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Expert Witness Participation in Civil and Criminal Proceedings

Committee on Medical Liability and Risk Management

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American Academy of Pediatrics
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Policy Statement—Expert Witness Participation in Civil and Criminal Proceedings

abstract

The interests of the public and both the medical and legal professions are best served when scientifically sound and unbiased expert witness testimony is readily available in civil and criminal proceedings. As members of the medical community, patient advocates, and private citizens, pediatricians have ethical and professional obligations to assist in the administration of justice. The American Academy of Pediatrics believes that the adoption of the recommendations outlined in this statement will improve the quality of medical expert witness testimony in legal proceedings and, thereby, increase the probability of achieving outcomes that are fair, honest, and equitable. Strategies for enforcing guidance and promoting oversight of expert witnesses are proposed. *Pediatrics* 2009;124:428–438

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KEY WORDS
expert witness, legal and ethical standards, oversight, peer review

ABBREVIATIONS
AAP—American Academy of Pediatrics
FRE—Federal Rule of Evidence

BACKGROUND

The American Academy of Pediatrics (AAP) first articulated policy on appropriate medical expert witness testimony in 1989 and was among the first medical specialty societies to do so.[1] The statement was revised in 1994[2] to incorporate additional provisions on expert witness testimony guidelines from the Council of Medical Specialty Societies.[3] A 2002 revision outlined responsible practices that physicians should follow to safeguard their objectivity in preparing and presenting expert witness testimony. Key legal concepts were explained, and the role of the expert witness in the litigation process (pretrial and trial) was described.[4] This latest AAP iteration expands the requirements and qualifications for experts testifying in civil and criminal cases, the latter primarily relating to cases involving alleged child abuse and/or neglect. The importance of expert witness testimony in the process of determining civil liability, child safety, or criminal culpability and its unique significance in pediatric cases are also stressed. Recent efforts to improve the quality of medical expert witness testimony are described. The known strengths or weaknesses of these programs are noted. Enforcement of policy recommendations are sought for the first time.

WHAT IS EXPERT TESTIMONY?

The expert witness plays an essential role under the US system of jurisprudence. Courts rely on expert witness testimony in most civil and criminal cases to explain scientific matters that may or may not be understood by jurors and judges. Standards of admissibility of expert witness testimony vary depending on state and federal rules of proce-

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dure and evidence. Although most state laws conform to both the Federal Rules of Procedure and Federal Rules of Evidence (FRE),[5] some do not. The same testimony from a given expert witness, therefore, might be admissible in some state courts but not in federal court, and vice versa. FRE 702 authorizes a judge to admit expert testimony into evidence if it assists the jury or the judge to "understand the evidence or to determine a fact in issue." FRE 703 permits a qualified expert to give testimony based on data of others, provided that the data are of the kind customarily used by the expert's peers. FRE 704 permits an expert to opine on the ultimate factual issue.

In a malpractice case, testimony of an expert witness differs from that of other witnesses. "Witnesses of fact" (those testifying because they have personal knowledge of the incident or are persons involved in the lawsuit) typically restrict their testimony to the facts of the case at issue. The expert witness is given more latitude. The expert witness is allowed to compare the applicable standards of care with the facts of the case and interpret whether the evidence indicates a deviation from the standards of care. Without the expert's explanation of the range of acceptable treatment modalities within the standard of care and interpretation of medical facts, juries may not have the technical expertise needed to distinguish malpractice (an adverse event caused by negligent or "bad" care) from maloccurrence (an unavoidable adverse event or "bad outcome").[6] An expert must be qualified. Although the rules vary among jurisdictions about whether the expert must be of the same specialty as the defendant, the expert, nevertheless, must demonstrate to the judge sufficient knowledge and expertise about the issue to qualify as an expert.

