

EXPERT WITNESS 101: PREPARING AND MAKING THE MOST OF THE EXPERIENCE

By John C. Shea

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THRESHOLD ISSUE: GETTING INVOLVED

Practicing physicians should expect to be called on to testify about their treatment of a patient at some point during the course of their practice. Some specialists, such as orthopedic surgeons, will be frequently required to testify about injuries they treated and observed in personal injury and workers' compensation cases. Understanding the role a treating doctor plays in the context of civil litigation will ease the anxiety associated with being asked to testify under oath. Essentially, a physician called to testify about his care and treatment of a plaintiff is a sophisticated fact witness and his role in the case is not dissimilar to that of a witness to an accident.

Unfortunately, some physicians are more interested in finding ways to *avoid* giving testimony than learning ways to prepare and make the most of the experience:

Outright refusal to cooperate

- Refusing to personally come to court
- Refusing to testify out of court (i.e., video deposition)
- Refusing to participate in trial preparation -- meeting with or speaking to the patient's attorney before trial

Discouragement tactics

- Demanding exorbitant witness fees for testimony [fees are borne by patient/plaintiff -- not the attorney]
- Exorbitant fees for meetings and conversations with the attorney
- Refusing to speak to or meet with the attorney during normal business hours

- Demanding excessive advance notice
- Ignoring notification letters on the pretext that their staff never told them about it or put it on their calendar.

Those who object to getting involved in the legal aspects of their patients' medical conditions and treatments should take note of the following Opinions from the American Medical Association Code of Ethics:

Opinion 10.015 - The Patient-Physician Relationship

The relationship between patient and physician is based on trust and gives rise to physicians' ethical obligations to place patients' welfare above their own self-interest and above obligations to other groups, and to advocate for their patients' welfare.

Opinion 8.02 - Ethical Guidelines for Physicians in Administrative or Other Non-clinical Roles

The ethical obligations of physicians are not suspended when a physician assumes a position that does not directly involve patient care. Rather, these obligations are binding on physicians in non-clinical roles to the extent that they rely on their medical training, experience, or perspective. When physicians make decisions in non-clinical roles, they should strive to protect the health of individuals and communities. (I, VII)

Opinion 9.07 - Medical Testimony

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.

LEGAL BASICS

Two types of legal cases: Criminal and Civil

Criminal = governmental body (prosecutor) vs. individual accused of a crime (defendant)

Civil = person or entity (plaintiff) vs. another person or entity (defendant) accused of wrongdoing causing injury or loss

Differences:

Procedural rules – discovery, motions (pretrial, during trial, post-trial) number of jurors

Level of proof – “beyond a reasonable doubt” vs. preponderance

Penalties – incarceration, fine, death vs. money damages

Issues – Criminal: commission/non-commission of crime

Civil: (1) Negligence (2) Causation (3) Damages

PHYSICIANS’ ROLE IN CIVIL CASES

ISSUES NECESSARY TO PROVE

(1) Negligence – usually not a medical question (except in medical malpractice cases)

(2) Causation – sometimes a medical issue, especially when a plaintiff has a preexisting medical condition:

A) Does plaintiff’s pain and suffering come solely from (and not in any way by defendant’s negligence) the preexisting medical condition?

B) Does plaintiff’s pain and suffering come from the aggravation (by defendant’s negligence) of the preexisting medical condition?

C) Does plaintiff’s pain and suffering come solely from the defendant’s negligence?

(3) Damages – usually a medical issue (unless patently obvious, e.g., loss of limb, scarring, death):

A) Was medical treatment reasonable & necessary?

i. When did treatment begin – right after the injury or many months later?

ii. Type of treatment – was it appropriate to the injury? Was it a type routinely used in the medical community or something experimental?

iii. Duration of treatment – did plaintiff “overtreat?” If so, was the physician just trying to make more money? Was plaintiff trying to “pad” the medical bills to get a larger verdict?

iv. Necessity – would plaintiff make a recovery anyway without the treatment?

B) Level of pain – was this injury painful? How painful (e.g., scale of 1 – 10)? How long was it painful? Was it painful all the time or only some of the time?

