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Expert Witness Participation in Civil and Criminal Proceedings

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The interests of the public and both the medical and legal professions are best served when scientifically sound and unbiased expert witness testimony is readily available in civil and criminal proceedings. As members of the medical community, patient advocates, and private citizens, pediatricians have ethical and professional obligations to assist in the civil and criminal judicial processes. This policy statement offers recommendations on advocacy, education, research, qualifications, standards, and ethical business practices all aimed at improving expert testimony.

BACKGROUND

The American Academy of Pediatrics (AAP) first articulated policy on appropriate medical expert witness testimony in 1989¹ and was among the first medical specialty societies to do so. The statement was revised in 1994² to incorporate additional provisions on expert witness testimony guidelines from the Council of Medical Specialty Societies.³ A 2002 revision outlined responsible practices that physicians should follow to safeguard their objectivity in preparing and presenting expert witness testimony.⁴ Key legal concepts were explained, and the role of the expert witness in the litigation process (pretrial and trial) was described. A 2009 iteration of this statement expanded the requirements and qualifications for experts testifying in civil and criminal cases, the latter primarily relating to cases involving alleged child abuse and/or neglect.⁵ The importance of expert witness testimony in the process of determining civil liability, child safety, or criminal culpability and its unique significance in pediatric cases also were stressed. This policy statement replaces the previous policy statement. In addition, it bolsters the requirements for expert testimony and provides new guidance on ways to prevent irresponsible testimony in medical liability proceedings as well as in child abuse cases. This policy statement applies to medical expert witness consultation or testimony in all legal venues (including pretrial consultations, civil suits, criminal legal proceedings, or other legal proceedings) in which attorneys ask pediatricians, pediatric medical subspecialists, or pediatric

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surgical specialists to provide their expert opinions or testimony. Detailed information forming the basis of the recommendations in this statement is found in the accompanying technical report.⁶

RECOMMENDATIONS

The AAP recognizes that physicians have the professional and ethical duty to assist in the legal process when medical issues are involved. Physicians who serve as expert witnesses have an obligation to present complete, accurate, and unbiased information. At this time, the best strategies for improving the quality of medical expert witness testimony include strengthening the qualifications for serving as a medical expert, educating pediatricians about ethical practices and standards for expert testimony, and endorsing and supporting state medical board/licensing organization regulation and disciplinary efforts, professional society expert witness affirmation statements, and, when feasible, professional society regulation and disciplinary efforts. To that end, recommendations on advocacy, education, qualifications, standards of testimony, standard of care, providing proper testimony, ethical business practices, and voluntary affirmation statements are offered.

Advocacy, Education, and Research

The AAP believes that advocacy, education, and research on the ethical and medical obligations of expert testimony will improve its quality and promote just and equitable verdicts. Therefore, the AAP recommends the following:

1. Implementing the relevant recommendations of this statement through legislative or regulatory reform (eg, relevant qualifications and standards of testimony).
2. Educating pediatricians (during residency training and through continuing medical education),

via both didactic and experiential learning methods, about the skills and knowledge base necessary for providing objective, scientific, and ethical expert witness testimony in legal proceedings.

3. Implementing additional specialized education, as well as oversight safeguards, for experts participating in the criminal law process because of heightened concerns for convictions based on inaccurate expert testimony in criminal cases.

Relevant Qualifications

The AAP believes that the establishment of certain minimal qualifications for physicians who serve as expert witnesses will improve the quality of testimony and promote just and equitable verdicts. Physicians should limit their participation as medical experts to cases only in which they have genuine expertise. To demonstrate the relevant education, certification, and experience, physicians should have the following qualifications:

1. Hold a current, valid, and unrestricted medical license in the state in which they practice medicine.
2. Be board certified by the relevant board (American Board of Medical Specialties or a board recognized by the American Osteopathic Association) or a board with equivalent standards. Alternatively, be capable of demonstrating sufficient training and clinical experience in the clinical area at issue to be qualified and accepted as an expert by the relevant specialty board(s).
3. Be actively and meaningfully engaged in clinical practice in the medical specialty or area of medicine about which they testify, including knowledge of or experience in performing the skills and practices at issue to the lawsuit.

