The Family Physician as a Legal Consultant

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Family physicians have a responsibility to their peers and patients to participate in malpractice litigation in a manner that ensures that evidence is properly and thoroughly evaluated. Family physicians have not routinely involved themselves as expert witnesses in medical malpractice litigation because of lack of training, misconceptions about their role, and distrust of attorneys.

The role of expert medical witness requires an ability to interact with attorneys, witnesses, and courts of law as well as a clear understanding of the malpractice process and the law that governs such proceedings. Philosophical differences, rationale for participation, and the malpractice process are discussed in this paper, and guidelines for the expert witness are presented.

Family physicians have been hesitant to participate in malpractice litigation as a result of a lack of training in this area and misconceptions as to their role and the time commitment involved in such proceedings. This article attempts to provide the rationale for participation and to set forth criteria for when and how to discharge such responsibilities.

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Professional Perspective

Ancient and modern societies have usually provided a forum in which to air disputes between patients and physicians. Expert medical testi-

mony, provided by the expert witness in a court of law, is the vehicle through which attorneys present the merits of their case for the plaintiff and by which the defendant justifies his or her actions.

Traditionally, however, there has been a general distrust between physicians and attorneys involved in malpractice litigation. To fully understand this antipathy, it is necessary to go beyond the financial and professional concerns and consider the basic philosophical differences between the groups.

There is a fundamental difference between how physicians and lawyers view truth.[1,2] In law, truth is relative and arises from the conflict of ideas. In medicine, science ideally provides an objective basis for truth, not subject to challenge.[1]

Medical training does not instruct or provide experience to physicians regarding the legal culture. With the exception of some exposure to forensic pathology, physicians are generally uninformed as to how facts and truths are viewed and determined in a court of law. Some physicians are reluctant to testify because of fear or lack of time. The "conspiracy of silence"[3] that physicians are often charged with, however, results more from ignorance of legal practice than from obstinacy.

This philosophical difference translates into a second major variance in the area of methodology. Legal reasoning involves both inductive and deductive approaches, but does not include experimentation as a method for confirming an hypothesis. This lack of scientific objectivity is often frustrating to physicians, who seek to control variables, but find attorneys more interested in making a point than in establishing the "truth."[4]

In light of these differences, it is not difficult to understand the reluctance that many family physicians feel regarding their participation as expert witnesses in malpractice cases. An adversarial environment where truth is determined by the strength of partisan, rather than objective debate, is generally intimidating for any physician.

Rationale for Participation

In addition to this philosophical concern, family physicians have been reluctant to get involved because they often do not regard themselves as experts in a single clinical area of medicine. Their assumption is that they are not in the position to refute the technical expertise of other specialists and therefore are not qualified to render an opinion.

While the limits of one's expertise must be respected, family physicians cannot avoid the reality that they will be called upon to render opinions regarding the care provided by their peers. The questions usually asked by attorneys relate to standards of care for a particular community and whether a physician's care has fallen below that standard. In California, over 20 percent of such litigation in 1983 involved primary care providers.

It is important that family physicians understand that most attorneys are uninformed about the intricate issues involved in patient management and will take simplistic approaches if not educated by responsible clinicians. If reputable family physicians are unwilling to provide attorneys with clear, impartial, and intellectually honest opinions in cases involving their specialty, a risk is created that less qualified physicians may fill that void.[4] If senseless litigation is to be avoided and the prospects for justice improved, family physicians must recognize that they have a responsibility to advise attorneys accurately as to the merit or lack of merit of potential cases.

The Expert Witness in the Malpractice Process

There are many potential situations that can precipitate a malpractice suit: a recognized failure to correctly diagnose and treat an illness, lack of communication, ignorance of facts resulting from overprotection of patients, and harm caused by risky or imperfect technology. This last situation is particularly difficult to manage because damages are often compensable even though the provider exercised good judgment[5] (eg, indicated minor surgical procedure resulting in permanent impairment).

The role of the expert medical witness in such cases is to render an opinion concerning whether

the care and treatment at issue met the standard of care[6] in the community, whether such care and treatment caused any injury, and, if so, to what extent.

The involvement of the expert witness, however, often begins before any lawsuit is actually filed. The initial information provided to the consultant is often vague and simplistic. The plaintiff's attorney wants to know whether there is evidence of significant deviation from the normal standard of care.[6] As there are generally no written standards, this is often a fairly complex task.