LEGAL AND ETHICAL STANDARDS OF TESTIMONY

The judge acts as the gatekeeper in deciding the qualifications of the expert as well as the relevance and reliability of the testimony. The 2 main standards used by judges in determining relevance and reliability are referred to as the Daubert and Frye standards.[7,8] The Daubert standard (expanded in later cases known as Joiner[9] and Kumho[10]) was established by the US Supreme Court in the 1993 case *Daubert v Merrell Dow Pharmaceuticals Inc*. This standard is used in federal courts and has been adopted by many states for use in state courts. Under the *Daubert* decision, a judge will act as the gatekeeper for expert testimony in determining whether the opinion is both relevant and reliable. The judge can, but is not required to, assess testimony according to 4 guidelines in determining whether it is reliable: (1) whether the expert's theory or technique can be (or has been) tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) the known or potential error rate of the theory; and (4) whether there is general acceptance in the relevant scientific community. The latter "general-acceptance" standard is at the core of the Frye standard of expert testimony established more than 80 years ago.[8] The Frye standard is still used in some states. Other states use a hybrid of the Daubert and Frye standards. Under the Daubert standard, trial judges are to focus on the reasoning or scientific validity of the methodology, not the conclusion of the methodology. Once the judge permits expert testimony to be admitted into evidence, it is the role of the jury to determine the "weight" (or importance) of the testimony. The *Daubert* court noted that challenges to questionable testimony are to be contested via cross-examination and the presentation of contrary evidence.[7]

The effect of the *Daubert* decision in reducing "junk science" from being admitted into evidence continues to be debated.[11] Yet, it seems to have benefited, rather than harmed, the process.[12] The importance of standards for admissibility of expert testimony at the trial level is underscored by the fact that appellate courts can only consider an "abuse-of-discretion" standard in reviewing a trial judge's decision to admit or exclude expert testimony (ie, defers to the trial judge's rulings unless overtly erroneous).[9] Critics have voiced concern over judicial discretionary power in admitting experts simply because some judges may lack the requisite scientific or medical background to interpret potentially complex medical issues.[13]

Attorneys may request experts to state that their testimony is being given "within a reasonable degree of medical certainty." This rubric is not universally defined and has been interpreted differently by the courts.[14,15] Also, it is not a standard required in all jurisdictions.[16] Ideally, expert witnesses should be unbiased conveyers of information. The pivotal factor in the medical tort process is the integrity of the expert witness testimony. It should be reliable, objective, and accurate and provide a truthful analysis of the standard of care. Regrettably, not all medical experts testify within these boundaries.[17] The medical community has long been aware that not all experts testify within scientific standards and ethical guidelines.[17,18] However, more research is needed to determine how invasive improper expert testimony is in the legal process. In a study of expert witnesses in lawsuits against neurologists over a 10-year period, significant errors of fact or interpretation and incorrect statements were noted to be common.[19] One study of charac-

teristics of expert witnesses in neurologic birth injury cases noted that a small group of physicians provided a disproportionate percentage of expert testimony in cases and that there may be suboptimal expertise and possible bias in testimony.[20]

WHAT IS MEDICAL MALPRACTICE?

Medical malpractice law is based on concepts drawn from tort and contract law. It is commonly understood as liabilities arising from the delivery of medical care. Causes of action can be based on negligence, insufficient informed consent, intentional misconduct, breach of a contract (ie, guaranteeing a specific therapeutic result), defamation, divulgence of confidential information, or failure to prevent foreseeable injuries to third parties. Medical negligence is the predominant theory of liability in medical malpractice actions.

According to *Black's Law Dictionary*,[21] negligence is defined as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." To establish negligence, the plaintiff must prove all of the following elements: (1) the existence of the physician's duty to the plaintiff, usually based on the existence of the physician-patient relationship; (2) the applicable standard of care and its violation (ie, breach of the duty); (3) damages (a compensable injury); and (4) a legally causal connection between the violation of the standard of care and the injury. In a medical malpractice case, experts may be asked to provide an opinion about 1 or all of these elements of a malpractice case. Experts should not testify about all of these elements if they are not within their area of expertise (eg, it may not be appropriate for a pediatrician to testify about whether a cesarean delivery should have been performed to prevent a brachial plexus injury).

