Guidelines for Expert Witness Testimony in Medical Liability Cases (S93-3)

Committee on Medical Liability

The American Academy of Pediatrics joins with other medical 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 Academy 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.

The role of an expert witness in a medical liability case is to testify to the standards of care in a given case, and to explain how the defendant did or did not conform to those standards. An expert witness may be asked to testify as to whether a deviation from the standard of care caused the injury. Expert witnesses are also called upon to help an attorney determine if a case has merit, and in several states attorneys are required by law to consult an expert before a suit is filed. 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 so that “expert testimony” does not narrowly reflect the experts’ views about applicable standards to the exclusion of other acceptable and perhaps more realistic choices. The standards of care for generalists may not necessarily be the standards of care for subspecialists. The Academy considers it unethical for any expert to provide testimony that does not adhere scrupulously to the goal of objectivity.

The Academy also recognizes its responsibility and that of its Fellows for continued efforts to improve health care for children. However, some claims of medical malpractice may represent the response of our society to a technologically advanced form of health care that has, unfortunately, fostered some unrealistic expectations. As technology continues to become more complex, risks as well as benefits continue and sometimes increase, making the practice of medicine more and more complicated.

Under such circumstances, it becomes most important to distinguish between “medical maloccurrence” and “medical malpractice.” 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.

In contrast, medical maloccurrence is a less-than-ideal outcome of medical care which may or may not be related to the reasonableness of the quality of care provided. While a medical maloccurrence is always present in cases of malpractice, the converse is not true. Certain medical or surgical complications can be anticipated and represent unavoidable effects or complications of disease. Still other unavoidable complications arise unpredictably for the individual patient. Of course, others occur as a result of judgments and decisions carefully made by physicians and patients with informed consent but which turn out, in retrospect, to have been the least desirable of several options considered. Each of these situations represents maloccurrence rather than malpractice and is a reflection of the innate uncertainty inherent in medicine.

The potential for personal satisfaction, professional recognition, or financial reward appears to encourage “expert testimony” that overlooks the distinction between a simple maloccurrence and actual malpractice. The Academy considers it unethical for an expert to distort or misrepresent a maloccurrence in which the applicable standard of care was not violated as an example of medical malpractice—or the converse.

The Academy supports the concept of appropriate, prompt compensation to patients for injuries due to medical negligence. Under the present legal, insurance, and social tenets, such remuneration is sometimes made for medical maloccurrence in which no malpractice is present, on the assumption that the larger society should bear financial responsibility for such injuries.

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 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 as the payment of such fees may be construed as attempting to influence testimony given by a witness.

The 1992 opinion of the American Medical Association on Medical Testimony states as follows:

As a citizen and as a professional with special training and experience, the physician has an ethical obligation to assist in the administration of justice. If a patient who has a legal claim requests a physician’s assistance, the physician should furnish medical evidence, with the patient’s consent, in order to secure the patient’s legal rights.

The medical witness must not become an advocate or a partisan in the legal proceeding. The medical witness should be adequately prepared and should testify honestly and truthfully. The attorney for the party who calls the physician as a witness should be informed of all favorable and unfavorable information developed by the physician’s evaluation of the case. It is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.2(46)

The Academy encourages the development of policies and standards for expert testimony. Such policies should embody safeguards to promote the accuracy and thoroughness of the testimony and efforts to encourage peer review of the testimony.

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, objective, and impartial and should not exclude any relevant information in order to create a perspective favoring either the plaintiff or the defendant. The ideal measure for objectivity and fairness 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 maloccurring which is not the result of a violation of the applicable standard of care 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 between the alleged substandard practice and the patient’s outcome, because deviation from a practice standard is not always the cause of the less-than-ideal outcome at issue in the case.

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.

8. It is unethical for a physician to accept compensation that is contingent upon the outcome of the litigation.

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