Committee on Medical Liability

Guidelines for Expert Witness Testimony

The American Academy of Pediatrics joins with other specialty organizations in emphasizing the obligation of objectivity when its members respond to requests to serve as expert witnesses in the judicial system. Regardless of the source of the request, such testimony ought to embody the relevant facts and the expert's knowledge, experience, and best judgment regarding the case. At the same time, the AAP reiterates that it cannot condone participation of its members in legal actions in which their testimony will impugn some performances that clearly fall within the accepted standards of practice or, conversely, will endorse some obviously deficient practices. Because experts are relied upon to help courts and juries understand the "standards of practice" as applicable to a given case, care must be exercised that such "expert testimony" does not narrowly reflect the experts' views about applicable standards to the exclusion of other acceptable choices. The Academy considers it unethical for any expert to provide testimony that does not adhere scrupulously to the goal of objectivity.

The AAP also recognizes its responsibility and that of its Fellows for continued efforts to improve health care for children. However, the Academy believes that many claims of medical malpractice represent the response of a litigation-oriented society to a technologically advanced form of health care that has, unfortunately, fostered some unrealistic expectations and often unexpectedly high risks. As technology continues to become more complex, risks as well as benefits continue and sometimes increase, making a complication-free practice of medicine less and less probable. Under such circumstances, it becomes most important to distinguish between "medical maloccurrence" and "medical malpractice." Medical maloccurrence is best considered a less-than-ideal outcome of medical care most often unrelated to the reasonableness of the quality of care provided. Certain medical or surgical complications can be anticipated and represent "unavoidable" effects or complications of disease or of entirely appropriate medical care. Still other complications arise unpredictably for the individual patient and appear to be unavoidable. And, of course, still others occur as a result of judgments and decisions carefully made by physicians and patients with fully informed consent but which turn out, in retrospect, to have been the less desirable of several options considered. Each of these situations represents maloccurrence rather than malpractice and is a reflection of the innate uncertainty inherent in all of medicine.

In contrast, "medical malpractice," according to Black's Law Dictionary, is defined as follows. In medical malpractice litigation, negligence is the predominant theory of liability. In order to recover from negligent malpractice, the plaintiff must establish the following elements: (1) the existence of the physician's duty to the plaintiff, usually based upon the existence of the physician-patient relationship; (2) the applicable standard of care and its violation; (3) a compensable injury; and (4) a causal connection between the violation of the standard of care and the harm complained of.

The potential for personal satisfaction, professional recognition, or financial reward appears to encourage "expert testimony" which overlooks the distinction between maloccurrence and actual malpractice. The AAP considers it unethical for an expert to distort or misrepresent a maloccurrence as an example of medical malpractice—or the converse.

The Academy supports the concept of appropriate, prompt compensation to patients for injuries engendered under the health care system. However, under present legal and insurance tenets, such remuneration also should reflect the distinction between medical maloccurrence, for which the larger society bears financial responsibility, and medical malpractice, for which health care providers are held culpable. The moral and legal duty of physicians to testify as called upon in a court of law in accordance with their expertise is recognized and supported. This duty implies adherence to the strictest ethics. Truthfulness is essential and misrepresentation or
exaggeration of expert clinical facts or opinion to attempt to establish an absolute right or wrong may be harmful both to the individual parties involved and to the profession as a whole. Furthermore, the acceptance of fees that are disproportionate to those customary for such professional endeavors is improper and can be construed as influencing testimony given by a witness. Moreover, it remains unethical for a physician to accept compensation that is contingent upon the outcome of litigation. 

The AAP encourages the development of policies and standards for expert testimony. Such policies should address safeguards to promote accuracy and thoroughness and efforts to encourage peer review of the testimony. Such policies also should attempt to assure that such testimony does not assume an "advocacy" or "partisan" role in legal proceedings. The following principles have been adopted as guidelines for the American Academy of Pediatrics and its members who assume the role of expert witness.

1. The physician should have current experience and ongoing knowledge about the areas of clinical medicine in which he or she is testifying and familiarity with practices during the time and place of the episode being considered as well as the circumstances surrounding the occurrence.

2. The physician's review of medical facts should be thorough, fair, and impartial and should not exclude any relevant information to create a view favoring either the plaintiff or the defendant. The ultimate test for accuracy and impartiality is a willingness to prepare testimony that could be presented unchanged for use by either the plaintiff or defendant.

3. The physician's testimony should reflect an evaluation of performance in light of generally accepted standards, neither condemning performance that clearly falls within generally accepted practice standards nor endorsing or condoning performance that clearly falls outside accepted practice standards.

4. The physician should make a clear distinction between medical malpractice and medical maloccurrence when analyzing any case. The practice of medicine remains a mixture of art and science; the scientific component is a dynamic and changing one based to a large extent on concepts of probability rather than absolute certainty.

5. The physician should make every effort to assess the relationship of the alleged substandard practice to the patient's outcome, because deviation from a practice standard is not always causally related to a less-than-ideal outcome.

6. The physician should be willing to submit transcripts of depositions and/or courtroom testimony for peer review.

7. The physician expert should cooperate with any reasonable efforts undertaken by the courts or by plaintiffs' or defendants' carriers and attorneys to provide a better understanding of the expert witness issue.

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William O. Robertson, MD, Chairman
Bradford P. Cohn, MD
William S. Conkling, MD
Harold J. Kuehn, MD
Charles Moloney, MD
Arnold L. Tanis, MD
Consultants
Holly Myers, Esq
Keith Phoenix, Esq

REFERENCES

BIBLIOGRAPHY
9. Robertson WO: Some 'experts' may not be all that expert. WSMA Reports, June 1988, p 4
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