Besides negligence, a medical malpractice lawsuit may also include an allegation of insufficient informed consent. Informed consent includes a discussion with a noncoerced patient or parent who has decision-making capacity. The discussion should include the benefits versus the risks of proposed and alternative tests or treatments and the option of no treatment. When insufficient informed consent is an aspect of the case, the expert should be familiar with the standards of informed consent in the particular state involved. There are 2 main standards of providing informed consent that have been implemented by either judicial decision or statute: the "reasonable-patient" standard versus the "reasonable-physician" standard (also known as "community" or "professional" standard).[22] In the former standard, the physician must disclose the treatments and risks that a reasonable patient/person would want disclosed (at trial, typically decided by the jury but may require expert testimony). In the latter standard, the physician must disclose the treatments and risks that a reasonable physician would disclose to the patient (at trial, typically requires expert testimony). In some circumstances in some jurisdictions, failure to obtain informed consent can result in a claim of "battery" (intentional, unauthorized touching of a person).[22,23]

HOW ARE STANDARDS OF CARE DETERMINED?

In the law of negligence, the standard of care is generally thought of as "that degree of care which a reasonably prudent person should exercise in same or similar circumstances."[21] If the defendant's conduct falls outside the standards, then he or she may be found liable for any damages that resulted from this conduct. In medical negligence disputes, the defendant's medical decision-making and practice are compared with the applicable standard of care. Generally, this is understood to be "that reasonable and ordinary care, skill, and diligence as physicians and surgeons in good standing in the same general line of practice, ordinarily have and exercise in like cases."[21] Many courts have held that the increased specialization of medicine and establishment of national board certification is more significant than geographic differences in establishing the standard of care. These courts contend that board-certified medical or surgical specialists should adhere to standards of their respective specialty boards (ie, a national standard). However, this recognition of specialty-based standards has critics, because it does not account for rural and other underserved communities or access to specialized health care facilities.[24] Thus, some jurisdictions continue to use a "locality" standard in which the physician is held to the standards of like physicians in the community.[24] Some states require out-of-state experts to demonstrate that they have familiarity with the "local" standard of care.

WAS THE STANDARD OF CARE BREACHED?

In medical liability cases, the role of the expert witness is often to establish standards of care applicable to the case at issue. The expert may also be asked to opine about any deviation from acceptable standards. When care has been deemed "substandard," the expert witness may be asked to opine whether that deviation from the standard of care could have been the proximate (ie, legal) cause of the patient's alleged injury. Because courts and juries depend on medical experts to make medical standards understandable, the testimony should be clear,

coherent, and consistent with the standards applicable at the time of the incident. Although experts may testify as to what they think the most appropriate standard of care was at the time of occurrence, they should know and consider alternative acceptable standards. These alternatives may be raised during direct testimony or under cross-examination. Expert witnesses should not consider new evidence, guidelines, or studies that were not available to the treating physicians at the time of the occurrence. Expert witnesses should not define the standard so narrowly that it only encompasses their opinion on the standard of care to the exclusion of other acceptable treatment options available at the time of the incident.

MEDICAL ERRORS VERSUS NEGLIGENCE

The Institute of Medicine's sentinel report on medical errors, *To Err Is Human*: *Building a Safer Health System*,[25] provides a helpful framework for understanding the many factors involved in medical interventions and how their permutations can affect patient outcome. Whenever a medical intervention is undertaken, several outcomes can occur—the patient's condition can improve, stay the same, or deteriorate. These same outcomes are possible even when the medical treatment is performed properly. A negative outcome alone is not sufficient to indicate professional negligence. It is essential that the trier of the case (either jury or judge) understand that negligence cannot be inferred solely from an unexpected result, a bad result, failure to cure, failure to recover, or any other circumstance that shows merely a lack of success.

BURDEN OF PROOF

In a medical malpractice case, the plaintiff bears the burden of proof and must convince a jury by a "preponderance of the evidence" that its theory of the case is more probably true than alternative theories. A "preponderance of the evidence" means more than 50% likely. Thus, jurors in a medical malpractice case must be persuaded that the evidence presented by the plaintiff is more plausible than any counterargument offered by the defendant.[26] The plaintiff and defense attorneys will present their respective experts, each side hoping their witnesses will appear more knowledgeable, objective, and credible than their counterparts. In a criminal case, the prosecutor bears the burden of proof, and the guilt must be proven by the much higher standard of "beyond a reasonable doubt."

