

GUIDELINES ON THE ETHICAL CONDUCT OF THE EXPERT WITNESS

Introduction

The American College of Legal Medicine (ACLM) is cognizant of the fact that there may be problems obtaining reliable information and opinions from expert witnesses. As an organization dedicated to the ethical conduct of attorneys, physicians, and especially expert witnesses, the following guidelines have been established.

The expert witness is fully protected under most state statutes and federal law from incorrect opinions expressed under oath. Statements that are intentional lies are subject to punishment under the laws for perjury. The medical expert has a vast amount of leeway as to what may be said under oath as long as it is expressed as an expert opinion. It is sometimes difficult to distinguish between a lie and what a misinformed physician believes is the truth.

Expert witness testimony is considered the practice of medicine.¹ As such, breaches in the truthfulness of statements made by the expert witness can be communicated to the American Medical Association (AMA), a State Medical Board, or any Society of which the offending physician is a member. These organizations may or may not investigate and take action concerning the physician.

Many times a case will turn on the opinion of an expert who is believable because of the physician's demeanor and not necessarily what is scientifically true or is actually the standard of practice. The truth can best be shown to a jury by actual statements from a reliable text or paper. But is a text or paper completely reliable? Possibly reliable, but depending on the expertise of the author. There are situations where there is no written

information and the opinion has to be based on medical practice. The expert should understand the definitions of Standard of Care and Informed Consent. The expert should be able to distinguish between probability and possibility.

Guidelines

Guidelines for the ethical conduct of the expert witness have been established by a variety of medical organizations.²⁻¹⁰ There are many similarities in these guidelines as these organizations recognize certain areas of expert witness conduct to be unethical. The following guidelines are offered by the ACLM:

GUIDELINES FOR THE EXPERT WITNESS

1. The expert witness has an ethical obligation to assist in the administration of justice.
2. The expert witness fee shall not be contingent upon the outcome of the case.
3. Compensation of the expert witness should be reasonable and commensurate with the time and effort reviewing records and literature, writing reports, and appearing for deposition and testimony (trial and arbitration).
4. The expert witness must not be an advocate or partisan for either party in the litigation.
5. The expert witness should have recent and substantive experience in the area in which testimony is to be given.
6. The expert witness should be adequately prepared for testimony.
7. Opinions should be unbiased.

8. Where possible, opinions should be based on medical literature.
9. Those opinions that are based on experience should be so stated.
10. The expert witness should testify honestly and truthfully without excluding any relevant information.
11. There should be no conflict of interest, either actual or potential, with the client or any of the attorneys.
12. The expert witness shall protect the privacy of records and communications.

These guidelines are the result of careful consideration by the Board of Governors of ACLM and may not reflect the opinion of some members of the organization. These are guidelines only and not to be considered Standards of Practice.

References

1. American Medical Association: Report of the Board of Trustees 18-I-98
2. American Medical Association: Code of Medical Ethics (Council on Ethical and Judicial Affairs), 2004-2005 Edition, section 9.07
3. American Society of Anesthesiologists: Expert Witness Qualifications and Testimony, Oct. 14, 1987, last amended Oct. 23, 1990
4. American College of Obstetricians and Gynecologists: Ethical Issues Related to Expert Testimony by Obstetricians and Gynecologists, No. 56, Oct. 1987
5. American College of Occupational and Environmental Medicine: Ethical Guidelines for Occupational and Environmental Medicine Expert Witnesses, Approved May 12, 1997

6. American Academy of Orthopaedic Surgeons: Guide to the Ethical Practice of Orthopaedic Surgery, Third Edition, Advisory Statement on Orthopaedic Medical Testimony, Feb. 1989, revised Oct. 1991, revised Oct. 1993, revised Feb. 1996
7. American Academy of Physical Medicine and Rehabilitation: Expert Witness Testimony, Approved April 1992
8. American College of Physicians – American Society of Internal Medicine: Ethics Manual (Fourth Edition), Approved Oct. 26, 1997. *Annals Int. Med.* 1998;128(7):576-594
9. American Society of Plastic and Reconstructive Surgeons: Code of Ethics for the American Society of Plastic and Reconstructive Surgeons, 1998
10. American College of Radiology: Code of Ethics, 1998. Article XIII of the 1998 American College of Radiology Bylaws