

NCBA MEDICAL-LEGAL COMMITTEE

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Medical Expert Affirmations Done Right, Every Time

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Law on Expert Opinions

CPLR 2106

CPLR 3101(d)(1)(i)

CPLR 3101(d)(1)(ii)

CPLR 3212(b)

Court Rules on Expert Opinions

22 NYCRR § 202.8-b

22 NYCRR § 202.26(c)

Case Law on Expert Opinions

Kielb, 217 A.D.3d 756 (2d Dep't 2023)

Restates elements of med-mal claim

Restates shifting burdens on SJ

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.”

Case Law on Expert Opinions

Kelly, 2024 NY Slip Op 00621 (2d Dep't Feb. 7, 2024)

Treating physician's unsworn report inadmissible

“the report was conclusory and speculative and failed to address the elements on which the defendants made their prima facie showing.”

The Affirmation's Purpose

Kielb, 217 A.D.3d at 756–57

“to demonstrate the existence of a triable issue of fact as to the elements on which the defendant met the prima facie burden.”

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.”

Affirmation as Evidence

Similar purpose

Similar content

Similar structure

Affirmation as Motion Exhibit

Supports the attorney's affirmation

Based on exhibits to the affirmation

Making Medical Records Exhibits

One provider = one chart = one exhibit

OCR the PDF

Paginate the PDF

Refer in discovery to exhibit page numbers

Identify the Issues

Complaint

Answers

Bills of particulars

Find the Right Expert

Have they been in the defendant's shoes?

Education

Board certification

Employment

Experience treating plaintiff's condition

Experience with treatment at issue

Give Them What They Need

Provide bases for opinions:

Deposition transcripts

Deposition exhibits

Prior motion exhibits

Stipulated or admitted authentic records

Authenticate everything in attorney
affirmation

Affirmation Structure

1. Preface
2. Qualifications
3. Basis for Opinions
4. Opinions on Alleged Departures
5. Opinions on Causation
6. Rebuttal of Opposing Expert's Opinions

An Affirmation, Not an Affidavit

CPLR 2106

Affirmation Style

Use headings – even subheadings!

Keep it simple!

Use formulaic language to present opinions

Short sentences, short paragraphs

Cite the motion exhibits

Avoid the passive voice

Working with Experts

Prep like it's trial!

Their affirmation; your document

Exchange Word documents or PDFs?

Compiling the executed PDF

Qualifications

Attach CV as exhibit to expert affirmation

Restate relevant qualifications

Show that they've been in the defendant's shoes

Basis for Opinions

List each item of record materials reviewed

Identify any extra-record materials reviewed

Refer to education and experience

“To a reasonable degree of medical certainty”

Opinions on Departures

Restate the background medicine and history

State the standard of care at each departure

State the departure from that standard of care

Explain each departure

Writing Style

Use short, focused paragraphs:

Begin each with a thesis

Follow only with what you need to prove your thesis

Never write a paragraph longer than ten lines!

Opinions on Causation

Go step by step from departure to injury

Explain how one step leads to the next

Address other possible causes:

- Prior conditions

- Subsequent treatment or injuries

Rebuttal

Quote each opinion

Follow each opinion with a rebuttal, however
brief

Working with Your Expert

Remind them that it's their affirmation

Go over any particular issues of phrasing

Make sure they're comfortable with the final edits

The Affirmation PDF

Electronic signatures acceptable

ESRA, State Technology Law § 301 et seq.

22 NYCRR § 202.5-b(e)(1)(vi) Signatures

Send a PDF for signature

Add scanned signature to “native” PDF

Redacted Affirmations

Richter, 216 A.D.3d 823 (2d Dep't 2023)

Redacted affirmation fails to raise issue of fact when plaintiff, without explanation, fails to submit unredacted copy for in camera inspection

Redacted Affirmations

Stewart, 204 A.D.3d 858 (2d Dep't 2022)

Granting leave to renew opposition after failure to submit unredacted affirmations of medical experts

Reply Opinions

Hussain, 179 A.D.3d 1046 (2d Dep't 2020)

“Contrary to the plaintiff’s contention, since he raised this argument for the first time in opposition to the motion, the defendants properly submitted evidence to respond to it in their reply papers.”

Limit to rebuttal of opinions raised in opposition

Show why each issue could not have been previously addressed