	247
13.2	First a Warning	248
13.3	Sources of Information on Testifying Physicians That Can Be Obtained by Attorneys	249
13.3.1	Investigating Your Past; Any Gaps in Your CV?	249
13.3.1.1	Checking into Your Past Testimony	249
13.3.1.2	Checking into Your Disciplinary Record; Checking Your Past Hospital Medical Staff Health Maintenance Organization (HMO) Affiliations and Terminations	250
13.3.2	Yes, Your Life Is Really an Open Book	252
13.4	Other Techniques to Investigate the Physician	253
13.4.1	Investigation of the Testifying Physician	253
13.5	What Other Investigation Tools Does the Opposition Have to Uncover Facts about You?	254
13.6	Summary and Conclusions	256
	References	256
14	Overview of a Medical Malpractice Trial	257
14.1	Introduction	257
14.2	A Trial Has a Definite Format and Order	257
14.3	The Closing Argument	258
14.4	Subpoena	260
14.5	The Oath	261
14.5.1	Maxims	261

- 14.6 Trial Testimony 261
 - 14.6.1 Your Direct Examination 262
 - 14.6.1.1 Puff and Stuff 262
 - 14.6.1.2 Helpful Hints 262
 - 14.6.1.3 Trial Tips 262
- References 263

15 Introducing the Physician to Legal Testimony: Preparing the Defendant Physician for Testimony 265

- 15.1 Introduction 265
- 15.2 Gold Nuggets Executive Summary 265
- 15.3 Strategies for First Time Medical Expert Witnesses 268
- References 270

16 A Trial Judge’s Advice to the Testifying Physician on Enhancing Credibility in Court 271

- 16.1 Reducing the Fear of the Unknown 272
 - 16.1.1 Visit the Courtroom 272
 - 16.1.2 Go through a Dry Run 272
 - 16.1.3 Use Imagery 273
- 16.2 Control the Environment 274
 - 16.2.1 Dress Professionally to Persuade 274
 - 16.2.2 Maintain a “Powerful” Posture on the Witness Stand 275
 - 16.2.3 Make Eye Contact 275
 - 16.2.4 Avoid Indicators of Deception 276
 - 16.2.5 Speak Clearly and Confidently 277
- 16.3 Anticipating the Trips and Traps Used to Discredit Witnesses 278
 - 16.3.1 Nonverbal Techniques to Unnerve a Witness 278
 - 16.3.2 Why Can’t You Just Answer “Yes” or “No”? 279
 - 16.3.3 Jargon 279
 - 16.3.4 “Always,” “Never,” and “Isn’t It Possible . . .” Questions 280
 - 16.3.5 Implying the Witness Is Biased 280
- 16.4 Conclusion 281
- References 281

17 Medical Malpractice Terms and Definitions for the Testifying Physician 283

- 17.1 Medical Malpractice 283
- 17.2 Burden of Proof 284
- 17.3 How Are Standards of Medical Care Determined? 284
- 17.4 Was the Standard of Care Breached? 285
- 17.5 What Is the Standard of Medical Care for the Prudent Physician? 285
- 17.6 Changing Standards of Medical Care Examples 286
 - 17.6.1 Treatment of Sexually Transmitted Diseases 287
 - 17.6.2 New AHA Diet and Lifestyle Recommendations 287

17.6.3	New Guidelines for Evaluating and Managing Diverticulitis	288
17.6.4	Metronidazole Plus Rifampin for <i>Clostridium difficile</i> — <i>Primum Non Nocere</i>	289
17.7	Definitions	290
17.8	Concern by the Public about the Credibility of Medical Expert Testimony in Malpractice Litigation	291
17.8.1	First, the Bad News	291
17.8.2	The Facts: Expert Witness Testimony	292
17.8.3	The Better News	293
17.8.4	Expert's Liability for Negligence	293
17.8.5	Federal and State Rules	293
17.8.6	Medical Review Panels	294
17.8.7	Sources on Vicarious Liability for Further Reading	298
	References	299
	For Further Reading	299

