Some physicians are finding sideline careers as expert witnesses. Others find themselves testifying frequently on an issue dear to them. Still others are forced to defend their choices on the stand. Here's how to prepare for court.

Called for the defense in the "British Nanny" case, Maryland neurosurgeon Ronald H. Uscinski found himself smack in the middle of an international media frenzy. A young woman had been accused of murdering an eight-month-old boy by shaking him to death, and her Boston trial was being broadcast live in England and around the globe. Her grieving parents, both physicians, were at the trial each day.

Uscinski testified that he believed the child died of an old injury, and that the baby did not appear to have wounds that would be expected if he had been violently shaken.(The young woman was convicted of second-degree murder, but the judge reduced her sentence to involuntary manslaughter, sentenced her to time served, and sent her home.)

The trial marked a turning point for Uscinski, who is convinced that shaken-baby syndrome does not occur as described in the medical literature, or as is commonly accepted today, and that it was founded based on misinterpreted data. Since that celebrated trial in 1997, he has testified in dozens of "shaken-baby" cases for the defense.

"I had no idea what I was getting into" when he agreed to testify for the nanny, Uscinski says. "If I had my druthers, I wouldn't do this. But it is a path that has been set before me." He says he has no regrets, but admits, "I don't particularly like what I am doing. My training is as a neurosurgeon and I really belong in an operating room, not a courtroom."

You probably share those sentiments. Still, you may find yourself stepping into Uscinski's shoes one day. Whether you appear for a defendant or a plaintiff, to earn extra money, or because you're passionate about a particular clinical issue, or have the unfortunate experience of testifying in your own defense, there may come a time when you are asked to "tell the truth, the whole truth, and nothing but the truth."

Lives, reputations, and financial security are at stake in these cases, so it is wise to be prepared for the experience of being in a courtroom. It's not enough to be right -- you have be confident and likeable. It's possible that, with experience, you may find you even like testifying, and discover a second career as an expert witness. Undoubtedly there is money to be made, and for some physicians, very big money. But it's not for everyone.

Expert witnesses are an integral part of all medical malpractice cases. In some states, the law requires an expert witness to testify in a pretrial hearing as to the evidence supporting the plaintiff's case.

"If your expert witness doesn't say the right thing, the case will get thrown out," says Larry Wobbrock, a plaintiff's attorney in Portland, Ore.

"Expert witnesses are important in the beginning, middle, and end of every case," says Laurel A. Matthews, a former surgeon and emergency medicine physician who is now a plaintiff's malpractice attorney in Cleveland. "I have some review the case before I file it, I have them examine the patient if possible. I need them to educate me about what wasn't done. I don't think expert witnesses can win cases for you -- but they can lose them for you."

Once a case is brought to trial, the number of experts may multiply. Wobbrock says he typically uses four to six per case; the most was 15, in the case of a brain-injured infant. Matthews expects that the physician who reviews a case will also be willing, if the case has merit, to see it through to a trial. "If the person is not willing to testify, they are of no use to me at all," she says.

Taking part in someone else's case is an excellent way to prepare yourself should you ever be sued...
or be in a situation where you are forced to testify. "It is better to [participate] when you are not personally involved," says Terri Vitale, RN, a legal nurse consultant who helps defend physicians for Gordon & Rees, LLP, a national law firm. "You can see how the process works. You see other people's perspectives ... There is a lot of research involved and you gain a wealth of knowledge."

Some physicians start doing witness work because they are passionate about a certain issue in medicine. Uscinski got involved in the nanny case when a colleague and mentor who was working for the defense asked his opinion; the case marked his first experience as a paid expert witness. As he researched the literature to learn more about shaken-baby syndrome, Uscinski began to question the foundations of the syndrome, and came to believe it was based on faulty interpretations of a few short papers published in the late 1960s and early 1970s.

He does not typically work as a paid expert in medical malpractice cases, saying "there are plenty of doctors who do that," but the shaken-baby cases struck him as altogether different. Because the media coverage of the nanny trial was so intense, Uscinski's name quickly spread, and he found it hard to turn down cases.

"I have seen too many people who I considered falsely accused or wrongfully imprisoned based simply on science and [in contrast to] my own clinical experience, and that did not seem like the America I grew up in," he says.

