

An Antidote for Prevaricating Physicians in Matters Medicolegal: Coalition and Center for Ethical Medical Testimony

A. Bernard Ackerman, MD

The lead editorial of the *New York Times* for Saturday, March 6, 2004, is titled “Courtroom tales of Martha Stewart’s lies...” The first sentence of the editorial reads as follows: “Martha Stewart, the woman who capitalized on her sense of decorum and good taste to build a business empire, is likely to go to jail for lying.”¹ And so it should be for any citizen in a legal proceeding who takes an oath to tell the truth, the whole truth, and nothing but the truth—and then proceeds to lie. Physicians should be no exception.

Lying by physicians under oath as they give testimony in depositions and in court is not uncommon, particularly in the matter of an error in diagnosis of melanoma and the implications of that mistake for prognosis. The prevaricators are often dermatologists and pathologists who should know better; many of them are professors at our most prestigious university medical centers. What they testify to in the courtroom would be deemed travesty in the classroom.

Two years ago, I was asked by Fred Castro II, MD, then the president-elect of the American Academy of Dermatology (AAD), to chair an ad hoc committee that would make recommendations to the AAD Board of Directors on a code of behavior for dermatologists in medicolegal matters. An outstanding committee was assembled by the Board, it consisted of Suzanne Connolly, MD; Allan Wirtzer, MD; Rex Amonette, MD; Evan Farmer, MD; Stephen Webster, MD; Elizabeth McBurney, MD; and John Maize, MD. Russell Pelton, JD, counsel to the American Association of Neurologic Surgeons, served as consultant to the committee, and Douglas Polk, JD, counsel to the AAD, acted as cement substance, as well as shepherd, for our endeavor. After several meetings, some daylong, in different cities, a proposal was drafted by the committee and adopted by

the Board. It read as follows (Douglas Polk, JD, written communication, October 21, 2003):

“The integrity of the judicial process depends, in part, on the honest, unbiased testimony of expert witnesses on both sides of courtroom controversies. Justice, humaneness, and professionalism demand that dermatologists bring to the courtroom the same competence, expertise, objectivity, and compassion that they bring to the care of their patients; testimony in matters medical/legal is as much a part of the practice of medicine as is caring for patients.

Witnesses are designated as ‘expert’ if they have knowledge of specific topics thought to be beyond the ready understanding of the laity. Non-partisan, scientifically valid expert testimony assists soundly in the deliberation of particular cases and contributes to equitable outcomes based on generally accepted medical principles. The expert witness is expected to be impartial and should not assume the role of advocate except as a spokesperson for the field of special knowledge that he or she represents.

It is unethical to request or to accept a fee that in any way is contingent on the outcome of any judicial proceeding. Compensation of the expert witness should be reasonable and commensurate with the time and effort devoted to preparing for, and attending, depositions and court proceedings.

In order to warrant designation as an expert witness, a dermatologist serving

as an expert witness should be licensed to practice medicine, certified by the American Board of Dermatology, should be engaged in the active practice of medicine and be able to demonstrate familiarity with current standards of practice in the arena pertinent to his or her testimony, as well as with standards of practice prevailing at the time of the matter at issue. A physician should never testify concerning matters about which he or she is not knowledgeable.

Prior to offering any testimony, a dermatologist serving as an expert witness should:

- Become familiar with all data relevant to the particular matter at issue, excluding no relevant information for the purpose of creating a view that favors either party to a dispute.
- Review previous and current concepts related to standards of dermatologic practice standards applicable to the matter at issue.
- Decide whether his or her opinions, if any, will contribute in a meaningful, positive, and unbiased way to adjudication of the case impartially.

The expert witness should:

- Testify honestly, fully, and impartially concerning his or her qualifications as an expert.
- Offer expert testimony that is objective, truthful and accurate, based solely on medical knowledge of the matter at issue and never on the litigation posture of plaintiff(s) or defendant(s).
- Offer an assessment of the matter at issue in the context of generally accepted standards of practice, neither condemning performance that clearly falls within generally accepted standards of practice nor endorsing or condoning performance that clearly falls outside accepted standards of practice.

- Honestly, and fully, describe where and how his or her opinions may differ from common practice, never representing his or her own views as the only correct ones if they differ from those held by other qualified dermatologists.

These principles apply equally to pre-trial evaluation of medical/legal disputes, whether or not such opinion is given under oath. The expert witness should be aware that depositions and courtroom testimony are public statements. The physician expert should not offer testimony that he or she would not be willing to submit for independent peer review.”

The committee recommended strongly that the Board of Directors of the AAD put “teeth” in the code of behavior pertaining to testimony by dermatologists in matters medicolegal by ensuring penalties would be imposed for flagrant violations. The Board of Directors rejected the notion of adopting disciplinary measures to enforce the code.

Without the specter of punishment, it is obvious that those dermatologists who lie under oath—irrespective of the motive, be it purely monetary, largely vendetta, or both—will not be brought to heel by what they consider to be platitudes about compartment mouthed by apparatchiks. It is mandatory, therefore, that the AAD Board of Directors reconsider its position and put on notice dermatologists who lie outrageously, brazenly, and blatantly under oath that they are at risk of losing their membership in the Academy. Lying in sworn testimony surely is incompatible with the spirit of an Academy.