18 Medical Malpractice Terms and Tips for the Testifying Physician 301

18.1	The Judge: <i>Paucis verbis</i> —in Few Words	301
18.2	Tips for the Medical Expert Witness	303
18.3	The Medical Expert and Consultant Expert	305
18.4	More Tips for the Medical Expert Witness	305
18.4.1	Question: How Much Are You Being Paid?	305
18.4.2	Your Written Communications	305
18.4.2.1	Reports	306
18.5	Summary of Recommendations	308
	References	309
	For Further Reading	309

19 How to Prepare for and Handle Your Deposition: Deposition Preparation for the Physician 311

19.1	Part I: General Orientation	311
19.2	Discovery	311
19.2.1	Be Prepared for Your Deposition	312
19.3	Depositions: Preparation of the Defendant Physician for Deposition	312
19.3.1	Defending Your Patient Care	312
19.3.2	Present Yourself as Confident and Competent	313
19.4	Deposition Testimony	314
19.5	Your Report	316
19.6	Example of Rule 26 Reports	318
19.6.1	Introduction: Example	318
19.6.2	Example of a Medical Report for the Retaining Attorney Representing the Plaintiff	318

19.6.3	Examples of a Medical Report for the Plaintiff's Retaining Attorney (All Names Disguised)	319
19.6.3.1	Conclusions	320
19.7	Deposition "Routine" Questions	321
19.8	Preparation for These Deposition Questions	322
19.8.1	Questions on Your Expert Report	322
19.8.2	Suggested Response Preparation to Deposing Attorney's Predeposition Requests	323
19.9	Deposition Goals of the Opposing Attorney	324
19.10	Deposing the Opposing Expert	326
19.10.1	What Are You Going to Be Asked to Bring Along with You to the Deposition?	327
19.10.2	At the Deposition	327
19.10.3	Do Not Forget the Other Objectives of the Opposing Attorney in Taking Your Deposition	329
19.10.4	Prepare for This Core Outline of Basic Deposition Questions	330
19.11	Spot Quiz	332
19.12	Additional Questions	333
	References	335
20	How to Manage Attorney Abuse	337
20.1	Abuse of Experts	337
20.1.1	What Constitutes Abuse and How Will You Recognize It?	337
20.2	How to Recognize the Beginning of Subtle Attorney Abuse Either at Deposition or Trial	339
20.3	Fight Your Impulses and Do Not Yield to Temptation	341
20.4	So How Should You Properly Handle Abuse?	341
	References	343
21	Ten Examples on the Daubert Impact on Physician Testimony	345
21.1	Summary of the Daubert Trilogy	348
21.1.1	Example 1	349
21.1.2	Example 2	349
21.1.3	Example 3	350
21.1.4	Example 4	350
21.1.5	Example 5	351
21.1.6	Example 6	351
21.1.7	Example 7	351
21.1.8	Example 8	352
21.1.9	Example 9	352
21.1.10	Example 10	353
21.2	How to Help Prevent an Effective Daubert Challenge to Your Testimony	353
	Reference	355

22	The Use of Evidence-Based Medicine to Fend Off a Daubert and Cross-Examination Challenge of Your Medical Opinion(s)	357
22.1	Introduction	357
22.2	You Must Understand Evidence-Based Medicine (EBM), Randomized Controlled Trial (RCT), and Clinical Practice Guideline (CPG) Terms	358
22.3	Additional EBM Terms to Understand	359
22.4	EBM Grades	359
22.5	How Do We Get to EBM the Long Way?	360
22.6	How Do We Get to EBM the Easier Way?	361
22.7	EBM Conclusions	363
22.8	The Use of Clinical Practice Guidelines in Testimony	363
22.9	What Is Your Minimum Task in a Daubert and Cross-Examination Challenge to Your Testimony	363
22.10	Documenting the Scientific Studies Supporting Your Testimony on the Standard of Care in a Daubert and Cross-Examination Challenge	364
22.11	What Is the Standard of Medical Care?	366
22.12	Biased RCTs and Guidelines	367
22.13	Potential Daubert and Cross-Examination Challenges to Your Testimony Especially for Academics, RCT, and CPG Authors	368
22.14	You Must Also Know the Implications and Challenges to Multiple, Biased, and Even Small Nonbiased CPGs and RCTs	368
22.15	Summary and Conclusions	370
	References	370
	For Further Reading	371
23	Resource of Legal Theories, Themes, and Analogies for the Medical Expert Witness	373
23.1	Introduction	373
23.2	What Is an Analogy?	377
23.3	What Is a Jingle?	377
23.4	What Is a Theme?—Examples	378
23.5	Ethnic Restaurant Menus of a Variety of Potential Themes; Pick from Columns A–H	380
23.5.1	Column A: Aesop’s Fables: The Goose That Laid the Golden Egg	380
23.5.2	Column B: Mottos/Morals from Aesop’s Fables	381
23.5.3	Column C: Maxims/Proverbs	382
23.5.4	Column D: Proverbs/Famous Quotations	384
23.5.5	Column E: Latin Quotations Found in Operas and Classic Literature	388
23.5.5.1	Roman Menu	388

