The Treating Physician as Expert Witness: Ethical and Pragmatic Considerations

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ABSTRACT

Objective. The objective of this analysis is to apprise pain physicians of the ethical concerns and practical considerations that arise when a treating physician is called upon to testify as an expert witness in a legal proceeding involving his or her own patient. The provision of expert testimony in medico-legal proceedings has come under heightened scrutiny in recent years. When a physician testifies as an expert witness, such testimony is considered to be the practice of medicine, and hence subject to the same ethical and professional obligations as patient care. Increasingly, medical professional organizations have promulgated guidelines for such activities, and even implemented oversight mechanisms to review complaints concerning expert testimony by their members. Additional issues are raised when the expert witness is also the treating physician for the patient who is a party to the legal proceeding in which the expert testimony is offered.

Conclusions. While it is not categorically unethical or inadvisable for a physician to testify as an expert witness in a medico-legal proceeding involving his or her own patient, such activity raises special issues and concerns. Prospective expert witnesses in such situations should be cognizant of these issues and insure that they have been adequately addressed before and during the testimony.

Key Words. Ethics; Expert Witness; Conflict of Interest; Informed Consent; Forensic

Introduction

When physicians are called upon to provide expert testimony in medico-legal cases involving their own patients, critical forensic and ethical issues arise. Such a situation was the subject of a previous Ethics Forum case and collection of commentaries, and I will employ that case to illustrate the type of situation in which such a request might arise [1]. Dr. D is a pain medicine practitioner who has been treating a patient with complex regional pain syndrome type 1 of the upper...
extremity for two years following an injury at work. The patient's attorney contacts Dr. D and asks him to provide expert testimony about the patient's pain, suffering, and functional disability in a forthcoming legal proceeding. The attorney offers to compensate Dr. D at the rate of $400/h for deposition testimony and $500/h for trial testimony, and indicates that the patient is most anxious for Dr. D to help him recover a substantial jury verdict. Our concern is not simply whether there are prevailing ethical norms that would preclude such a dual role for Dr. D, but also, even if there are not, how Dr. D can conduct himself responsibly as an expert witness for his own patient.

**Distinguishing Between Types of Witnesses**

There are two general types of witness in legal proceedings—factual and expert—and they are treated in substantially different fashions by courts and other quasi-judicial bodies. A factual witness testifies to firsthand knowledge of matters and events that are relevant to the legal proceeding. An example of a factual witness would be the patient himself, who would be asked to testify, for example, about the circumstances under which he sustained the original injury, his efforts to secure medical treatment, and the impact of the injury on his ability to work and engage in the activities of daily living. There is a general rule that factual witnesses may not offer opinions and inferences except when they are rationally based upon the witness' immediate perception and will aid in the understanding of the testimony. Factual witnesses receive only token compensation, if any, for the time involved in appearing and testifying.

An expert witness testifies to matters that are determined by the court to be beyond the knowledge and experience of the average layperson. The opinions of the expert may be based upon facts that are assumed for purposes of formulating the opinion, and need not be known firsthand. Many states have adopted the federal rules of evidence provisions that pertain to the admissibility of expert witness testimony [2]. Nothing in the federal rules precludes an expert with firsthand knowledge of the pertinent facts of the case, such as a patient's treating physician, from being put forward by a party to the litigation or recognized by the court as an expert witness.

The distinction between factual and expert witness is not always as neat and tidy as the above discussion may suggest. When a treating physician testifies on such critical questions as the proximate cause of an injury or the percentage of a permanent partial disability, she brings her own clinical knowledge and experience to the formulation of her opinion. It is certainly not as though in the course of possibly extended testimony a treating physician or the attorney who questions her always or even consistently makes clear when her testimony is that of a factual witness with clinical expertise and when it is that of an expert per se.

**Qualifying the Expert Witness**

Legal proceedings that rely heavily on expert witness testimony for their outcome have come to be referred to colloquially as “battles of the experts,” with the implication that the party with the best expert wins. In recent years, courts have become considerably more stringent in their scrutiny of the credentials of purported experts and the soundness of the science upon which their opinions are based [3]. During cross-examination by opposing counsel, the expert witnesses’ credentials will be subjected to rigorous review and critique seeking to expose any vulnerabilities that may have an impact on whether the witness should be allowed to offer opinions or the weight that the trier of fact (judge or jury) should give them. Any potential bias of the expert is also a fair subject for cross-examination, so when a physician testifies on behalf of her own patient, it may be difficult to convey the requisite level of impartiality.

Another potential vulnerability arises from clinicians who perform a substantial amount of forensic activity. They are at risk of being labeled “professional medical witnesses” or worse still, “hired guns.” There is no bright line between an occasional and a professional witness, but presumably any physician who devotes substantially more than 5–10% of her professional time and effort testifying as an expert witness may be so perceived. There is no hard data to support this percentage range. It is based upon the author’s prior professional experience as a trial attorney. A physician who spends more than an “incidental” amount of time testifying in litigation rather than taking care of patients is at least at risk of being viewed by lay jurors as a creature of the courts rather than of the clinic. The credibility, objectivity, and genuine clinical expertise of a physician who appears to spend almost as much, if not more time testifying in legal proceedings than providing patient care or conducting clinical research can easily be called into question. There is also the factor that some
physicians may earn substantially more per hour for their forensic work than their clinical work, suggesting a potentially corrupting financial bias in their testimony. Concerns of this nature have influenced the policies that some medical specialty organizations have promulgated in recent years. Nevertheless, some recent studies indicate that jurors engage in much more complex processes of evaluation when they decide which expert witness to believe. In some instances, a high rate of compensation did not undermine the witnesses’ effectiveness, whereas in others it did [4].

