This article was published in Northern Ohio Physician, November/December 2009, Vol. 94, No. 6.

The Physician Witness: Issues and Ethical Considerations

By Victoria Vance, Esq. and Jane F. Warner, Esq., Tucker Ellis & West LLP

Physicians are frequent participants in civil litigation. They may be a party or a party's treating physician; or, they may be acting as the medical expert whose purpose is to define the standard of care, opine as to whether the care at issue met the standard and testify about the cause of an injury. Regardless of the role, physician witnesses face distinctive challenges that lay litigants and witnesses do not. The purpose of this article is to alert physicians to these challenges and offer recommendations as to how to avoid legal pitfalls.

Physicians' Ethical Obligations to Participate in the Medico-Legal System

Physicians do not have a legal obligation to testify as an expert or treating physician; they do however, have an ethical obligation "to assist in the administration of justice." AMA Policy E-9.07. This policy recognizes that physicians, through their participation in litigation, contribute to the improvement of public health. It also recognizes that physicians, by virtue of their education, training and experience, are in a unique position to aid juries in medically-complex litigation and prevent the legal system from becoming "arbitrary and unfair." CEJA Report 12-04. Thus, the AMA and other professional medical societies encourage their members to be active participants in the legal process.

The physicians' primary obligation as a witness is to provide testimony that is "honest and independent." *Id.* Honest testimony is based upon experience, published research, consensus statements or evidence-based medicine. *Id.* Honest testimony also incorporates standards of care that prevailed at the time the event under review occurred. *Id.* If physicians offer testimony based upon standards that are or were not widely accepted, honest physicians are obligated to make that known. *Id.*

In Ohio, physicians are held to the ethical standards set forth in AMA policies and policies promulgated by national professional organizations. R.C. 4731.22(B)(18) authorizes the State Medical Board of Ohio to discipline any physician who violates the codes of ethics promulgated by the AMA or national professional organizations. Thus, a physician who undertakes to assist the administration of justice by offering testimony should not do so lightly.

Practical Considerations

1. Setting Fees

Independent medical testimony is that which is free from external influence. To assure independence, physicians should identify potential conflicts of interest before accepting a role in litigation. Financial interests present the most obvious conflicts. For example, in a medical malpractice action, if the physician-witness and the physician-defendant share the same insurance coverage, and an adverse judgment against the defendant affects the financial interest of the witness, the witness may feel pressured to offer testimony that is favorable to the defendant. Similarly, the physician-witness may feel compelled to offer favorable testimony in a medical device or pharmaceutical case if he has a financial relationship with the manufacturer. If financial interests are at stake, physicians should strongly consider declining involvement in litigation.

Professional fees are another matter. Physicians routinely are compensated for the professional time they devote to civil litigation. These fees, however, must be reasonable; otherwise it appears as if physicians are being paid for their testimony and not their time. Testimony that appears "bought and paid" is not likely to be perceived as honest or independent. Thus, reasonable fees are paramount. Physicians may seek advice from colleagues or the attorneys who request their services to determine whether their fees are reasonable.

2. Clarify the Scope of Testimony

Physician witnesses can enhance their ability to provide honest and independent testimony by defining the scope of involvement at the time they are retained. In other words, the physician should ascertain what he is being asked to do. For experts, this means identifying the standard of care and proximate cause issues they are expected to address so that they can determine whether their training and experience allows them to offer the required opinions.

Defining the scope of involvement is especially important for treating physicians, and this presents two separate issues. First, treating physicians must consider the duty of confidentiality that is owed to their patients. In Ohio, a patient who files a lawsuit generally waives the physician patient privilege, but the waiver is limited and treating physicians may discuss only those aspects of care that are relevant to the lawsuit. If treating physicians provide information that exceeds the scope of waiver, they may unwittingly find themselves at the wrong end of a lawsuit for invasion of privacy.

3. Clarify Expectations

Treating physicians also need to clarify patient expectations. Does the patient need a written report, or will the patient ask his physician to testify at trial? Does the patient expect the physician only to discuss the diseases or conditions diagnosed and the treatment rendered, or does the patient expect the treating physician to double as a medical expert and offer opinions on the standard of care and the cause of injury? Such issues must be outlined prior to becoming involved in litigation; otherwise, treating physicians may inadvertently implicate themselves or colleagues in the litigation.

4. Consult with Counsel Early in the Process

Physicians can avoid the pitfalls associated with medical testimony by obtaining as much information as possible. Potential experts should have a full discussion with the retaining attorney before agreeing to review records. Treating physicians should consult with their patients, their patients' attorneys, and they also should consult with their own attorney. Attorneys will explain the litigation process in detail and help the treating physicians identify issues that may surface during deposition. Attorneys also will act as liaisons with attorneys for the parties, and in so doing, attorneys can solicit agreements from the other attorneys as to the timeframe, logistics and scope of the treating physicians' anticipated testimony. At depositions, attorneys can protect the treating physicians' legal rights, something the attorneys for the parties have no obligation to do.

Engaging in the medico-legal process can be rewarding, intellectually stimulating, and a public service. But, the physician should do so with an awareness of the expectations of the court, counsel, and the patient. ■