9.7.1 Medical Testimony

Medical evidence is critical in a variety of legal and administrative proceedings. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.

Whenever physicians serve as witnesses they must:

(a) Accurately represent their qualifications.

(b) Testify honestly.

(c) Not allow their testimony to be influenced by financial compensation. Physicians must not accept compensation that is contingent on the outcome of litigation.

Physicians who testify as fact witnesses in legal claims involving a patient they have treated must hold the patient’s medical interests paramount by:

(d) Protecting the confidentiality of the patient’s health information, unless the physician is authorized or legally compelled to disclose the information.

(e) Delivering honest testimony. This requires that they engage in continuous self-examination to ensure that their testimony represents the facts of the case.

(f) Declining to testify if the matters could adversely affect their patients’ medical interests unless the patient consents or unless ordered to do so by legally constituted authority.

(g) Considering transferring the care of the patient to another physician if the legal proceedings result in placing the patient and the physician in adversarial positions.

Physicians who testify as expert witnesses must:

(h) Testify only in areas in which they have appropriate training and recent, substantive experience and knowledge.

(i) Evaluate cases objectively and provide an independent opinion.

(j) Ensure that their testimony:

   (i) reflects current scientific thought and standards of care that have gained acceptance among peers in the relevant field;

   (ii) appropriately characterizes the theory on which testimony is based if the theory is not widely accepted in the profession;

   (iii) considers standards that prevailed at the time the event under review occurred when testifying about a standard of care.
Organized medicine, including state and specialty societies and medical licensing boards, has a responsibility to maintain high standards for medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate.

*AMA Principles of Medical Ethics: II, IV, V, VII*

*Background report(s):*

CEJA Report 12-A-04 Medical testimony
In the mid-1980’s, the Council on Ethical and Judicial Affairs issued Opinion E-9.07, “Medical Testimony,” which addresses the physician’s ethical obligation to provide evidence in court, the general qualifications necessary for those who testify, and the importance of honest testimony. The Council is undertaking a new report to provide greater guidance to physicians who testify in legal proceedings, building on prior AMA policy and the efforts of other medical societies that currently engage in professional self-regulation related to the conduct of physicians who provide expert testimony.

A NEXUS BETWEEN PUBLIC NEED AND PROFESSIONAL EXPERTISE

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

While physicians’ unique knowledge and skills qualify them to make important contributions to the legal system, they generally are not legally required to provide expert testimony in legal proceedings. Particularly at a time when professional liability is of great concern, physicians may view the adversarial nature of trials as contrary to professional collegiality and may eschew the role of medical expert. However, as members of a profession, physicians have a professional obligation to serve the needs of the public in settings where their expertise is required. Accordingly, the AMA encourages physicians’ participation as “a matter of public interest” (H-265.994). The current ethical Opinion refers to a physician’s obligation as citizen as advocated by Principle VII, which encourages physicians to participate in activities that contribute to the improvement of the community and the betterment of public health.
In addressing medical testimony, it is important to distinguish between physicians who provide medical testimony as fact witnesses or as expert witnesses. Generally, fact witnesses present factual findings or observations. In contrast, expert witnesses’ testimony relies on specialized knowledge that is applied to the facts of a case to help explain them. Physicians who serve as both fact and expert witnesses in a single proceeding may be conflicted, as roles for each have different goals.

The presentation of medical evidence in the courtroom often is fraught with controversy. Physicians deliver expert testimony against the backdrop of constant technological and scientific advances. Theories once deemed heretical later gain acceptance: famous examples include William Harvey’s revolutionary theory of blood circulation and Ignaz Semmelweis’ theory of hand washing. Even today, when much of medical science is based on evidence, some well-accepted medical practices have not been proven through standard scientific research. The lines separating certainty from probability, or standard, innovative, and inappropriate practices can easily be blurred when complete scientific explanations are not available or when beneficial results cannot be assured. This can impact not only professional liability litigation but also products liability litigation, such as cases related to the safety of pharmaceuticals or the effect of tobacco, where medical experts must consider evolving perspectives and contested evidence. Similarly, medical testimony in criminal proceedings can be challenged when it relies on the application of new technologies such as “DNA fingerprinting,” as experts debate the validity of these advances. Even physicians who testify on the basis of medical examinations of a person’s physical or mental condition may present testimony that over time would be altered by medical advances.

