The Physician As Expert Witness

Samuel D. Hodge, Jr. and Avi J. Cohen

To uphold high professional standards, a growing number of specialty societies and medical boards have enacted “Expert Witness Affirmations” through which members affirm in writing to uphold their ethical obligations when providing expert witness services.

The following exchange took place during cross-examination of a medical expert by defense counsel:

Q: “Doctor, you stated on direct examination that the plaintiff’s herniated disk is a direct result of the automobile accident. Did you ever treat the plaintiff before the incident?”

A: “No.”
Q: “So, you have no idea of the condition of his back shortly before the accident, right?”
A: “The patient told me he had no prior back problems.”
Q: “Did you contact his family doctor or obtain that physician’s records to verify that the plaintiff had no prior back problems before forming your opinion?”
A: “No. It was not necessary.”
Q: “Doctor, did you at least review the patient’s medical records from the other physicians who treated him for his accident-related injuries?”
A: “I did not have to look at any other records to form my opinion. I have treated back patients for 25 years and I saw this patient for his accident-related injuries. Therefore, I am more than qualified to form a belief as to the cause of his herniated disk.”

Has this physician run afoul of any ethics rule regarding expert witness testimony issued by the medical board to which this doctor belongs and can this healthcare professional be sanctioned by that organization for failing to review all of the patient’s relevant medical records before appearing in court? The answer in many instances is yes. The information needed to treat a patient is much different and less strenuous than the documentation required to form an opinion in a legal proceeding that passes ethical muster. This article will provide an overview of the additional requirements involving expert testimony, and will offer practical tips on how these rules can be used by attorneys during the course of litigation.

THE PRACTICE OF MEDICINE INCLUDES TESTIFYING IN COURT • The role of a physician is much more complex than it was years ago. Government and insurance regulations permeate the practice of medicine and physicians are increasing drawn into legal battles requiring their learned opinions. From the simple note excusing a patient from employment to providing expert testimony in a malpractice case, doctors are participants in the personal injury and disability arenas.

Since medicine is beyond the understanding of the average person, counsel must present expert witness testimony to explain a medical condition or to offer an opinion as to the causal relationship between an injury and trauma or whether another physician has committed malpractice. In fact, as a precondition to the filing of a malpractice lawsuit, some states require a plaintiff’s attorney to secure a written statement from a physician opining that there is a reasonable probability that the care or knowledge exercised in the patient’s treatment fell outside of acceptable medical standards and that such conduct was the proximate cause in bringing about the harm. See, e.g., Pennsylvania Rule of Civil Procedure 1042.3; Maryland Courts and Judicial Proceeding Code Annotated §3-2A-04.

THE MEDICAL PROFESSION AS SELF-REGULATING • The medical profession is self-regulating and is accordingly compelled to protect society from dishonest and incompetent health care providers. In a litigation setting, the public is harmed by physicians who offer tainted expert testimony. This is especially true in the medical malpractice context, in which physicians incur higher insurance premiums that in turn negatively affect the public’s ability to obtain healthcare services. Jennifer A. Turner, Going After the “Hired Guns”: Is Improper Expert Witness Testimony Unprofessional Conduct or the Negligent Practice of Medicine?, 33 Pepp. L. Rev. 275 (2006). For instance, a growing number of doctors have dropped their malpractice insurance while others have abandoned high-risk procedures and specialties, such as neurosurgery and obstetrics, or have relocated to more physician-friendly states. Rachel Emma Silverman, Doctors Take the Offensive. More-Aggressive Tack Used to Cut Frivolous Malpractice Claims, Medical Justice Corp., http://www.
ETHICS PRONOUNCEMENTS • The medical profession has recognized these problems by enacting pronouncements to regulate physicians when they testify in legal proceedings. Many lawyers, however, are unaware of these expert witness guidelines and physicians do not fully appreciate the distinction between the information needed to treat a patient and that required when providing expert testimony.

Federal Rule of Evidence 702 allows a party to call an expert witness to present “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.” In many cases, such expert testimony is required to present a cause of action or defense. H. Henry, Necessity of Expert Evidence to Support an Action for Malpractice against a Physician or Surgeon, 81 A.L.R.2d 597 (1962). Trials involving personal injury or medical malpractice claims, therefore, often turn into a “battle of the experts,” with each side hiring a physician to present evidence from which a jury can find in its favor. The large amounts of money at stake and the ability of lawyers to hand-pick their experts has led to a perception that the judicial process is often distorted by professional witnesses who offer unreliable opinions in favor of the highest bidder. Douglas R. Eitel et al., Physicians’ Attitudes About Expert Medical Witnesses, 18 J. Legal Med. 345 (1997); Douglass Mossman et al., Courtroom Whores? — or Why Do Attorneys Call Us?: Findings from a Survey on Attorneys’ Use of Mental Health Experts, 26 J. Am. Acad. Psychiatry & L. 27, 31-33 (1998).

JUDGES AS GATEKEEPERS • Trial courts are entrusted with a gatekeeper function under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), to prevent experts from offering unscientific testimony. Courts focus on the reasoning and validity of an expert’s methodology, rather than their conclusions, while questionable conclusions are challenged though cross-examination and the presentation of contrary evidence. See Ambrosini v. Labarraque, 101 F.3d 129, 133-34 (D.C. Cir.1996). However, judges often lack sufficient knowledge of medicine to effectively perform their gatekeeper function. After all, judges are unlikely to second-guess an expert’s seemingly valid specialty certification. Jurists simply don’t possess the medical background to decide if an expert has misrepresented his or her field of specialty. Andrew D. Feld & William D. Carey, Expert Witness Malfeasance: How Should Specialty Societies Respond?, 100 Am. J. Gastroenterology 991 (May 2005).

While Fed. R. Evid. 706 allows a court to appoint independent experts, there is a widespread belief in the medical community that judges are still unable to effectively police expert testimony. See e.g., Aaron S. Kesselheim and David M. Studdert, Role of Professional Organizations in Regulating Expert Witness Testimony, 298 JAMA 2907 (Dec. 26, 2007); Catherine T. Struve, Improving the Medical Malpractice Litigation Process, 23 Health Affairs 33 (July/Aug. 2004).

The perception that dishonest experts are contributing to the medical malpractice crisis has led the AMA and various medical specialty societies to enact a host of proposals to tackle the problem. See William P. Gunnar, Is There an Acceptable Answer to Rising Medical Malpractice Premiums?, 13 Annals Health L. 465, 498-499, Summer 2004.

THE AMERICAN MEDICAL ASSOCIATION • In the mid-1980s, the American Medical Association recognized the need for a physician to act as a factual or expert witness and the Council on Ethical and Judicial Affairs issued an opinion on the topic entitled “Medical Testimony.” The AMA has revisited this topic several times and currently advocates that the rendering of medical testimony constitutes the practice of medicine. AMA Policy