23.5.6	Column E: Proverbs/Maxims from Ancient Rome and Greece	390
23.5.6.1	Greek Menu	390
23.5.7	Column F: More Modern Quotations That Can Be Used as Themes	391
23.5.8	Column G: The Classics	392
23.5.9	Column H: Litigation Combat	392
23.5.10	Yiddish Menu of Proverbs and Common Sayings	393
23.6	Let All Who Testify Remember These Words of Caution	394
	References	395
24	Example of Translating for the Jury; Medicalesse into Understandable English	397
24.1	Jury Translations into English	397
24.2	First a Case Discussion in Medicalesse	398
24.2.1	CC and HPI	398
24.2.2	Medical Course	398
24.2.3	Standard of Medical Care Discussion	398
24.2.3.1	Introduction	398
24.2.3.2	Standard of Medical Care	399
24.3	Translating the Same Case to a Jury from Medicalesse to Understandable English	400
24.3.1	Background	401
24.3.2	Physical Examination	401
24.3.3	Medical Course	401
24.3.4	Standard of Medical Care Discussion	402
24.3.4.1	Introduction	402
24.3.4.2	Standard of Medical Care	403
	References	404
25	Lessons from My Expert Testimony Mistakes	405
25.1	Introduction	405
25.2	Summary of Medical Expert Rules and Code of Ethical Conduct for the Physician Expert Witness	405
25.2.1	<i>Taft v. Salvador I</i>	410
25.2.1.1	My Testimony with Commentary	410
25.2.1.2	Direct Examination by Counsel for Plaintiff	410
25.2.2	<i>Taft v. Salvador II</i>	422
25.2.2.1	The Cross-Examination	425
25.2.2.2	Additional Rules for Physician Testimony I Learned the Hard Way	426
25.2.3	<i>Taft v. Salvador III</i>	435
25.2.4	<i>Taft v. Salvador IV</i>	446
25.2.5	<i>Taft v. Salvador V</i>	461
25.2.6	Further Examination by Counsel for Plaintiff	473

25.3	Critique of Hookman Testimony in Salvador Case by Tim Junkin, Esq. (Medical Malpractice Attorney)	473
25.3.1	Direct Examination	473
	References	477

26	Critiques and Golden Nuggets for Physician Defendants and Medical Expert Witnesses	479
26.1	Introduction	479
26.2	“Under Oath: Tips for Testifying” by William P. Isele	480
26.3	“Succeeding as an Expert Witness: Increasing Your Impact and Income” by Harold A. Feder	482
26.4	“The Trial Lawyers” by Emily Couric	483
26.5	“The Expert Witness Marketing Book: How to Promote Your Forensic Practice in a Professional and Cost-Effective Manner” by Rosalie Hamilton	485
26.6	“The Expert Witness Handbook: Tips and Techniques for the Litigation Consultant” by Dan Poynter	486
26.7	“Effective Medical Testifying: A Handbook for Physicians” by William T. Tsushima	487
26.8	“Malpractice: A Trial Lawyer’s Advice for Physicians” by Walter G. Alton Jr.	489
26.9	“Clinicians in Court: A Guide to Subpoenas, Depositions, Testifying, and Everything Else You Need to Know” by Allan E. Barsky and Jonathan W. Gould	490
26.10	“Testifying in Court: Guidelines and Maxims for the Expert Witness” by Stanley L. Brodsky	491
26.11	“Testifying in Court: The Advance Course” by Jack E. Horsley	495
26.12	“Effective Expert Testimony” by David M. Malone and Paul J. Zwier	496
26.13	“Legal Answer Book for Managed Care Aspen Health Law Center” by Patricia Younger et al.	496
26.13.1	Adapted Cross-Examination Nuggets for Physicians	496
26.14	“The Effective Deposition: Techniques and Strategies That Work” by David M. Malone and Peter T. Hoffman, “Deposition Practice Handbook: How to Take and Defend Depositions” by LJ. Chris Martiniak, “The Art of Cross Examination” by Francis L. Wellman	497
26.14.1	Summary of Points That I Find Interesting in These Books	497
26.15	“Cross Examination: The Comprehensive Guide for Experts” by Steven Babitsky and James J. Mangraviti	498
26.16	“How to Become a Dangerous Expert Witness: Advanced Techniques and Strategies” by Steven Babitsky and James J. Mangraviti Jr.	498