Regardless of the nature of the legal proceedings, physician experts cannot eschew their role in explaining that medical science is inherently dynamic, and in many cases, uncertain.

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

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

This standard was interpreted further by the US Supreme Court in a case alleging that an anti-nausea drug for pregnant women had caused birth defects. In *Daubert v. Merrell Dow Pharmaceuticals* (1993), the court was particularly concerned with determining whether the cause of the birth defects could be proven, beyond proving that a duty of care existed and had been breached. The Supreme Court ultimately ruled that scientific testimony should be limited to evidence that is relevant and reliable. Four considerations were outlined to determine that expert testimony was not simply a subjective belief or mere speculation: the evidence set forth was based on scientific knowledge that has given rise to a testable and tested hypothesis; it had been subjected to peer review and publication; it is generally accepted within the relevant scientific community;
and known or potential rates of error are made known to the court.\textsuperscript{15} All jurisdictions are not required to apply these guidelines, but many do.\textsuperscript{16,5}

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

Evidence in professional liability cases

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

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

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

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

HONESTY AND INDEPENDENCE IN THE PROVISION OF MEDICAL TESTIMONY

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

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

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

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

Testimony of the Non-Treating Physician

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

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

As to physicians whose incomes depend largely upon expert witness activities, no direct relationship has been shown between amount of service provided to the legal system and degree of influence upon one’s testimony. However, two distinct scenarios are possible: physicians as experts may have an incentive to present biased and dishonest testimony to ensure future testifying opportunities. Alternatively, the honesty and independence of an expert may ensure his or her reputation for objectivity and help secure future work. When physicians choose to provide expert testimony, particularly in professional liability cases, ethical conduct requires that they be willing to evaluate cases objectively and derive an independent opinion. In instances when a physician’s expertise appears to serve primarily the interests of one class of litigants, it is especially important that objectivity and impartiality be maintained, for example by drawing on others’ research.
summary, the onus rests upon individual physician witnesses to avoid any undue influence from financial incentives.33

MAINTAINING STANDARDS FOR MEDICAL TESTIMONY

Qualifications for Expert Witnesses

Federal Rule of Evidence 702 explains that a witness can qualify as an expert by knowledge, skill, experience, training, or education. There are concerns that this legal standard is insufficient to ensure that only qualified physician experts testify. Therefore, many have advocated for additional standards establishing minimum requirements for expert witnesses’ credentials to ensure that opinions presented are thoroughly informed by knowledge or experience in the relevant field.

Particular concerns surround medical liability litigation with regard to an expert’s licensure, training and experience compared to that of the physician defendant. To address possible gaps in the standards set for acceptable witness testimony, many state and specialty societies have developed guidelines for expert witness qualifications in their respective states and specialties.

The AMA also has developed model state legislation to set legal standards for expert witnesses, and has enacted policy supporting the dissemination of these guidelines in hopes of achieving their widespread adoption [H-265.995]. In light of the importance of qualifications, failure to accurately disclose one’s applicable qualifications and misrepresentation of qualifications each constitute a form of dishonest testimony.

Professional Self-Regulation of Testimony

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

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

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

RECOMMENDATION

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

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

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

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

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

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

Organized medicine, including state and specialty societies, and medical licensing boards have important roles to play in promoting the ethical conduct of physician witness activities. With careful attention to due process, these organizations can help maintain high standards for
medical witnesses by assessing claims of false or misleading testimony and issuing
disciplinary sanctions as appropriate. (New CEJA/AMA Policy)

Fiscal note: Less than $500
REFERENCES

22. Snow v. Bond 438 S.W. 2d 549.


36 Victoroff MS. Peer review of the inexpert witness, or…Do you trust the chickens to guard the coop?. Managed Care. September 2002.


39 Austin v. American Association of Neurological Surgeons, 253 F.3d 967.