PRETRIAL ROLE OF EXPERT TESTIMONY

In medical malpractice, expert witness testimony may be used to evaluate the merits of a malpractice claim before filing legal action. Some states have enacted laws that require that a competent medical professional in the same area of expertise as the defendant review the claim and be willing to testify that the standard of care was breached.[27] This may require a filing of an affidavit or certificate of merit that malpractice has occurred. Some states have deemed this system unconstitutional, claiming that legitimate plaintiffs may be denied access to the legal system solely on procedural, rather than substantive, grounds.[28]

Some states use review panels to prescreen medical malpractice cases. These panels typically consist of a physician, attorney, and lay representative. However, state laws that govern the timing and process for review panels can vary. Depending on the state, the review can take place before or after the claim has been filed. Review-panel findings can be binding or nonbinding. The opinion of the review panel may or may not be admissible should the matter proceed to litigation. The continuing future role of these panels has been questioned.[29]

Those who are seeking regulation of expert witness testimony have noted that the expert opinions provided during this early stage of the legal process are subject to even less scrutiny and accountability than testimony provided later. Critics believe that the lack of oversight of experts during the pretrial reviews allows too many nonmeritorious cases to proceed, thereby defeating the purpose of having pretrial reviews.[30]

EXPERT REPORTS AND DEPOSITION

The purpose of "discovery" is to identify all the facts related to the case. Discovery is applicable to both fact witnesses and expert witnesses. The deposition of key fact witnesses is a very important facet of the discovery process in malpractice cases. A deposition is a witness's recorded testimony, given under oath, while being questioned by attorneys for the parties in the case. Throughout the deposition process, attorneys gather information on what fact witnesses will say and assess the relative effectiveness of their testimony as well as their demeanor (eg, clarity, believability, arrogance, sincerity). Crucial decisions in determining the next phase of the case (eg, seeking a settlement, going to trial, moving for dismissal/summary judgment) are often based on the strength of the testimony. Experts can also be deposed. Rather than through depositions, written reports of the experts are typically shared between the 2 parties before trial. However, some states may not require disclosure of the identity of the expert or even disclosure of the report. Most medical malpractice lawsuits that are re-

solved in favor of the plaintiff are typically settled during or at the conclusion of the discovery phase.[31]

UNIQUE FACTORS IN PEDIATRIC CASES

In theory, expert witness testimony from the plaintiff and the defense should give the jury enough of a technical understanding of the medical care provided and its appropriateness to determine if the preponderance of the evidence proves the defendant liable for the plaintiff's injury. In cases that reach trial, some authorities note that jurors can generally be effective in assessing expert testimony.[32] However, other aspects of the proceedings may unduly influence triers of the case. This is particularly true in cases that involve children. Because people tend to have a natural sympathy for children, the focus of the trial has the potential to become the plaintiff rather than the evidence. A jury might be influenced by the needs of, for example, a family with a neurologically impaired infant or a ventilator-dependent teenager.

Patients who experience long-term consequences of injuries attributable to medical negligence should be appropriately and promptly compensated. However, using malpractice awards to compensate patients for adverse outcomes not caused by medical negligence is not the intent of the system. Whether society at large should provide more assistance to families faced with such tragic circumstances is a policy decision. Wanting to assist the families of children with disabilities or injuries regardless of whether the physician committed any medical error may seem altruistic to the jury, but in fact, it is an inappropriate outcome. To prevent unjust results, objective expert witness testimony is needed.

CRIMINAL CASES

Pediatricians often serve as experts in civil child protection cases (in which custody of children may be at issue) and in criminal cases of alleged child abuse and neglect. The new subspecialty of "child abuse pediatrics" approved by the AAP and the American Board of Pediatrics sets high standards for professional competence and conduct in this area. Pediatricians who are not board certified in child abuse pediatrics may still be called to testify in cases of abuse and neglect if they have special knowledge and experience that qualifies them to explain medical issues to the court, both as experts and as fact witnesses. Pediatricians who are inexperienced in evaluating children suspected of abuse or neglect should be cautious of providing an expert opinion because of the devastating outcome of a wrongful conviction based on inaccurate testimony. This is a high-risk area for expert testimony, and even experienced professionals have been engaged in controversy.[33] If a general pediatrician feels uncomfortable in testifying in these cases, consultation with subspecialists in child abuse pediatrics should be strongly considered.