C) Did the injury prevent or interfere with plaintiff’s work, enjoyment of life, or day-to-day living activities?

(D) Permanency?

(E) Impairment/disability? How much and for how long?

(F) Future medical care/medical costs?

(G) Loss of income – did plaintiff’s injuries prevent going to work? Did it prevent only certain movements or activities at work? Was the time taken off during recovery reasonable in proportion to the injury? Will plaintiff have to miss more work in the future? Will plaintiff need to find a different occupation?

STATUS OF THE PHYSICIAN WITNESS AT TRIAL

I. “Fact” witnesses – what was seen, heard, touched, smelled, etc.

II. “Expert” witnesses – opinions

III. Treating Physicians – Although all physicians are “expert witnesses” because of their credentials, a legal distinction is made between physicians who testify based solely on facts gained from their actual treatment of a patient (fact witnesses), and physicians who give opinions based upon facts and/or materials furnished to them during the course of litigation (expert witnesses).

REQUIREMENT OF “MEDICAL PROBABILITY”

1. The law requires “reasonable medical certainty” or “reasonable medical probability.”

2. In law the two phrases are identical in meaning.

3. The doctor must feel that the opinion is more likely than not accurate. Example: the doctor is asked, based upon the reasonable medical certainty, whether the injuries were the result

of the accident, the doctor need only feel that the accident was “more likely than not” the cause of the injury claimed in order to answer “yes.”

4. “Possibility” and “probability.” **Not** the same meaning.

Opinions based upon the following are not admissible:

- (1) It “might be” true.
- (2) It “is possible.”
- (3) It “might have” that effect.
- (4) It “could have” that effect.

5. While there must be more than a bare possibility, the law does recognize that a degree of uncertainty is present in almost every medical opinion. Our court has said: “It is consistent for a doctor to admit an element of speculation and still be convinced that an accident is more likely than not the cause of the injury.”

HOW TO BE A BETTER WITNESS

- Understand the question before you attempt to give an answer. You can’t possibly give a truthful and accurate answer unless you understand the question. If you don’t understand, ask the lawyer to repeat it. Keep a sharp lookout for questions with double meaning and questions that assume you have testified to a fact when you have not done so.
- Do not look at the lawyer for help when you are on the stand. You are on your own. You will not get any help from the judge either. If you look at the lawyer for your side when a question is asked on cross-examination or his or her approval after answering a question, the jury is bound to notice it, and it will create a bad impression.
- Do not fence or argue with the lawyer on the other side. The lawyer has a right to question you, and if you engage in smart talk or give evasive answers, the judge may reprimand you. Don’t answer a question with a question unless the question you are asked is not clear.
- Do not lose your temper no matter how hard you are pressed. Maintaining grace under fire is imperative. If you were to view the expert’s role as a teacher enthused with their field, when under cross-examination, you want to be viewed as a patient teacher who must deal with a difficult student. Be neither hostile nor dismissive.

- Be courteous. Being courteous is one of the best ways to make a good impression on the court and jury. Be sure to answer, “Yes, sir” and “No, sir” and to address the judge as “Your Honor.”
- If asked whether you have talked to the lawyer on your side, or to an investigator, admit it freely. Remember you are not getting paid for your testimony, you are being reimbursed for the time you lose and your expenses.
- Do not be afraid to look the jury in the eye and tell the story. Jurors are naturally sympathetic and want to hear what you have to say. Look at them most of the time and speak to them frankly and openly as you would to a friend or neighbor.
- Be prepared. This is job one.
- Rehearse. Take the time to role-play.
- Maintain your credibility. Rehearse short declarative sentences for use when confronted with obvious and undeniable weaknesses in the case. Denying the obvious will surely undermine your credibility while admitting the obvious could undermine an attorney’s attempt at melodrama.
- Use regular language.
- Meet with and speak to your patient’s attorney to help prepare.
- Review your notes to refresh yourself on your treatment.
- Don’t impose unreasonable conditions or fees as prerequisites to your cooperation and participation [those fees do not come out of the attorney’s pocket – they come out of your patient’s pocket].
- Help educate your patient’s attorney on medical subjects.
- Alert the attorney to medical issues that may affect your testimony.