

REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*

CEJA Report 12 - A-04

Subject: Medical Testimony

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Referred to: Reference Committee on Amendments to Constitution and Bylaws
(Mary W. Geda, MD, Chair)

1 In the mid-1980's, the Council on Ethical and Judicial Affairs issued Opinion E-9.07, "Medical
2 Testimony," which addresses the physician's ethical obligation to provide evidence in court, the
3 general qualifications necessary for those who testify, and the importance of honest testimony. The
4 Council is undertaking a new report to provide greater guidance to physicians who testify in legal
5 proceedings, building on prior AMA policy¹ and the efforts of other medical societies that currently
6 engage in professional self-regulation related to the conduct of physicians who provide expert
7 testimony.

8 9 A NEXUS BETWEEN PUBLIC NEED AND PROFESSIONAL EXPERTISE

10
11 The legal system adjudicates disputes and delivers decisions on such wide-ranging topics that it is
12 impossible for the system to maintain expertise in all necessary areas. Therefore, the courts rely on
13 experts such as engineers, actuaries, and others to help juries and judges render informed decisions.
14 Because the medical profession possesses the experience and knowledge to address matters
15 involving health and medicine, it is necessary for medical professionals to contribute their expertise
16 to the courts. Without the contributions of physician witnesses, parties in dispute could not
17 advance medical or health-related cases effectively, and the legal system would be more arbitrary
18 and unfair.

19
20 While physicians' unique knowledge and skills qualify them to make important contributions to the
21 legal system, they generally are not legally required to provide expert testimony in legal
22 proceedings. Particularly at a time when professional liability is of great concern, physicians may
23 view the adversarial nature of trials as contrary to professional collegiality and may eschew the role
24 of medical expert. However, as members of a profession, physicians have a professional obligation
25 to serve the needs of the public in settings where their expertise is required. Accordingly, the
26 AMA encourages physicians' participation as "a matter of public interest" (H-265.994). The
27 current ethical Opinion refers to a physician's obligation as citizen as advocated by *Principle VII*,
28 which encourages physicians to participate in activities that contribute to the improvement of the
29 community and the betterment of public health.

* Reports of the Council on Ethical and Judicial Affairs are assigned to the reference committee on Constitution and Bylaws. They may be adopted, not adopted, or referred. A report may not be amended, except to clarify the meaning of the report and only with the concurrence of the Council.

1 SCIENCE IN THE COURTS

2
3 In addressing medical testimony, it is important to distinguish between physicians who provide
4 medical testimony as fact witnesses or as expert witnesses. Generally, fact witnesses present
5 factual findings or observations. In contrast, expert witnesses' testimony relies on specialized
6 knowledge that is applied to the facts of a case to help explain them. Physicians who serve as both
7 fact and expert witnesses in a single proceeding may be conflicted, as roles for each have different
8 goals.

9
10 The presentation of medical evidence in the courtroom often is fraught with controversy.²
11 Physicians deliver expert testimony against the backdrop of constant technological and scientific
12 advances.³ Theories once deemed heretical later gain acceptance: famous examples include
13 William Harvey's revolutionary theory of blood circulation and Ignaz Semmelweis' theory of hand
14 washing.^{4,5} Even today, when much of medical science is based on evidence, some well-accepted
15 medical practices have not been proven through standard scientific research.⁶ The lines separating
16 certainty from probability, or standard, innovative, and inappropriate practices can easily be blurred
17 when complete scientific explanations are not available or when beneficial results cannot be
18 assured.^{7,8} This can impact not only professional liability litigation but also products liability
19 litigation, such as cases related to the safety of pharmaceuticals or the effect of tobacco, where
20 medical experts must consider evolving perspectives and contested evidence. Similarly, medical
21 testimony in criminal proceedings can be challenged when it relies on the application of new
22 technologies such as "DNA fingerprinting," as experts debate the validity of these advances.⁹ Even
23 physicians who testify on the basis of medical examinations of a person's physical or mental
24 condition may present testimony that over time would be altered by medical advances.¹⁰
25 Regardless of the nature of the legal proceedings, physician experts cannot eschew their role in
26 explaining that medical science is inherently dynamic, and in many cases, uncertain.¹¹

27
28 Given the ever changing nature of scientific knowledge, many attempts have been made to
29 establish rules of procedures to govern the admissibility of scientific testimony and evidence.¹² For
30 the better part of the last century, courts required that the scientific theory be sufficiently
31 established so as to have gained general acceptance in the relevant field.¹³ Subsequently, Federal
32 Rule of Evidence 702 established a more liberal standard:

33
34 If scientific, technical, or other specialized knowledge will assist the trier of fact to
35 understand the evidence or to determine a fact in issue, a witness qualified as an expert by
36 knowledge, skill, experience, training, or education, may testify thereto in the form of an
37 opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the
38 testimony is the product of reliable principles and methods, and (3) the witness has applied
39 the principles and methods reliably to the facts of the case.¹⁴

40
41 This standard was interpreted further by the US Supreme Court in a case alleging that an anti-
42 nausea drug for pregnant women had caused birth defects. In *Daubert v. Merrell Dow*
43 *Pharmaceuticals* (1993), the court was particularly concerned with determining whether the cause
44 of the birth defects could be proven, beyond proving that a duty of care existed and had been
45 breached. The Supreme Court ultimately ruled that scientific testimony should be limited to
46 evidence that is relevant and reliable. Four considerations were outlined to determine that expert
47 testimony was not simply a subjective belief or mere speculation: the evidence set forth was based
48 on scientific knowledge that has given rise to a testable and tested hypothesis; it had been subjected
49 to peer review and publication; it is generally accepted within the relevant scientific community;

1 and known or potential rates of error are made known to the court.¹⁵ All jurisdictions are not
2 required to apply these guidelines, but many do.^{16,5}

3
4 Overall, it is ethically important for physician expert witnesses to make clear whether a consensus
5 exists on the scientific theories presented in testimony. When a physician renders expert testimony
6 based on theories not widely accepted, he or she should describe the degree of existing consensus.
7 It also is important that probabilities not be misrepresented as definitive conclusions.^{17,18,19}

8 9 Evidence in professional liability cases

10
11 Conflict often arises in cases of professional liability in which expert witnesses inform the courts of
12 standards of care and draw conclusions about whether deviation from these standards has resulted
13 in harm. As historian James C. Mohr explains, “There can be no *malpractice* without established
14 *practice*; physicians cannot be convicted of deviating from accepted standards if no accepted
15 standards exist.”²⁰

16
17 The standard of care has been characterized as “that level of care, skill and treatment which, in
18 light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by
19 reasonably prudent similar [physicians]”²¹; more concisely, it is that standard which a “reasonable
20 and prudent [physician] similarly situated would provide under similar circumstances.”^{22,23,24}

21
22 A physician testifying with regard to the standard of care must be mindful of examining a case
23 according to the standard that prevailed at the time the event under review occurred. Moreover,
24 there often are variations in medical practice that can give rise to disagreements between experts
25 even though each approach is medically acceptable. If a medical expert knowingly provides
26 testimony based on a standard not widely accepted in the profession, the witness should
27 characterize it as such. Similarly, innovative treatments require careful presentation. Overall,
28 expert witnesses should avoid inflammatory accusations to express differences of opinion. They
29 also must not merely offer speculations but rather be able to substantiate claims that are made, for
30 example, on the basis of experience, published research, consensus statements or evidence-based
31 guidelines, recognizing that some evidence may be more authoritative.^{7,16}

32
33 Unexpected medical outcomes can occur for many reasons other than deviations from the standard
34 of care.²⁵ In fact, as described by the Institute of Medicine,²⁶ and further discussed in a recent
35 CEJA Report,²⁷ patient safety and continuing quality improvement efforts are premised on the
36 understanding that a majority of adverse events are attributed to factors other than negligence, such
37 as flawed systems.²⁸ These distinctions often can be drawn only through honest and independent
38 testimony.²⁴

39 40 HONESTY AND INDEPENDENCE IN THE PROVISION OF MEDICAL TESTIMONY

41
42 Honesty is a core ethical value in medicine and, according to the *Principles of Medical Ethics* [II],
43 its significance extends to all spheres of professional conduct,²⁹ and is the basis of the trust that is
44 placed in physicians. AMA policy makes clear that honesty is the most salient ethical principle for
45 physicians providing testimony in court [H-265.991, H-265.994, AMA Policy Database].
46 Moreover, false testimony can place physicians in contempt of court, and subject them to legal and
47 professional sanctions.³⁰ Although the testifying physicians’ services may have been sought
48 primarily by one party, they testify to educate the court as a whole.