Any physician invited to be an expert witness must first establish whether the issue in question falls within his area of expertise.[3] Sometimes the issue involves only a small component of the case such as a test, the certainty of a diagnosis, or the availability of a service. If the case is within his area of expertise, an orderly review of the information should proceed.

The medical expert is relatively free to rely on any information that the members of her specialty consider significant and relevant to the issue in question. This information might include the review of records and depositions, conversations with the plaintiff or the plaintiff's family, consultations with other specialists, or published articles. It is significant to note that the normal "hearsay rule,"[7] which in essence bans all evidence of written or spoken statements made outside the courtroom, is broadened considerably to allow the expert witness to form his opinion.

It should be emphasized that in the process of forming an opinion, the expert witness is not making any commitment to continue with the case. There is no obligation implied that cannot be terminated if, in the opinion of the expert, the case is without merit. The fear of being trapped in a particular case is unfounded and should not be a reason for avoiding initial involvement.

In conducting a systematic review to determine the merits of the case, generally it is necessary to review lengthy depositions. Crucial information is often contained in these personal statements, and only careful review will reveal it. The intent of the review should be to discover evidence supporting the position that the services provided did in fact satisfy the standard of care. No other assumptions should be made.

The reasons for the physician-patient interaction also should be noted. Very different perceptions of that interaction often come to light. It should be ascertained whether the physician or hospital had proper support services and was prepared for unwanted potential complications (eg, defibrillation capabilities if engaging in office stress testing), particularly in elective situations, or whether certain services were widely advertised. Judgment ought to be used, however, when dealing with unexpected situations (eg, a massive trauma case arriving at a small rural hospital as opposed to a major metropolitan trauma center).

The consultant should determine whether what went wrong was detectible, what effect that would have had, and what actions were actually taken. Equally important is the issue of earliest possible discovery and its implications on outcome. When taking notes on any findings, the consultant should remember that these notes can be subpoenaed during a deposition or subsequent trial. The consultant should ensure that the standard of care used is appropriate for the community being evaluated.

At the end of the review, the consultant should have an understanding regarding his future involvement in the case. He should discuss the probability of settlement prior to trial or alternatives to trial such as arbitration.[8] He should determine whether he will have to make a deposition and be expected to testify. If a personal testimony will be required, the expert witness should review all materials prior to making any statements, since trials generally occur long after the original charge is filed.

Practical Guidelines

Malpractice litigation can often arouse justifiable anger in consultants, particularly when confronted with gross negligence or incompetence. Pragmatically, however, cases may have intuitive merit but not be provable or have different than expected outcomes. Where there is disagreement, juries are often influenced by credentials and communicative skills of the expert witness. Personal feelings of intimidation and incompetence that may arise from such interactions have to be

dealt with. The following are suggestions that have been helpful[9] and might be useful to the reader who is contemplating involvement in legal consultantships as an expert witness:

Prior to deciding to be involved: (1) Decide whether the issue is within your realm of expertise (do not be seduced by financial rewards). (2) Determine what the attorney or law firm's prior experience and reputation is in malpractice litigation. Avoid novices and those looking for "hired guns." (3) Agree on fees for consultation, depositions, and court testimony. Consider the time involved and avoid overloading a calendar.

During the review of the case: (1) Determine what aspect of the case is being reviewed and avoid lengthy research if it is not relevant to the component under evaluation. (2) Request copies of all medical records and depositions, and do research to determine what is relevant. (3) Communicate only verbally with the attorney; do not put anything in writing until asked to do so, and then do it accurately. (4) Measure the case objectively against the local standard of care, reviewing similar cases, if available. Do not feel compelled to participate in a case after reviewing it. If the case causes discomfort, staying involved would only be a disservice.

Once involved in the case: (1) Be able to describe in precise terms the process used to evaluate data, as precision will be important during cross-examination if testimony is required. (2) Maintain strict confidentiality. Do not communicate with opposing counsel, discuss the case in public forums, or give statements to the media, as witnesses are potentially libel for all such statements.[10] (3) Remember an expert witness is not a trial lawyer; do not argue with opposing counsel during testimony or expound beyond the limits of direct expertise and experience. (4) Alert attorneys to newly discovered facts, speaking directly with the attorney involved and not with office staff or paralegal personnel.

These guidelines will assist the family physician in relating more effectively with attorneys, judges, and the public in the area of malpractice litigation. They represent practical steps designed to make the physician's experience as an expert witness more satisfying and more productive.

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