26.17	“Anatomy of Cross Examination: A History and the Techniques of an Ancient Art” by Leonard E. Davies, “Expert Rules: 100 and More Points You Need to Know about Expert Witnesses” by David M. Malone and Paul J. Zwier, “Expert Witnesses” by Faust F. Rossi	502
26.17.1	More Nuggets and Points of Interest from the above Generic Expert Books	502
	26.17.1.1 What to Expect from Cross-Examination?	502
	26.17.1.2 Questions to a Teaching Medical Expert or University Medical Expert	502
	26.17.1.3 What to Expect about the Issue of Your Fees?	503
26.18	“How to Excel During Depositions: Techniques for Experts That Work” by Steven Babitsky and James J. Mangraviti Jr.; “Art of Advocacy: Cross Exam of Non-Medical Expert” by Matthew Bender; “ABA’s Practice Checklist Manual on Taking Depositions” by Gregory P. Joseph; “Defense Counsel Journal,” Rex K. Linder	503
26.18.1	Nuggets from These Generic Expert Books Adapted for Testifying Physicians	503
26.19	“The Psychiatrist as Expert Witness” by Thomas G. Gutheil	507
26.20	“Cross Examination of Witnesses: The Litigator’s Puzzle” by T. Aron	508
26.20.1	Summary of the Only Points That I Agree with in This Book	508
26.21	“The Deposition Handbook” by Dennis R. Suplee and Diana S. Donaldson	509
	26.21.1 Report Writing	509
	26.21.2 Deposition Transcripts Points	509
26.22	“Talk Is Cheap: Using the Pretrial Deposition to Advantage an Examining Expert’s Trial” by R. Dietz	510
	26.22.1 Depositions Points	510
26.23	Irving Younger’s “The Art of Cross Examination”	512
26.24	“Medical Malpractice Law” by Angela Roddey Holder, “Medico-Legal Forms with Legal Analysis” Published by the American Medical Association, “Malpractice Solutions, Coming to Doctors’ Defense” by James Rosenblum, “Expert Testimony: A Guide for Expert Witnesses and the Lawyers Who Examine Them” by Steven Lubet	514
26.24.1	Depositions	514
	26.24.1.1 Theory Testing	514
26.24.2	Strategy	516
26.24.3	Incremental Questions	517
26.24.4	Concessions to “Common Sense” Questions	517
26.24.5	Ambiguous Questions	518
26.24.6	Argumentative Questions	518
26.24.7	Cross-Examination Challenges to Your Credentials	518

26.24.8	Impeachment from Prior Contrary Opinions	519
26.24.10	Impeachment from Biased, Nonapplicable, or Otherwise Wrong Published Clinical Guidelines	519
26.24.11	Need I Say This? Do Not Trust the Cross-Examiner	519
26.24.12	Predicate or Partial Truth Questions	520
26.24.13	The Perfection Fallacy/the Ideal Test/the Gold Standard Question	520
26.25	The Chess Match	521
	References	524
	For Further Reading	526
27	Medical Expert Witness Rewards	527
27.1	Academic and Teaching Rewards of a Testifying Medical Expert Witness	527
27.2	Rewards of My Medicolegal Case Reviews	528
	References	530
	For Further Reading	531
	Appendix: CD Table of Contents	533
	Index	535