Expert Witness Policies of Medical Specialty Organizations

Among the organizations that have policies in place specifically addressing testimony, my members as expert witnesses are the American Academy of Orthopedic Surgeons, the American College Surgeons, the American College of Emergency Physicians, and the American Urological Association. Some common themes that run through guidelines and policies concerning expert testimony that have been issued by such organizations:

- Testimony should be fair, impartial, and free from advocacy.
- Testimony should be scientifically and clinically sound.
- The witness should restrict testimony to areas of legitimate expertise.
- Compensation for testimony should be reasonable, commensurate with the time and effort involved, and not linked in any way to the outcome of the case.

A few medical specialty organizations have gone further by establishing a peer-reviewed process for the forensic activities of their members. The first of these was the American Association of Neurological Surgeons (AANS) Professional Conduct Committee in 1983 [5].

The AANS committee considers only complaints by members against other members. Interestingly, of the roughly 40 cases reviewed between 1983 and 2003, all but one involved testimony on behalf of the plaintiff patient.

Such peer-reviewed processes are based upon the proposition that testifying as a medical expert constitutes the practice of medicine. In 1998, the American Medical Association adopted a policy declaring this to be the case [6]. A survey by the AMA of state medical practice acts suggested that slightly over half defined the practice of medicine broadly enough to include testifying as a medical expert. Thus far, state medical boards have taken disciplinary action against physicians with regard to their forensic activities only when there was compelling evidence that they knowingly provided false testimony [7].

Being a Medical Expert for One’s Own Patient

The only medical specialty that has taken a strong and consistent stand on this question is psychiatry. There is a solid body of psychiatric literature that suggests that whenever possible, treating psychiatrists should avoid testifying as an expert with regard to their own patient because of a perceived role conflict [8]. In addition, the American Academy of Psychiatry and the Law has promulgated ethical guidelines for forensic psychiatry that discourage taking on this dual role [9]. A detailed analysis of whether there is a uniqueness in the relationship of psychotherapist and patient, or in the role of the forensic psychiatrist, that creates a potential conflict in such situations that does not exist in other physician–patient relationships is beyond the scope of this article. Boundary violations, of which such a dual role is believed to be an example, are known to be a special concern in psychiatry to a degree not commonly found in other medical specialties [10].

Practical Considerations for the Treating Physician

It has become increasingly common for physicians to participate in one fashion or another in medico-legal activities as either a factual and/or expert witness that involve the formulation of opinions based upon their clinical knowledge and experience. When an attorney requests that you testify as an expert in a case involving your patient, be sure to do the following:

- Find out the nature of the legal proceeding and the nature and purpose of the testimony being sought.
- If you are being called as an expert witness, establish the rate at which you will be compensated for your time and the issue(s) concerning which you will be expected to formulate and express and opinion.
- Discuss your potential appearance as an expert witness with your patient, including the risks and benefits of your taking on this dual role, and obtain his or her informed consent to your participation.
• Insist upon at least one face-to-face meeting with the attorney for your patient in advance of providing any testimony, regardless of whether it is a deposition, administrative hearing, or trial.

There are also basic rules to follow whenever testifying, regardless of the capacity in which you are doing so, but particularly as an expert for your own patient:

• Stay within the limits of your own knowledge, training, and experience.
• Thoroughly review pertinent medical records and the latest medical literature, including potentially applicable clinical practice guidelines.
• Scrupulously maintain a position of objectivity and impartiality.
• Acknowledge any potential bias, especially if you are testifying as a treating physician.

It is not categorically unethical for a physician to testify as an expert witness for his or her patient, but it is inadvisable to do so unless the basic parameters discussed in this article are met.

References
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Conflicts of Interest with the Health Industry

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The physician’s commitment to altruism, which puts the patients’ interests first and is associated with scientific integrity and the absence of bias when making medical decisions, has traditionally constituted the cornerstone of medical ethics. In recent years, however, a flurry of federal prosecutions, class action lawsuits, and congressional investigations have underlined an increasing collusion between physicians and pharmaceutical and device manufacturers. When profit-seeking behavior overshadows concern for the patients’ welfare, major conflicts ensue. In such cases, a conflict of interest may be defined as a set of conditions in which professional medical judgment concerning patients’ welfare or the validity of research is unduly influenced by secondary interests. These can be financial, such as competition for research funding, or professional, such as professional retribution. Public anxiety about the interaction between physicians and the health industry has grown as a result of observing the increasing influence of money on the quality of patient care and the research process.

The health industry has contributed to the discovery, development, and distribution of new drugs and devices that benefited patients. One offshoot of these activities has been the industry’s commitment to medical education. However, the