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Expert Testimony*

Committee on Ethics

Reaffirmed 2016

ABSTRACT: It is the duty of obstetricians and gynecologists who testify as expert witnesses on behalf of defendants, the government, or plaintiffs to do so solely in accordance with their judgment on the merits of the case. Obstetrician–gynecologists must limit testimony to their sphere of medical expertise and must be prepared adequately. They must make a clear distinction between medical malpractice and medical maloccurrence. The acceptance of fees that are greatly disproportionate to those customary for professional services can be construed as influencing testimony given by the witness, and it is unethical to accept compensation that is contingent on the outcome of litigation.

The American College of Obstetricians and Gynecologists (ACOG) recognizes that it is the duty of obstetricians and gynecologists who testify as expert witnesses on behalf of defendants, the government, or plaintiffs to do so solely in accordance with their judgment on the merits of the case. Furthermore, ACOG cannot condone the participation of physicians in legal actions where their testimony will impugn performance that falls within accepted standards of practice or, conversely, will support obviously deficient practice. Because the experts articulate the standards in a given case, care must be exercised to ensure that such standards do not narrowly reflect the experts' views to the exclusion of other choices deemed acceptable by the profession. The American College of Obstetricians and Gynecologists considers unethical any expert testimony that is misleading because the witness does not have appropriate knowledge of the standard of care for the particular condition at the relevant time or because the witness knowingly misrepresents the standard of care relevant to the case.

The Problem of Professional Liability—Reality and Perceptions

The American College of Obstetricians and Gynecologists recognizes its responsibility, and that of its Fellows, to continue efforts to

advance health care for women through every available method of quality assessment and improvement. The American College of Obstetricians and Gynecologists also recognizes, however, that many claims of professional liability represent the response of a litigation-oriented society to a technologically advanced form of health care that has fostered unrealistic expectations. As technology becomes more complex, associated benefits and risks may increase, making the complication-free practice of medicine less possible.

It therefore becomes important to distinguish between medical “maloccurrence” and medical “malpractice.” *Medical maloccurrence* is defined as a bad or undesirable outcome that is unrelated to the quality of care provided. In some cases, specific medical or surgical complications may be anticipated but are felt by the patient and the health care provider to be offset by the balance of benefits from the planned intervention and, therefore, represent unavoidable risks of appropriate medical care. There are other types of complications that cannot be anticipated and in their unpredictability are similarly unavoidable. Still other complications occur as a result of decisions that have been made carefully by patients and physicians with fully informed consent but appear, in retrospect, to have been a less optimal choice among several options. Each of these situations represents a type of maloccurrence, rather than an example of malpractice, and is the result of the uncertainty inherent in all of medicine. *Malpractice*, in contrast, requires a



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Physicians*

*Update of “Expert Testimony” in *Ethics in Obstetrics and Gynecology*, Second Edition, 2004.

demonstration of negligence (ie, substandard practice that causes harm). The potential for personal, professional, and financial rewards from expert testimony may encourage testimony that undermines the distinction between unavoidable maloccurrence and actual medical malpractice. It is unethical to distort or to represent a maloccurrence as an example of medical malpractice or, conversely, represent malpractice as a case of maloccurrence.

The American College of Obstetricians and Gynecologists supports the concept of appropriate and prompt compensation to patients for medically related injuries. Any such response, however, also should reflect the distinction between medical maloccurrence, for which all of society should perhaps bear financial responsibility, and medical malpractice, for which health care providers should be held responsible.

Responsibility of Individual Physicians

The moral and legal duty of physicians who testify before a court of law is to do so in accordance with their expertise. This duty implies adherence to the strictest personal and professional ethics. Truthfulness is essential. Misrepresentation of one's personal clinical opinion as absolute right or wrong may be harmful to individual parties and to the profession at large. The obstetrician–gynecologist who is an expert witness must limit testimony to his or her sphere of medical expertise and must be prepared adequately. Witnesses who testify as experts must have knowledge and experience that are relevant to obstetric and gynecologic practice at the time of the occurrence and to the specific areas of clinical medicine they are discussing. The acceptance of fees that are greatly disproportionate to those customary for professional services can be construed as influencing testimony given by the witness. It is unethical for a physician to accept compensation that is contingent on the outcome of litigation (1, 2).

The American College of Obstetricians and Gynecologists encourages the development of policies and standards for expert testimony. Such policies should address safeguards to promote truth-telling and to encourage openness of the testimony to peer review. These policies also would encourage testimony that does not assume an advocacy or partisan role in the legal proceeding.

The following principles are offered as guidelines for the physician who assumes the role of an expert witness:

1. The physician must have experience and knowledge in the areas of clinical medicine that enable him or her to testify about the standards of care that applied at the time of the occurrence that is the subject of the legal action.

2. The physician's review of medical facts must be thorough, fair, and impartial and must not exclude any relevant information. It must not be biased to create a view favoring the plaintiff, the government, or the defendant. The goal of a physician testifying in any judicial proceeding should be to provide testimony that is complete, objective, and helpful to a just resolution of the proceeding.
3. The physician's testimony must reflect an evaluation of performance in light of generally accepted standards, neither condemning performance that falls within generally accepted practice standards nor endorsing or condoning performance that falls below these standards. Experts and their testimony should recognize that medical decisions often must be made in the absence of diagnostic and prognostic certainty.
4. The physician must make a clear distinction between medical malpractice and medical maloccurrence.
5. The physician must make every effort to assess the relationship of the alleged substandard practice to the outcome. Deviation from a practice standard is not always substandard care or causally related to a bad outcome.
6. The physician must be prepared to have testimony given in any judicial proceeding subjected to peer review by an institution or professional organization to which he or she belongs.

References

1. American Medical Association. Medical testimony. In: Code of medical ethics of the American Medical Association: current opinions with annotations. 2006–2007 ed. Chicago (IL): AMA; 2006. p. 286–9.
2. American Bar Association. Rule 3.4. Fairness to opposing party and counsel. In: Annotated model rules of professional conduct. 5th ed. Chicago (IL): ABA; 2003. p. 347–58.

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