1 Testimony of the Treating Physician

2
3 The patient-physician relationship requires physicians to dedicate themselves to their patients' best
4 interests; according to the *Principles of Medical Ethics*, "[A] physician shall, while caring for a
5 patient, regard responsibility to the patient as paramount"[VIII].²⁹ When a physician is called upon
6 to serve as a fact witness in his or her own patient's case, the treating physician witness must be
7 committed to delivering an honest opinion. In other words, patient advocacy must be limited by the
8 requirement of honesty. The patient's attorney must be the advocate who advances the patient's
9 legal goals.³¹ This important distinction requires those who testify as treating physicians to engage
10 in continuous self-examination to ensure that their testimony represents the facts of the case.

11
12 Providing testimony in a legal proceeding involving a current patient can have a significant impact
13 on the therapeutic relationship. If the physician is called upon to testify in a matter that could
14 adversely affect the patient's medical interests, the physician should decline to testify unless
15 ordered to do so, or unless the patient has given the physician permission to do so, despite the
16 possible adverse effect. In the latter case, it may be advisable that the physician witness discuss
17 with a patient the testimony that will be presented prior to the appearance in court.

18
19 When a legal case makes opponents of a patient and a treating physician, such as a medical
20 malpractice case, the trust necessary to the maintenance of the therapeutic relationship likely will
21 be eroded. In those instances, it is appropriate that the physician transfer the care of the patient.³²

22
23 Testimony of the Non-Treating Physician

24
25 The opinions of non-treating physician experts must remain honest and objective, free from any
26 undue influence. "An independent expert is not affected by the goals of the party for which she
27 was retained, and is not reticent to arrive at an opinion that fails to support the client's legal
28 position."³¹ Avoiding undue influence as an expert once again involves self-examination to ensure
29 that one's testimony is not biased by allegiance to any party in a legal proceeding.

30
31 Certain fee structures for the payment of expert witnesses have been identified as potentially
32 constituting undue influence. Contingent fees create incentives to give testimony in support of
33 specific legal outcomes, thereby interfering with witness objectivity and the imperatives for
34 honesty and independence.³¹ According to AMA policies, a physician is entitled to reasonable
35 compensation for time and effort spent on medico-legal service, but it is unacceptable for a
36 physician to accept fees contingent on the outcome of a case [H-265.994, H-265.997, H-435.970
37 AMA Policy Database]. Disproportionate compensation for witness activities also could influence
38 physician testimony, and would create the appearance of indebtedness to the contracting party.

39
40 As to physicians whose incomes depend largely upon expert witness activities, no direct
41 relationship has been shown between amount of service provided to the legal system and degree of
42 influence upon one's testimony. However, two distinct scenarios are possible: physicians as
43 experts may have an incentive to present biased and dishonest testimony to ensure future testifying
44 opportunities. Alternatively, the honesty and independence of an expert may ensure his or her
45 reputation for objectivity and help secure future work. When physicians choose to provide expert
46 testimony, particularly in professional liability cases, ethical conduct requires that they be willing
47 to evaluate cases objectively and derive an independent opinion. In instances when a physician's
48 expertise appears to serve primarily the interests of one class of litigants, it is especially important
49 that objectivity and impartiality be maintained, for example by drawing on others' research. In

1 summary, the onus rests upon individual physician witnesses to avoid any undue influence from
2 financial incentives.³³

4 MAINTAINING STANDARDS FOR MEDICAL TESTIMONY

6 Qualifications for Expert Witnesses

8 Federal Rule of Evidence 702 explains that a witness can qualify as an expert by knowledge, skill,
9 experience, training, or education. There are concerns that this legal standard is insufficient to
10 ensure that only qualified physician experts testify. Therefore, many have advocated for additional
11 standards establishing minimum requirements for expert witnesses' credentials to ensure that
12 opinions presented are thoroughly informed by knowledge or experience in the relevant field.
13 Particular concerns surround medical liability litigation with regard to an expert's licensure,
14 training and experience compared to that of the physician defendant. To address possible gaps in
15 the standards set for acceptable witness testimony, many state and specialty societies have
16 developed guidelines for expert witness qualifications in their respective states and specialties.
17 The AMA also has developed model state legislation to set legal standards for expert witnesses,
18 and has enacted policy supporting the dissemination of these guidelines in hopes of achieving their
19 widespread adoption [H-265.995]. In light of the importance of qualifications, failure to accurately
20 disclose one's applicable qualifications and misrepresentation of qualifications each constitute a
21 form of dishonest testimony.

