

## PHYSICIAN AS WITNESS

### **May a physician serve as a witness in a lawsuit?**

Yes. Physicians are often asked to serve as witnesses in lawsuits. A physician may serve as either a fact or an expert witness.<sup>1</sup>

### **What is the difference between a physician serving as a fact witness or as an expert witness?**

The distinction between a physician who is testifying as a fact witness and an expert witness is whether the physician's opinions were obtained for the specific purpose of the lawsuit.<sup>2</sup>

### **When is a physician a fact witness?**

When a physician testifies in his or her capacity as a treating physician, the physician is a fact witness and not an expert witness.

### **How does the physician-patient privilege affect what information the treating physician may disclose?**

By placing his or her medical condition at issue the patient waives the physician-patient privilege with respect to information relative to that condition.<sup>3</sup> Thus, a physician may testify as to opinions held and facts observed by the physician. But see DISCLOSURE OF HEALTH CARE INFORMATION; and SUBPOENAS for when patient authorization is needed and when health care information can be disclosed in response to a subpoena. The fact that a physician's testimony regarding facts or causation is harmful to the patient's position in a lawsuit does not prohibit a physician from testifying.<sup>4</sup>

### **May a physician fact witness charge for his or her time?**

Yes. The party seeking testimony from a treating physician must pay the physician a reasonable fee for the time spent.<sup>5</sup> Generally, the physician is advised to reach an agreement concerning the fee for the physician's time in advance with the party making the request. If an agreement over the fee is not reached in advance the physician must respond to the request for information or deposition unless the court has issued an order to the contrary. The physician make later seek a order from the court setting the fee to be paid by the party who sought information from the physician.

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<sup>1</sup> CR 26(b)(5), (b)(7); CR 35.

<sup>2</sup> CR 26(b)(4), *Peters v. Ballard*, 58 Wn. App. 921 (1990).

<sup>3</sup> RCW 5.60.060(4)(b), *Carson v. Fine*, 123 Wn. 2d 206, 213 (1994).

<sup>4</sup> *Carson*, 123 Wn. 2d at 224.

<sup>5</sup> CR 26(b)(7).

### **May a treating physician meet privately with an attorney to discuss a patient?**

Generally, no. A physician may not discuss a patient with an attorney, other than the physician's own attorney, without a signed patient authorization, a subpoena issued in compliance with the requirements of the Uniform Health Care Information Act, or a court order.<sup>6</sup> See **DISCLOSURE OF HEALTH CARE INFORMATION**. This rule, however, does not apply in workers' compensation cases. See **WORKERS' COMPENSATION**.

### **When is a physician an expert witness?**

A physician who is retained for the purpose of litigation and who develops facts or forms opinions for the purpose of litigation is an expert witness.<sup>7</sup>

### **May a physician expert witness charge for his or her time?**

Yes. A physician serving as an expert witness is entitled to a reasonable fee for time spent.<sup>8</sup> A physician should bill the time spent reviewing the case, meeting with the party who retained the physician, or testifying at trial to the party who requested the expert's services. Time spent at a deposition generally is billed to the party taking the deposition.

A physician is well-advised to discuss fees for serving as an expert witness in advance with the attorney or party retaining the physician and to confirm in writing any agreement reached.

### **May a physician expert witness be asked in deposition or at trial how much time they spend testifying for plaintiffs or defendants or how much they earn from testifying?**

Generally, yes.

### **May a physician expert witness performing an independent medical examination be required to permit an attorney or other legal representative to be present during the examination?**

Yes. The court rules permit the party being examined to have a representative present at an independent medical examination.<sup>9</sup> The representative may observe the examination but may not interfere with or obstruct the examination.<sup>10</sup>

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<sup>6</sup> *Smith v. Orthopedics Int'l, Ltd.*, 170 Wn. 2d 659.

<sup>7</sup> *Peters v. Ballard*, 58 Wn. App. 921 (1990).

<sup>8</sup> CR 26(b)(5)(C).

<sup>9</sup> CR 35(a)(2).

<sup>10</sup> *Id.*

**May a physician expert witness performing an independent medical examination be required to permit an audiotape of the examination?**

Yes. Unless otherwise ordered by the court, the party being examined or the party's representative may make an audiotape recording of the examination, but any audiotape recording must be done in an unobtrusive manner.<sup>11</sup> A videotape recording may only be made on agreement of the parties or by order of the court.<sup>12</sup>

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<sup>11</sup> CR 35(a)(3).

<sup>12</sup> *Id.*