IMPROVING THE QUALITY OF EXPERT TESTIMONY

Various branches of organized medicine and some state medical licensure boards have implemented programs to help curb unscientific expert witness testimony. Strategies for regulating expert witness testimony generally fall under the principles of education, prevention, peer review, and sanctioning.

Education

Continuing medical education about the expert witness process is needed at all levels of pediatric experience.[34] The 2006 AAP graduating resident survey revealed that only 25% of residents reported that their training program provided adequate education on the expert witness process.[35] Educational programs at both the national and state levels are critical for this effort. One strategy for effective programs is to use false or unscientific testimony from closed cases for teaching purposes in continuing medical education venues. This strategy is particularly effective when biased or false testimony played an important role in the outcome of the case. It illustrates the power of expert witness testimony in malpractice litigation and can be an excellent teaching technique to present acceptable and optimal treatment modalities that should have been introduced by the experts.

Prevention

Despite the critical importance of the expert witness, no uniform standards on credentialing of experts currently exist. One specialty society has initiated a process to certify experts.[36] Imposing eligibility restrictions on those who provide expert witness testimony might be a way to prevent irresponsible testimony. By 2006, approximately 22 states had measures requiring minimum qualifying standards for physician experts.[37] Some states have proposed or enacted legislation or regulations that tighten the qualifications for medical experts to more closely match those of the defendant physician (eg, geographic factors, specialty training, certification, percentage of time spent on direct patient care, etc).[38,39]

Other preventive measures decrease financial incentives for serving as an expert witness, which is especially applicable to witnesses who travel extensively to provide expert ser-

vices ("itinerant" witnesses). Examples include recommending caps on the percentage of annual revenue that a medical expert can derive from testimony fees or establishing fee schedules for expert witness testimony that are based on a set hourly rate (determined to be reasonable or comparable to other medical consulting services). The medical profession has deemed it unethical for expert witnesses to base their fees for testifying contingent on the outcome of the case.[40–42] Other suggestions for preventing itinerant experts include the sponsoring by medical specialty societies of expert scientific panels and court-appointed medical experts (permitted under FRE 706). A few medical societies have proposed that, for physicians to serve as experts in malpractice cases, they are required to join their medical society (even those from out-of-state). Thus, all experts testifying in that state would be potentially subject to disciplinary action of the local medical organization. Some states require an expert to hold a medical license in that state. Some states consider expert testimony as part of the "practice of medicine," with possible sanctioning by the licensing board for improper testimony.[43] The American Medical Association House of Delegates has discussed a series of resolutions aimed at curtailing improper testimony by physicians and in 1998 adopted the position that the provision of expert witness testimony should be considered the practice of medicine and should be subject to peer review.[44] Adopting this approach not only makes medical licensure a requirement for providing expert witness testimony but also puts physicians on notice about potential actions against their medical license for giving false, biased, or unscientific testimony. Because licensing boards already function as disciplinary bodies, they may be an appropriate setting for judging the appropriateness of physician conduct, which can include expert testimony.[45] However, not all courts have agreed that medical expert witness testimony is engaging in the practice of medicine.[46]

Peer Review

Specialty medical organizations have established programs in which a panel of peers will review and critique the content of expert witness testimony.[47–50] Sometimes, the testimony and the peer analysis, along with commentary, are published in scientific journals. Some specialty societies, such as the American Association of Neurologic Surgeons (www.aans.org/about/membership/professional_conduct10_06.pdf), maintain libraries of expert witness testimony that are accessible by legal counsel of their members. There are obstacles to an effective peer-review process, including costs, time, and possibility of lawsuits against peer reviewers.[51–53] Any oversight process must be fair and objective and ensure due process. Peer review has lead to sanctioning of experts.