4. If retired from clinical practice, remain knowledgeable of the current standard of care and clinical literature in the field before rendering expert opinions on cases.
5. Not give false, misleading, or misrepresentative details about their qualifications.
6. Be subspecialty-trained pediatricians for evaluation and expert testimony in child abuse cases, whenever feasible.

Standards of Testimony

Physician expert witnesses should take all necessary steps to provide thorough, fair, objective, and impartial review of the medical facts. To meet that obligation, physicians who agree to testify as experts in legal cases should conduct themselves as follows:

1. Lend their knowledge, experience, and best judgment to all relevant facts of the case regardless of the source of the request for testimony (plaintiff/prosecutor or defendant).
2. Render an opinion only after reviewing sufficient medical records and documents to enable the formation of unbiased and accurate conclusions. If all medical records are unavailable for review, recuse themselves from serving in an expert capacity or acknowledge that their expert opinion is based on limited information.
3. Not exclude relevant information for any reason and certainly not to create a perspective that favors either the plaintiff/prosecutor or the defendant.
4. Provide objective, valid opinions that are well supported by their clinical experience and the best evidence-based medical literature, regardless of whether it is to be used by the plaintiff/prosecutor or defendant.
5. Testify to matters only within their expertise. If asked about matters outside of their expertise,

refrain from testifying on those matters.

6. Testify in cases of child abuse and neglect when they have special knowledge and/or extensive experience in the field. When lacking such or uncomfortable with testimony in such cases, may consult with subspecialists in child-abuse pediatrics.

Standard of Care

Physician expert witnesses should be familiar with the medical standard of care at the time of the incident at issue. Those unfamiliar with the medical standard of care do not meet the recommended qualifications of an expert.

1. Thoroughly review and understand the current concepts and practices related to that standard as well as the concepts and practices related to that standard at the time of the incident that led to the legal proceeding before testifying.
2. Present testimony that reflects the generally accepted standard within the specialty or area of practice, including those standards held by a significant minority.
3. State candidly and clearly when a variety of reasonable and acceptable treatment modalities exist.
4. Not condemn performance that clearly falls within generally accepted practice standards or condone performance that clearly falls outside accepted practice standards.
5. Respect the privacy and confidentiality of the process, as required by law.

Providing Proper Testimony

Physician expert witnesses:

1. Must take all necessary steps to provide expert work that

is relevant, reliable, honest, unbiased, and based on sound scientific principles.

2. Be willing to submit his or her testimony to scrutiny, if requested, by professional organizations, hospitals, peer review bodies, and state medical and/or licensing boards, as appropriate, and be willing to participate in expert witness review programs.

Ethical Business Practices

It is important that expert witnesses conduct the business practices (eg, marketing, contractual agreements, and payment for services) associated with provision of their testimony in a manner conducive to remaining nonpartisan and objective throughout the legal proceedings. To that end, the AAP recommends that expert witnesses do the following:

1. Not participate in advertising or solicit employment as expert witnesses in which such advertising or solicitation contains inaccurate or outdated representations about their qualifications, experience, titles, or background.
2. Structure contractual agreements between physician expert witnesses and attorneys in a way that promotes fairness, accuracy, completeness, and objectivity.
3. Accept compensation for expert witness work that is reasonable and commensurate with the time and effort involved at the prevailing market value.
4. Not enter into agreements in which compensation for expert witness work is contingent on the outcome of the case.
5. Contact their professional liability insurance carrier to ascertain the need for additional coverage for these activities.

6. Contact their employers to ascertain the organization's

policy regarding participation in these activities before agreeing to serve as expert witness pediatricians, pediatric medical subspecialists, or pediatric surgical subspecialists.

Voluntary Affirmation Statement

Because the use of expert witness voluntary affirmation statement is a useful tool for those involved in the legal system and medical associations, the AAP recommends the following:

1. AAP members should offer to provide a certified expert witness affirmation statement to the legal counsel that secured their services.
2. Legal counsel should routinely inquire whether an expert witness has executed a voluntary Expert Witness Affirmation Statement and use its existence or absence.

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ABBREVIATION

AAP: American Academy of Pediatrics

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