Sometimes an encounter with the legal system prompts a physician to begin expert work. That's what happened with Karl Steinberg, 47, a family physician and geriatrician with Sharp Healthcare in San Diego. He was named as a defendant in a couple of civil nursing home cases -- all of which were eventually dropped -- but he did not think the expert witness his attorney hired was the best expert for the job, even though he was supportive of the care Steinberg gave in every case. The expert was an internist with little experience with nursing home patients; all of Steinberg's patients are in long-term care facilities.

"I turn down half the cases I see -- because I don't believe there was malpractice. Ninety percent of the rest are settled after the deposition," Steele says. "One of 10 goes to trial."

Steinberg's experiences have made him a "good detective" and kept him "sharp," he says. Steele and Steinberg agree that witness work has improved their patient care.

"I guarantee it has, in several ways," says Steele. "I learn from other people's mistakes. We have a filing system where I know a chest X-ray will never be misfiled. ... I read very extensively. It forces you to go back and read stuff, and you learn from other experts' testimony."

He has also found the work has led him to more directly assist his local colleagues. "Oddly enough, I am kind of their local free legal counsel. I have served on the hospital's quality assurance committee for 15 years," Steele says.

During the course of this work, Steele says he has kept eight of his colleagues from being sued for malpractice; he was the one to review the charts on patients whose attorneys were considering suit. And the physicians have never known about this, he says.

Steinberg adds, "When you are doing chart reviews, it makes you examine your own way of doing things. As far as the effect on my practice, and my documentation, every note I make I picture blown up in front of a jury."

But does that mean he is practicing "defensive medicine"? Not necessarily, Steinberg says. "If you are ordering unnecessary tests or doing a lot of potentially unwanted or futile life-prolonging measures, I think that is really questionable. But it is not questionable when you are being meticulous in your charting and in getting informed consent."

In addition to preparing yourself for future court appearances, witness work could be an untapped business opportunity, says Matthews. "The medical malpractice industry is a business, and both sides need expert witnesses. It costs $80,000 to $100,000 to bring a case to trial -- mostly due to the cost of expert witnesses on both sides, and bringing them all into the courtroom," she says.

"I think it would be good if more physicians got involved. It would bring a fresh perspective, and I think one of the bonuses is you get a great education," she adds.
Still, it isn't clear that you can boost your income dramatically through expert work, or even that you should try. "If physicians are thinking of doing this because they need the money -- please don't do it," cautions Steele, who says he earns less than 10 percent of his income from testifying. "This is not something you do to beef up the college fund, or buy a vacation home. You don't want to put yourself in a financial position where you are dependent on that income because it could compromise your objectivity.

Steinberg disagrees. Probably less than 15 percent of his professional time is spent in medical-legal consulting and testimony, but it constitutes 40 percent of his net income. Doing too much witness work "is a potential issue," Steinberg acknowledges. But for him, testifying "is something I do on the side. I have a full-time job. I like doing expert work. It pays very well. It is challenging and enjoyable. I don't think that makes me a prostitute or 'professional expert.'"

The makings of a good witness
The qualities that will help you do well on the stand are the same regardless of why you are up there, says Matthews. "All of the things that are important for expert witnesses and defendants alike go to honesty and credibility," she says.

For a physician-defendant, "the single most important thing is to educate themselves before they get deposed," she says. "Look at what happened, look at the literature, to open themselves up the criticism they are going to face. They need to be prepared. They should probably have a colleague review the record for them."

Secondly, says Matthews, all physicians giving testimony need to be "nice" and "likeable" before a jury. "I need them to be human beings," she says. "The best [witness] is someone who is not a pompous ass; that a juror would say, 'That is someone I would want to be my doctor.' They need to be knowledgeable, likeable, and have an approachable manner. Those are the people juries believe." Steele agrees. "I face the jury. I turn my chair and look at the jury when I am testifying. You don't want to be arrogant, you don't use medical terms, and you cannot appear to be uncaring." Substance matters, too. What you say on the stand has to make "common sense," she adds. "A lot of times the medicine is just way too complicated."

Wobbrock says he prefers a physician-witness who is "fair-minded" and "doesn't buy into the arguments that attorneys are the devil and are responsible for the malpractice crisis. "I need a person who believes in people and wants to uphold the standards of the profession. I don't want someone to lie for me. I want someone who has some actual [clinical] experience. Often in academia is where we start, but I need to balance that with practical experience."