Sanctioning

The most aggressive method of curbing irresponsible testimony is to discipline physicians whose expert opinions are deemed to be biased, inaccurate, incomplete, or unscientific. Disciplinary actions can even result in the physician being expelled from membership in professional organizations. Such actions have been upheld by the appellate courts.[54]

There have been lawsuits against expert witnesses for alleged improper testimony. Historically, the principle of witness immunity has shielded experts from legal reprisal that is based on the nature of their testimony.[55,56] To bring greater accountability to expert witness testimony in malpractice cases, some legal authorities have sought to have a distinction drawn between expert witnesses and witnesses of fact relating to immunity.[55] These critics postulate that because experts testify voluntarily and receive significant compensation for their services, general witness immunity should not apply to them. Various courts have responded differently to this concept.

Additional proposals that may affect or improve the expert witness system include mediation and arbitration[57,58]; specialized health courts[59]; an internal dispute-resolution process within the hospital[60]; standardizing and regulating expert medical case review, analysis, and testimony[61]; adopting a "data-based standard of care in allegations of medical negligence"[62]; use of third-party experts[63]; and encouraging academic institutions to be accountable for the testimony of their faculty members.[64] At least 1 federal judge has suggested that judges may be more willing to use third-party experts if the experts were more easily accessible and their fairness and impartiality could be ensured by professional oversight and discipline.[65]

Because of the increasing complexity and uncertainty surrounding the issue of expert testimony by physicians, the medical community must proceed cautiously. Although courts have upheld the right of specialty organizations to discipline a member for improper testimony, any disciplinary process is fraught with risks and must be fair and objective and ensure due process. An expert witness disciplinary program that is too aggressive may be seen as organized medicine's discouragement of physicians from testifying. Some courts have been punitive about efforts to quash potential experts from testifying.[66] The physician community

will need to remain firmly committed to reviewing and sanctioning false statements by medical experts for both the defense and the plaintiff or prosecutor. It has been suggested that fear of sanctions could dissuade physicians from fulfilling their civic and professional duty to participate as experts in legal processes. One concern is that a decrease in the number of physicians willing to provide expert witness testimony may be associated with greater reliance on "professional" witnesses. Beyond the considerable legal risks, disciplinary programs are labor intensive and may be expensive to implement and maintain. Because disciplinary programs can be beyond what a state or local organization can shoulder, specialty societies are often urged to provide this service for their members on a nationwide basis.[47,67] Continual attempts to improve the expert witness process should affect the delivery of future medical care by reducing the number of lawsuits and litigation costs and ensuring adequate physician supply in those specialties with high exposure to malpractice lawsuits.[68]

RECOMMENDATIONS

The AAP recognizes that physicians have the professional, ethical, and legal duty to assist in the legal process when medical issues are involved. Physicians who serve as expert witnesses have an obligation to present complete, accurate, and unbiased information to assist the triers of facts to understand the scientific issues so that they can arrive at a fair and equitable result. At this time, the best strategies for improving the quality of medical expert witness testimony must include strengthening the qualifications for serving as a medical expert, educating pediatricians about standards for experts, and providing more specific guidelines for physician conduct throughout the legal process. To that end, the following recommendations are offered.

Advocacy and Education

The AAP believes that the establishment of certain minimal qualifications for physicians who serve as expert witnesses will improve the quality of testimony and promote just and equitable verdicts. Therefore, the AAP supports the following efforts.

1. Implement the recommendations of this statement through legislative or regulatory reform of expert witness testimony (eg, establish minimal qualifications for expert witnesses).
2. Educate pediatricians (during residency training and through continuing medical education) and provide them with the skills and knowledge base needed for them to provide objective, scientific, and ethical expert witness testimony in legal proceedings.
3. Implement additional specialized education as well as oversight safeguards for experts participating in the criminal law process because of heightened concerns for convictions based on inaccurate expert testimony in criminal cases.
4. Aid in the establishment of expert panels to study, standardize, and disseminate elements of expert testimony that have been inadequately addressed (eg, define "within a reasonable degree of medical certainty," establish the role of evidence-based medicine in expert opinions, opine whether expert testimony should be considered "the practice of medicine").

Relevant Qualifications

Physicians should limit their participation as medical experts to cases in which they have genuine expertise. The following qualifications must be met (and verified) to demonstrate relevant education, certification, and experience.