Donald Palmisano, MD, JD, the current president of the American Medical Association, has made tort reform the major thrust of his presidency. Unfortunately, Dr. Palmisano concentrates his efforts on arenas in which he has no control, namely, the government, insurance companies, trial lawyers, and the laity. What he can control, however, he does nothing about, namely, physicians who lie deliberately under oath and who, perforce, are responsible for further eroding a system of jurisprudence that clearly is broken at the same time that they are contributing immeasurably to the “malpractice crisis” by sabotaging the system now filled with deliberate untruths. The American Medical Association, like the AAD, will continue to tilt at windmills unless it

compels physicians to do the obvious, namely, tell the truth, unvarnished, in medicolegal matters. That not having been done, 2 concerned physicians, Louise Andrew, MD, JD, and I, founded the Coalition and Center for Ethical Medical Testimony (CCEMT). The organization is single-mindedly devoted to impeding physicians from doing damage to 2 professions (namely, the medical and legal) and to the society beyond it. CCEMT is dedicated to purposes that are not quixotic. The statement of purposes of CCEMT reads thus²:

Vision

By 2015, our system of jurisprudence will no longer be dependent on the random testimony of hired expert witnesses to determine for lay juries the standard of care in the practice of medicine.

Mission

The Mission of CCEMT.org is to make honesty and ethicality the *sine qua non* of physicians and others engaged in healthcare who serve as expert witnesses, and to eliminate the ability of unethical experts to testify with impunity in medical-legal matters on the assumption or under any law or regulation that makes such testimony privileged or protected from scrutiny by peers.

Values

Members in the association value above all, an unswerving dedication by medical professionals to the truth in all matters, but most particularly, in the provision of expert testimony.

Indicators of truth and accuracy in expert testimony include:

- Accurate representation of credentials and qualifications
- Use of available standards of care and clinical guidelines in determining applicable standards of care
- Awareness and application of prevalent standards of clinical practice in effect at the time of incidents giving rise to allegations of medical negligence
- Limitation of testimony to arenas in which the expert has had proper training, and verifiable, recent and significant clinical experience
- Adherence to codes of ethical conduct of the medical profession and those of the specialty in which the expert testifies
- Logical consistency in testimony between comparable cases
- Scrupulous objectivity and fairness in any advice given to attorneys regarding cases
- Meticulous analysis of all facts in a case before rendering an opinion about it
- Willingness to disclose his/her identity to all parties, even if not required by law
- Willingness to admit publicly when a mistake has been made by the witness in previous analysis or testimony
- Willingness to submit any testimony, affidavits, reports, or other legally admissible documents to peers for review
- Willingness to affirm adherence to Principles of Ethics for Medical Expert Witnesses

Goals

- To promote truthfulness, accuracy, honesty and ethicality among medical expert witnesses through education of ourselves, the legal profession and the public about the problem of unethical expert testimony
- To provide access to verifiable information to members about untruthful, inaccurate, dishonest and unethical testimony and experts
- To facilitate sharing of information between members about effective techniques to disclose indicators of dishonesty in expert testimony
- To facilitate sharing of information between members about particular cases and experts

- To stimulate and support individual action creating accountability of expert witnesses
- To stimulate and support organizational action promoting accountability of expert witnesses
- To become and remain financially sustainable until the Mission of the organization has been accomplished
- To encourage grass roots activity through other existing organizations to pursue meaningful reform of legislation pertaining to medical expert witnesses

Objectives

- To empower members to educate physicians, attorneys and the public about the existence and prevalence of dishonesty or unethical practices among expert witnesses
- To educate and empower members to educate physicians, attorneys, judges and juries about appropriate qualifications and potential disqualifications for serving as an expert medical witness
- To educate and empower members to educate physicians, attorneys, judges and juries about existing regulatory mechanisms available to promote accountability among expert witnesses
- To empower members to exert influence on courts and regulatory agencies to demand accountability of expert witnesses
- To educate and empower members to educate physicians, attorneys, judges and juries about existing ethical codes applicable to physicians in various specialties, and about the existence of disciplinary proceedings for breaches in such codes
- To educate members about existing laws and regulations regarding expert witnesses in varying jurisdictions

Already, 2 examples of indisputably dishonest testimony by physician “professors” are on the Web sites of CCEMT.org and Derm101.com, to wit, “A trial in Philadelphia,” and “A deposition at Kinko’s in Norwood, Massachusetts.” Another example, “A trial in St. Louis,” will appear soon. Interested colleagues can review those cases in which the spotlight is put directly on prevaricating physicians, each of whom is given a chance repeatedly to defend his sworn testimony. In one case, the response came in the form of a threat of a suit from his attorney, the case then being published on the Web immediately with no suit forthcoming; bluff is not honesty either. In another case, attorneys hired by a prevaricating professor raised the specter of legal action; that case will be published, too. In most instances, however, no response at all comes from the miscreants, which is particularly curious given their academic titles, which imply willingness to engage in exercises intellectual.

CCEMT, as its name denotes, is for ethical medical testimony and against that which is not, no matter whether it comes from physicians who represent the defense or the plaintiffs. Lying is lying—and it is intolerable, especially for physicians. Which patient would like to think of his/her physician as an unmitigated liar? If those institutions that are supposed to represent physicians in general and dermatologists in particular are unable to gird their loins and act courageously, we citizens will. Look up CCEMT.org, and if you are in sympathy with its purposes, join. You are acting not only in your own and society’s best interest but also in the best interest of what should be the most noble and learned of all professions—the medical.

REFERENCES

1. Courtroom tales of Martha Stewart’s lies [editorial]. *New York Times*. March 6, 2004:A14.
2. Statement of purpose. Coalition and Center for Ethical Medical Testimony Web site. Available at: <http://www.ccemt.org/index.pl/mission>. Accessed April 1, 2004.