On the stand you should be definitive but not "dogmatic," Steinberg says. "Sometimes there is a gray area ... but ultimately it is what it is -- either there is malpractice or there's not, the standard of care was breached or it was not. And obviously, always tell the truth."

If you testify repeatedly, be consistent. Bigger law firms will research previous testimony and catch you if you change your comments from case to case. If you are on the stand in your own defense, be aware of any publications or statements you have made on issues that might apply.

For example, Steinberg has had attorneys question his position that "not all bedsores are avoidable." He stands by that statement, but is prepared to clarify it when the specifics of a particular case indicate the plaintiff's sores could, and should, have been prevented.

Giving testimony is more difficult than it sounds, Uscinski says, because the physician must describe in words a procedure or a kind of treatment that he or she usually does out of routine. "You are not talking to other doctors; you are talking to lay people. You have to put the information in a context they can understand. It is like talking to patients," Uscinski says. "When I talk about shaken-baby syndrome, I say injuries don't have labels. Intentional or accidental ... I can't say. I can only tell what I see," he says. "It is important to keep the ground rules in mind all the time. Your job is to educate the jury, not to be an advocate."

Regardless of what side he is on, opposing other physicians is the toughest part of the work, Steele admits. "It's very difficult to sit on a witness stand and tell a jury a doctor screwed up," he points out. This is one reason he does not accept cases in his general geographic area.

If you want to sharpen your skills on the stand, send your CV to local healthcare attorneys, says Steele. Tell them your areas of expertise and your interest, and ask them to contact you if a relevant case comes up. "Only work with lawyers you like; you will get to know them and you will want to help them out. The biggest help I can give them is telling them not to take a case," he says.
Ensure that your employer or partners don't object to your plan, and check with your specialty's association or college -- some actively discourage physicians from serving as expert witnesses for physician plaintiffs, or have guidelines on the topic.

Decide whether you have the right temperament -- are you unflappable and do you exude confidence? Good witnesses also must "have a clean background and present well. They don't need acting classes," says Vitale.

Next, determine whether you really have extra time for this kind of work. "It has eaten into my practice a little," says Uscinski. "I have to leave town, and I have to devote time to this material. Other people take call for me, and I will take it for them. It is easier for people who are in academia or in a group practice than for an individual like me in solo practice."

Steinberg figures he devotes about eight hours per week to his legal work, and he squeezes it in when he can -- he reads in the car if he's not driving, devotes some time on weekends, and occasionally during his workdays if he has to give a deposition.

Steele limits his cases to no more than 50 a year; for a few years he did 90 cases and found the work began to take over. "Now I get up at 3:30 in the morning and work on it a couple of hours before I go to rounds. Fortunately I am a workaholic, so it works out OK."

Don't let inexperience before a jury stop you. Matthews, for one, is willing to overlook that. "I like using people who have never testified before because there is no stigma that they are a defense whore, or they are a plaintiff's whore. I want someone who is expert in their field and who believes in what they say," she says.

But before taking on a legal case, consider cutting your teeth on something other than adversarial, high-stress expert witness work. Steinberg got his start by spending a number of years working for the Social Security Administration reviewing disability claims. He also suggests contacting your state medical board to see if you could serve as an expert reviewer.

What to charge?

Listing yourself on a witness Web site or with a legal agency is one way to build up business and gain experience testifying. But investigate any agencies you work with so that you understand their fees and whether they will charge you or the retaining law firm a large fee, or tack a fee onto your rates. Be aware of the difference between a simple listing and a referring agency.

Keep a lid on how much self-promotion you do. Some attorneys look askance at any "advertising" and at using referring agencies, and they may question you or try to discredit you if all or a large part of your work comes from them.

You must also set a fee for your services, and pricing yourself is something of an art. "You don't want to be too high or too low," Steinberg says. A low fee implies inexperience, while a higher fee might drive away clients, he notes.

Fees paid to expert witnesses begin at several hundred dollars per hour and increase for deposition or trial testimony. Steinberg charges $350 per hour for non-testimonial work, such as reviewing charts, and $500 per hour for depositions and testimony. For trials or arbitration, his half-day rate is $2,500; for a full day he gets $4,000.

Uscinski says he has a "standard fee but it doesn't always get met. I have testified for as much as $10,000 for an out-of-town stay, away from the practice, and for as little as nothing."

Uscinski says the fees are "one" source of income, which he could "do without. That's not why I got into this. I certainly could spend the time in better ways."

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