1. Physician expert witnesses must hold a current, valid, and unrestricted medical license in the state in which they practice medicine.
2. Physician expert witnesses should be certified by the relevant board recognized by the American Board of Medical Specialties or a board recognized by the American Osteopathic Association or by a board with equivalent standards. Alternatively, the expert should be capable of demonstrating sufficient training or clinical experience in the clinical area at issue to be qualified and accepted as an expert by the relevant specialty board(s).
3. Physician expert witnesses must have been actively engaged in clinical practice in the medical specialty or area of medicine about which they testify, including knowledge of or experience in performing the skills and practices at issue to the lawsuit. Alternatively, the expert should be able to demonstrate updated competence in the profession within a reasonable time period contiguous to the alleged act. Evidence of updated competence could include medical student or resident teaching, relevant publications, or research.
4. Unless retired from clinical practice, most of the expert's professional time should not be devoted to expert witness work. If retired, the physician should render expert opinions on cases that occurred at the time he or she was in active practice.
5. Physician expert witnesses should not give false, misleading, or misrepresentative details about their qualifications.

Standards of Testimony

Physician expert witnesses should take all necessary steps to provide thorough, fair, objective, and impartial review of the medical facts. To meet that obligation, physicians who agree to testify as experts in medical malpractice cases should conduct themselves as follows.

1. Regardless of the source of the request for testimony (plaintiff or defendant), physician expert witnesses should lend their knowledge, experience, and best judgment to all relevant facts of the case.
2. Physician expert witnesses should take necessary steps to ensure that they have access to all documents used to establish the facts of the case and the circumstances surrounding the occurrence. If all medical records are unavailable for review, experts should consider recusing themselves from serving in an expert capacity.
3. Physician expert witnesses should not exclude relevant information for any reason and certainly not to create a perspective that favors the plaintiff or the defendant.
4. The physician expert should be comfortable with his or her testimony regardless of whether it is to be used by the plaintiff or defendant.

Standards of Care

The physician expert witness should be familiar with the medical standards of care at the time of the incident at issue. A physician who is unfamiliar with the medical standards would not meet the recommended qualifications of an expert.

1. Before testifying, the physician expert witness should thoroughly review and understand the current concepts and practices related to that standard as well as the concepts and practices related to that standard at the time of the incident that led to the lawsuit.
2. The testimony presented should reflect generally accepted standards within the specialty or area of practice about which the physician expert witness is testifying, including those held by a significant minority.
3. When a variety of acceptable treatment modalities exist, this should be stated candidly and clearly.
4. In states where the standard of practice is based on the "locality rule," the physician expert witness must be knowledgeable about local practice and procedure at the time of the incident at issue.
5. Expert witness testimony should not condemn performance that clearly falls within generally accepted practice standards or condone performance that clearly falls outside accepted practice standards.
6. An expert should respect the privacy and confidentiality of the process as required by law.

Assessing Breach of Care and Proximal Cause

Physician expert witnesses must exercise care in assessing the relationship between the breach in the standard of care and the patient's condition, because deviation from a practice standard may not be the cause of the patient outcome at issue. Thus, physician expert witnesses should base distinctions between medical malpractice and medical maloccurrence on science, not on unique theories of causation that would not be deemed reliable according to the Daubert, Frye, or other applicable standards.

Ensuring That Testimony Is Proper

Physician expert witnesses:

1. Must take all necessary precautions to ensure that the expert work is relevant, reliable, honest, unbiased and based on sound scientific principles.
2. Know that transcripts of depositions and courtroom testimony are public records and may be reviewed by others outside the courtroom.

Ethical Business Practices

The business practices (eg, marketing, contractual agreements, and payment for services) associated with the provision of expert witness testimony must be conducive to remaining nonpartisan and objective throughout the legal proceedings.

1. Contractual agreements between physician expert witnesses and attorneys should be structured in a way that promotes fairness, accuracy, completeness, and objectivity.
2. Compensation for expert witness work should be reasonable and commensurate with the time and effort involved and prevailing market value.
3. Compensation for expert witness work must not be contingent on the outcome of the case.

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