EXPERT WITNESSES

caught in a moral and ethical dilemma

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In a recent press release published by the *New York Times* (and repeated in most major newspapers across the U.S.), the American Trial Lawyer's Association complained that their members are finding it increasingly difficult to retain expert witnesses for the plaintiff. Their assumption is that this newfound obstruction can be traced to expanding activism by specialty societies that take disciplinary action against members who testify against another member on behalf of the plaintiff.

This renewed interventionism stems from a case in which the American Association of Neurological Surgeons (AANS) did, in fact, take disciplinary action against a member who not only frequently testified for the plaintiff's side, but also testified differently in almost identical cases. The member in question promptly sued AANS, but the association prevailed, not only in the original suit, but also in all the subsequent appeals to higher authority. Perhaps not surprisingly, specialty societies soon began to react to this significant and unusual development. As a result, professional organizations seem to be overcoming their sense of impotence in responding to the plaintiff bar's widely perceived intimidation.

New dilemma

Those who have experienced leadership in organized medicine, on the one hand, but are also familiar with the unique American tort system on the other, perceive a different dimension to the problem. We see a very real moral and ethical dilemma emerging, which simply adds ammunition to the increasingly open public brawl between medicine and the law.

The dilemma has to do with the ethical and moral responsibility of any physician who agrees to be the expert witness for the plaintiff in a medical malpractice trial. Although the legal system in this country descends from our English forebears, during the last three centuries some substantial differences have developed. No other country in the world routinely tries medical lawsuits before a jury of lay people. Elsewhere, magistrates preside over the cases and seek professional advice from a pool of medical experts attached to the court. An expert in a specific case may be interrogated by counsel for either side but has no other relationship to either one of them. In the American system, both sides recruit expert witnesses who are, in fact, paid for their service by the attorney who hired them. Understandably, this arrangement transfers the naturally adversarial relationship between both counsel to the experts for either side.

Our current system does something else. It automatically creates an unspoken sense of advocacy toward the viewpoint of plaintiff or defense. It inevitably then becomes difficult to remain completely objective. More importantly, the high honoraria offered experts become a clear incentive to testify, thus further clouding the objectivity required of an expert witness. Understandably, the opinions then tend to fall on whatever side the expert is helping.

The expert must bear in mind that many diagnoses are just as adequately treated through one of several perfectly acceptable means. For example, a basal cell carcinoma may be equally well treated by surgery, X ray, or topical chemotherapy. Provided it is supported in peer reviewed literature, a surgeon certainly may use his or her best medical judgment to decide which is the best option. It is the mark of a truly objective expert witness that he or she has the knowledge and experience, as well as the intellectual elasticity, to recognize a treatment that may not be his or her first choice but that is different from one that clearly falls outside the standard of care.

Accept or decline?

For the physician inclined to accept the responsibility of acting as an expert witnesses, a review of the medical record quickly allows him to decide whether to accept or reject the assignment. If the invitation is from the defense team, and the case is truly defensible, the decision should be easy and the prospect appealing. After all, what doctor would not be pleased to help defend a confrere? Even if the case is seen as insupportable, a polite declination may produce disappointment but few, if any, bruised egos.

An invitation to act as an expert for the plaintiff brings with it an array of totally unfamiliar exposures for the physician. How often have we heard the trial bar express their inability to understand why a physician should have any sense

of conflict—much less any emotional distress. To them an accusation of malpractice is routine, everyday business. They keep telling us, "It does not mean you are a bad doctor; it just means that you made a mistake, that's all. There is no need to get emotional about it!" This attitude reflects total disregard for the effect a malpractice allegation has (win or lose, guilty or not) on a physician's competence, integrity, self-confidence, and values. Certainly plaintiff's counsel fail to understand (or care little) about the potential effects on a physician's practice or well-being. The principles of advocacy requires that he or she do whatever is necessary to win for their client.

Tips for dealing with the dilemma

A plethora of advice is available to those physicians contemplating whether to serve as an expert witness in a medical malpractice trial. Virtually all of this advice deals with the reality of sitting in a witness chair. It deals with how to respond, how to behave, how to dress, what to do, what not to do, and so on. The attorney representing the side for which you are testifying will cover all of this in detail before the trial. However, little has been said about the ethical and moral responsibility of making the original commitment to testify. The decision to volunteer is yours and yours alone to make. Following are some guidelines to help in making this difficult choice.