23 Professional Self-Regulation of Testimony

25 If physicians deliver dishonest or fraudulent medical testimony, they discredit physicians as a
26 group, and endanger the public's trust in physicians. Moreover, testimony that rejects applicable
27 standards of care without supporting scientific evidence undermines the public's understanding of
28 medicine. Organized medicine has a role to play in protecting individual patients, defendant
29 physicians, and society as a whole, from the negative effects of false or misleading medical
30 testimony. Some state and specialty medical societies as well as licensing boards now engage in
31 the review of medical testimony to assess claims of dishonest or false testimony. The Council on
32 Ethical and Judicial Affairs, in a 2003 informational on its judicial function, also explained how it
33 may review complaints against expert witnesses who are AMA members or applicants only if a
34 court has determined that the expert committed perjury for false testimony or if a licensing board
35 has imposed licensure sanctions.³⁴ Overall, such review of testimony is justified in part on the
36 basis that testimony lies within the sphere of professional activities that are intrinsically linked to a
37 physician's medical education and training.

39 Some commentators have expressed concerns that review of physicians' testimony may have a
40 "chilling effect" that extends to credible expert witnesses.^{35,36,37,38} However, review and any
41 consequent adverse action against a physician is legally condoned only if it is conducted fairly and
42 in good faith, as prescribed in Opinions E-9.10, "Peer Review," of the AMA' Code of Medical
43 Ethics. In the case of *Austin v. American Association of Neurological Surgeons*,³⁹ the US Curt of
44 Appeals For the Seventh Circuit concluded that, having respected its own procedural requirements,
45 the Association could suspend a member who had provided "irresponsible" testimony. The court
46 further stated that "discipline by the Association, therefore, served an important public policy."
47 Other medical societies that review their members' conduct as expert witnesses help fulfill the
48 profession's commitment to uphold the principles of honesty and integrity in all aspects of
49 physicians' conduct.

1 CONCLUSION

2
3 The legal system relies on medical testimony to render informed and fair decisions. Therefore,
4 physicians serve an important function in the pursuit of justice when they apply their expertise in
5 court. Legally and ethically, this function is strictly bound by the obligation to testify honestly. In
6 this regard, organized medicine has an important role to play in ensuring that physician testimony
7 is honest and reflects the full knowledge of the medical community. By engaging in the review of
8 expert testimony and promoting qualifying standards for medical witnesses, physician
9 organizations can lend their collective expertise to the legal system.

10
11 RECOMMENDATION

12
13 The Council on Ethical and Judicial Affairs recommends that the following be adopted and the
14 remainder of the report be filed.

15
16 In various legal and administrative proceedings, medical evidence is critical. As citizens and
17 as professionals with specialized knowledge and experience, physicians have an obligation to
18 assist in the administration of justice.

19
20 When a legal claim pertains to a patient the physician has treated, the physician must hold the
21 patient's medical interests paramount, including the confidentiality of the patient's health
22 information, unless the physician is authorized or legally compelled to disclose the information.

23
24 Physicians who serve as fact witnesses must deliver honest testimony. This requires that they
25 engage in continuous self-examination to ensure that their testimony represents the facts of the
26 case. When treating physicians are called upon to testify in matters that could adversely
27 impact their patients' medical interests, they should decline to testify unless ordered to do so
28 or unless the patient has given the physician permission to do so, notwithstanding the possible
29 adverse effect. It is appropriate for a treating physician to transfer the care of the patient if, as
30 a result of legal proceedings, the patient and the physician are placed in adversarial positions,
31 eroding the trust necessary to maintain the therapeutic relationship.

32
33 When physicians choose to provide expert testimony, they should have recent and substantive
34 experience or knowledge in the area in which they testify and be committed to evaluating
35 cases objectively, and deriving an independent opinion. Their testimony should reflect current
36 scientific thought and standards of care that have gained acceptance among peers in the
37 relevant field. If a medical witness knowingly provides testimony based on a theory not
38 widely accepted in the profession, the witness should characterize the theory as such. Also,
39 testimony pertinent to a standard of care must consider standards that prevailed at the time the
40 event under review occurred.

41
42 All physicians must accurately represent their qualifications and must testify honestly.
43 Physician testimony must not be influenced by financial compensation; in particular, it is
44 unethical for a physician to accept compensation that is contingent upon the outcome of
45 litigation.

46
47 Organized medicine, including state and specialty societies, and medical licensing boards have
48 important roles to play in promoting the ethical conduct of physician witness activities. With
49 careful attention to due process, these organizations can help maintain high standards for

- 1 medical witnesses by assessing claims of false or misleading testimony and issuing
- 2 disciplinary sanctions as appropriate. (New CEJA/AMA Policy)

Fiscal note: Less than \$500

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