

THE EXPERT MEDICAL WITNESS: CONCERNS, LIMITS, AND REMEDIES

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The problems associated with inaccurate, misleading, or biased testimony from expert witnesses are well known. Expert witnesses are actively pursued for their views, their presentation style, and their willingness to tailor their testimony according to the particular needs of the case.¹

Not only do these “professional experts” advertise widely, but they will also travel long distances to testify for a fee. Furthermore, their testimony or “opinion” may prove convincing to lay jury members who are often faced with conflicting testimony from opposing expert witnesses. A natural reaction by the defendant surgeon, frequently independent of the jury’s verdict, is to request that a surgical organization take action against the “hired gun” for fraudulent or misleading testimony.

Few physicians know that it is the responsibility of the court to determine the reliability and relevance of any expert witness testimony. Furthermore, the Supreme Court has affirmed this judicial role on more than one occasion.* In addition,

*In a March 23, 1999, decision regarding the Carmichael case, the Supreme Court determined that the “gatekeeping” function of the judiciary, as established by the Federal Rules of Evidence and the Daubert decision, applies to all expert witness testimony. Specifically, in its review of the Daubert case in 1993, the Supreme Court ruled that scientific expert witness testimony is admissible only if it is both relevant and reliable. In the Carmichael case, the Supreme Court determined that all expert witness testimony, not just scientific, was subject to this rule.

although they seldom exercise it, judges have the power to dismiss expert testimony and to call upon independent, court-appointed experts.²

No organization should attempt to interfere with or seek to influence any member’s legal right to testify or provide an opinion regarding a case. To do so would come close to witness tampering or interference.³ If an expert witness commits perjury, remedies are available within the legal system.

One solution for solving some of the problems associated with the expert witnesses is to replace current legal definitions of an expert’s qualifications and establish standards for the determination of an expert’s competence to provide testimony.


Currently, baseline qualifications for expert witnesses are established by the Federal Rules of Evidence. Expert witnesses, according to this document, must establish their expertise “by knowledge, skill, experience, training, or education.”⁴ Furthermore, the Federal Rules of Evidence state that the competency of a witness must be determined in accordance with state law.⁵

Any organization, such as a medical or surgical society, can establish guidelines or standards for expert witness qualifications, and many organizations, including the College, have done so. However, these standards do not have the force of law. If they can be incorporated into law, the standards must ultimately withstand almost certain legal challenge and be upheld by a state supreme court. While these may seem impossible hurdles to overcome, there have been notable successes. Most recently, due to the persistence of the state's medical societies in collaboration with others, expert witness guidelines were passed into law in the State of Michigan and upheld by that state's Supreme Court.⁶

Until new legal criteria for expert witness qualifications are established in every state or adopted for inclusion into the Federal Rules of Evidence, incompetent or misleading expert witnesses must be identified as such to the lay jury. IDEX, a network of defense organizations, provides information concerning expert witness testimonies.⁷ An attorney may use this information to determine how often an expert witness has testified, as well as to verify and assess the consistency or accuracy of that testimony. In some instances, simply informing the jury that the expert witness has testified frequently in different states during the past year is sufficient to undermine his or her credibility.

It is clear that the defendant in any case of alleged malpractice must become an active participant in his or her defense. The defendant should not only review the data contained in the patient's chart, but he or she should be present for a significant portion of the trial. While the defense attorney is skilled in law, he will need assistance in determining which portions of an expert's testimony should be questioned or challenged. Proving that the expert medical witness is incompetent or simply wrong in his or her testimony or rendered opinion requires the combined legal knowledge of the defense attorney and the medical knowledge of the defendant physician.

Fellows who find themselves as defendants in cases of alleged malpractice should provide their defense attorneys with copies of the College's "Statement on the physician expert witness" (revised by the Board of Regents in February 2000), which follows this article on page 24. In addition,

Fellows of the College may contact IDEX (1-800/521-5596) and, using their Fellowship identification number, request the testimonial history of a particular itinerant plaintiff expert witness. Finally, Fellows may request the Professional Liability Kit, as well as *Professional liability/risk management: A manual for surgeons*, from the College. Contact Ruth Shea, Professional Liability Program, ACS, 633 N. Saint Clair St., Chicago, IL 60611-3211; tel. 312/202-5413, e-mail rshea@facs.org. 