1. The actions of the defendant physician must be far enough removed from any reasonable standard of care as to fall well within the definition of negligence.
2. It is a mark of integrity when the decision to act as expert witness is based not only on the physician's desire to do his or her utmost to exonerate the unjustly accused defendant physician, but equally to fulfill a civic and moral responsibility to the public by speaking out on behalf of the patient when the circumstances clearly call for it, regardless of personal consequence.
3. Expert medical witnesses must be able to prove beyond doubt that they possess sufficient experience and knowledge within the specific treatment modality in question so as to avoid any doubt as to their true qualifications. To do otherwise may result in strong prejudicial consequences. It will certainly guarantee that well-prepared opposing counsel will make them look foolish.
4. The inexperienced witness should remember the words of Charles O'Brien, Esq., a wise and respected legal scholar: "Most medical malpractice trials in the U.S. have little to do with science, truth, fairness, or civil discourse. It is theater, pure and simple, and the best actors walk off the stage with the award."
5. If the candidate expert witness has experienced the same or similar problems, such as the one at issue in the trial, it is far wiser to discuss the details of that occurrence with one's attorney long before trial. The consequences of failing to do so can be disastrous.
6. The expert medical witness recruited by either side is in a unique position to affect the resolution of the medical dispute. By careful examination of the medical record and detailed interview with the attorney, he may either be able to get the case dropped and avoid a trial altogether or to encourage an out-of-court settlement. Experienced plaintiff attorneys specializing in medical liability are loath to waste their time and often drop the case on advice of an expert they trust. Defense counsel will be inclined toward settlement if the expert's opinion calls for it. Thus, that expert witness may exert major influence on the outcome and save everyone considerable anguish and expense.
7. It is a test of your integrity whether you have the ego to stand up and point fingers at the defendant or opposing medical expert, regardless of their stature. You also should consider whether you have the courage to defend a colleague, even if you do not necessarily agree with the treatment, but believe that it still represents a valid therapeutic decision.
8. The "moment of truth" is at hand when you must elect, all circumstances considered, whether to agree to act as an expert witness against a colleague. Only you, in the loneliness of your own mind, can decide which road to follow, because in one direction, the circumstances may be overwhelmingly for it, whereas in the other, something inside is saying, "There but for the grace of God go I."

On the other hand, peer approval is a very high priority among most physicians. Anything that will dull one's professional image is difficult to cope with. Our built-in psychological defense mechanisms block us from accepting that our professional behavior, in any given instance, might have been less than stellar. It is almost impossible for most of us to admit to ourselves, let alone others, that we "screwed up." Thus, none of us ever commit malpractice (at least judging by "curbside consults" in the hallways of medical conventions). Guilty or not, this defensive reaction is coupled with the conviction that anyone who helps the plaintiff's team, including the expert witness, has just bought a ticket to hell. Worse yet, the action is viewed akin to a knife in the back when it involves a colleague of the same specialty, lamentably sometimes one with a high national "profile."

The nature of the ethical and moral dilemma with regard to expert witnesses is multifaceted and complex. Suppose the medical records show that the treatment was clearly inappropriate, and its direct result was serious, disfiguring, or life-threatening? Worse yet, suppose you knew that this surgeon had experienced a similar outcome in more than one case? What looms higher in your conscience: the imperative to do your civic duty or your devotion to your specialty and impeccable image among your peers? Is your reputation more important than the prevention of severe damage to an unlucky future patient? What say you then to testifying against someone you know to be unscrupulous or incompetent? Are you sure you can always identify the sharp, bright line that defines those parameters?

Despite our conflict with the plaintiff's bar, a rational surgeon knows deep inside that ours is an inexact art. None of us argues that a patient injured by provable iatrogenic negligence deserves compensation. What all of us deplore are the glaring abuses that occur in our unique way of resolving medical disputes. What we find totally unacceptable is that "acts of God" are also clear liability in the U.S. tort system.

Acting responsibly

Nonetheless, until the unlikely day when our system changes, we need to accept that ours is a truly adversarial system. As part of that, we also must accept the responsibility of participating in it with as much integrity as our conscience can muster.

The committees of the medical societies charged with identifying members whose testimony is questionable must have incontrovertible evidence of such abuse. They must filter any letters from other aggrieved colleagues for real proof, stripped of all emotion or prejudice.

Those physicians who assume the defense expert's role are also obligated to ascertain that whatever actions the defendant took were within the standard of care and that the untoward results were totally beyond human control.

Those physicians asked to act as plaintiff's witness need not uniformly refuse to participate on the basis of fear or possible damage to their ego. This responsibility, however, assumes a much higher priority: to separate fact from fiction, to know with certainty that the act is one that was plainly outside the standard of care, to consider all extenuating circumstances, and to reject compensation for services as an expert as the principal motivation for agreeing to be a witness. Most importantly, the expert must consider whether the same event might have happened had the case been under his control. Then, and only then, can the candidate expert witness decide in the loneliness of his mind whether the totality of the situation outweighs the constraints of the heart. Ω

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