References

1. Gross, SR: "Expert evidence," 1113 *Wis Law Rev*, (1991).
2. Federal Rules of Evidence, Rule 706.
3. Spencer, Frank C. "The expert witness: One surgeon's opinion," *Bull Am Coll Surg*, 73(5):11-14, 43.
4. Federal Rules of Evidence, Rule 702.
5. Federal Rules of Evidence, Rule 601.
6. Michigan Public Act of 1961, Section 2169, as amended July 8, 1993.
7. Fellows may contact IDEX (1-800/521-5596) directly and, using their FACS identification number, request the testimonial history of a particular itinerant plaintiff expert witness.

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Statement on the physician expert witness

One of the most important and controversial figures in malpractice litigation is the physician expert witness. With the increasing number of malpractice suits in the country—and the growing size of awards for damages—the number of available “expert witnesses” has greatly increased in the past few years. In response to the need to define the recommended qualifications for the physician expert witness and the guidelines for his or her behavior, the Professional Liability Committee of the American College of Surgeons has issued the following statement. The statement is an adaptation of guidelines developed by the Council of Medical Specialty Societies and several other medical groups.

I. Recommended qualifications for the physician expert witness

A. The physician expert witness must have a current, valid, and unrestricted license to practice medicine in the state in which he or she practices.

B. The physician expert witness should be a diplomate of or have status with a specialty board recognized by the American Board of Medical Specialties, as well as be qualified by experience or demonstrated competence in the subject of the case.

C. The specialty of the physician expert witness should be appropriate to the subject matter in the case.

D. The physician expert witness should be familiar with the standard of care provided at the time of the alleged occurrence and should

be actively involved in the clinical practice of the specialty or the subject matter of the case during the time the testimony or opinion is provided.

E. The physician expert witness should be able to demonstrate evidence of continuing medical education relevant to the specialty or the subject matter of the case.

F. The physician expert should be prepared to document the percentage of time that is involved in serving as an expert witness. In addition, the physician expert should be willing to disclose the amount of fees or compensation obtained for such activities and the total number of times the physician expert has testified for the plaintiff or defendant.

II. Recommended guidelines for behavior of the physician expert witness

Physicians have an obligation to testify in court as expert witnesses when appropriate. Physician expert witnesses are expected to be impartial and should not adopt a position as an advocate or partisan in the legal proceedings.

A. The physician expert witness should review the medical information in the case and testify to its content fairly, honestly, and in a balanced manner. In addition, the physician expert witness may be called upon to draw an inference or an opinion based on the facts of the case. In doing so, the physician expert witness should apply the same standards of fairness and honesty.

B. The physician expert should be prepared

to distinguish between actual negligence (substandard medical care that results in harm) and an unfortunate medical outcome (recognized complications occurring as a result of medical uncertainty).

C. The physician expert witness should review the standards of practice prevailing at the time of the alleged occurrence.

D. The physician expert witness should be prepared to state the basis of his or her testimony or opinion, and whether it is based on personal experience, specific clinical references, evidence-based guidelines, or a generally accepted opinion in the specialty field. The physician expert witness should be prepared to discuss important alternate methods and views.

E. Compensation of the physician expert witness should be reasonable and commensurate with the time and effort given to preparing for deposition and court appearance. It is unethical for a physician expert witness to link compensation to the outcome of a case.

F. The physician expert witness is ethically and legally obligated to tell the truth. Transcripts of depositions and courtroom testimony are public records, and subject to independent peer reviews. The physician expert witness should be aware that failure to provide truthful testimony exposes the physician expert to criminal prosecution for perjury, civil suits for negligence, and revocation or suspension of his or her professional license.