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Letters to the editor

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TO THE EDITOR: This is a position statement from the Medico-Legal Committee of the Joint Council of State Neurosurgical Societies. It has been approved by all members of the Committee and represents the official position of the Committee on this subject. Members of the Committee include: David A. Herz, Chairman, Parvis Baghai-Naini, Stephen Burstein, Cliff Cannon, Albert Capanna, Robert Clubb, Horace Cupp, Sergio Gonzalez-Arias, Jonathan Greenberg, Robert Jaeger, Thomas Kingman, Mark Kubala, Henry Laurelli, Philipp Lippe, Byron Neely, Harold Portnoy, James Sabshin, Karl Stecher, Roger Vieth, John White, Joseph Zabramski, and H. Evan Zeiger.

Neurosurgical liability: The expert witness

The ever-increasing need for neurosurgeons to testify as expert medical witnesses begins with the ordinary court rules of the United States; the decision on the admissibility of testimony would belong to the judge in any given case. In civil actions regarding the conduct of a professional defendant, the judge and jury are not experts on the technical issues under deliberation. Testimony must, therefore, be obtained from professional experts who can attest to whether a defendant's actions were appropriate with regard to what is expected from a reasonably prudent man. How is the judge to determine when he or she is truly hearing from a medical expert? A precise legal definition of what qualifications an expert witness must possess seems long overdue. In its absence, there has been gross abuse of the legal system because of the itinerant, incompetent, greedy, or dishonest expert. Any physician, no matter how limited in training or experience, regardless of his locale in the United States or foreign country, would be considered an acceptable "expert" and his or her testimony would be admissible in a court of law. Some physicians have intentionally testified for profit repeatedly. These individuals rely on such behavior to generate income, replacing their clinical practice.

There is now a developing trend whereby the definition of an expert witness has been legislated into law. This has occurred in at least 11 states and should continue in the process of reforming state tort (civil wrong) laws. The problem of the dishonest or less than expert witness will persist, however, until the courts and state legislatures progressively adopt realistic definitions. Until then, the only effective response is to impeach the testimony of an unacceptable witness and for highly credible witnesses to introduce a greater weight of contrary evidence.

In response to the increasing problem of the incompetent or "professional" expert witness, at least four specialty groups have published standards for their members to follow when giving testimony. A trial judge may, of course, not be bound to recognize or accept these self-imposed standards; however, the standards themselves may be useful in impeaching a witness who claims the credentials of a professional organization but does not adhere to its published statements.

One must realize that the right of any citizen to testify in court is protected by legal precedent, including the constitutional amendments regarding free speech. Any effort to discourage or prohibit proper testimony is, therefore, unethical and illegal. Because of this, professional organizations have been warned in several judicial decisions against undertaking disciplinary action when, in their judgment, an expert witness had testified improperly. On the other hand, the right of a professional association to enforce its ethical code has been upheld by judicial decisions, as long as the code is not interpreted as being against public policy.

The American Association of Neurological Surgeons (AANS) has published criteria for giving legal testimony on two separate occasions. The 1991 AANS Policy Manual sets out the following code of ethics:


a. The following are guidelines for Testimony by Neurosurgeons Acting as Expert Witnesses:

In our society, it is customary that testimony be given in all adversary proceedings brought before the court system. The AANS has adopted a position advising all neurosurgeons to testify impartially and prudently for both the defendant and plaintiff in matters brought before the courts.

Witnesses are designated as expert witnesses if they have knowledge of any specific topics thought to be beyond the ken of the average layman. Expert witnesses are expected to be impartial and should not adopt a position of advocacy except as spokesperson for the field of special knowledge that they represent. The neurosurgical expert witness must testify...
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as to the practice behavior of a prudent neurosurgeon giving differing viewpoints, if such there are. 

Prior to offering any testimony the expert neurosurgical witness should:

1. Become familiar with all pertinent data of the particular matter at issue.
2. Review prior and current concepts related to standard neurosurgical practice in the matter at issue.
3. Not concern himself with the legal issues of the matter in question.
4. Identify as such, personal opinions not generally accepted by other neurosurgeons.

In this manner the neurosurgical expert witness presents to the court those opinions which represent the broad spectrum of neurosurgical thought and practice.

Compensation of the neurosurgical expert witness should be reasonable and commensurate with the time and effort given to preparing for his deposition or court appearance.

b. AMA [American Medical Association] Resolution on Medical Expert Witness Testimony:

Whereas, society imposes an obligation on physicians to make themselves available as expert witnesses, testifying on legal matters pertaining to medical practice; and

Whereas, some physicians at times testify in an irresponsible and incompetent manner, not consistent with the highest ideals of the medical profession; and

Whereas, such behavior brings discredit to the medical profession and does not further the cause of justice; and

Whereas, at present there exists no effective remedy for such egregious conduct; therefore, be it

Resolved, that the AMA adopt as policy the concept that providing expert medical testimony is within the scope of professional practice of medicine of a physician and within the purview of professional peer review organizations and Board of Medical Examiners; and be it further

Resolved, that the AMA seek to incorporate this concept in its efforts at tort reform and alternative administrative method of dispute resolution; and be it further

Resolved, that the AMA encourage State Medical Societies to seek to incorporate this concept within the State Medical Practice Acts in the most appropriate and effective manner possible.

22. Position Statement of Testimony in Professional Liability Cases [p 51]

The American Legal System requires expert testimony for both plaintiff and defendant. The Committee believes it is of central importance that such testimony be truly expert and as impartial as possible. The Committee proposes the following guidelines for expert witnesses:

a. "Expert" testimony should reflect not only the opinions of the individual but also honestly describe where such opinions vary from common practice. The expert should not present his or her own views as the only correct ones if they differ from what might be done by other neurosurgeons.

b. An expert should be a surgeon who is still engaged in the active practice of surgery or can demonstrate enough familiarity with present practices as warrant designation as an expert.

c. The neurosurgeon should champion what he believes to be the truth, not the cause of one patient or the other.

d. The neurosurgeon should not accept a contingency fee as an expert witness.

V. Ethics as Related to the Physician and the Legal Profession [p 67]

B. The neurological surgeon, as an expert witness, shall diligently and thoroughly prepare himself or herself with relative facts so that he or she can, to the best of his or her ability, provide the court with accurate and documentable opinions on the matters at hand.

It appears reasonable for the practicing neurosurgeon to avoid repetitive appearances as an expert witness for profit, and to familiarize himself or herself with the standards herein discussed. This will provide inroads toward the goals of reducing the incidence of non-meritorious claims, and facilitating the legal process wherein a neurological defendant is involved with a case of malocurrence, as opposed to malpractice.

DAVID A. HERZ, M.D.
Michigan State University
Grand Rapids, Michigan

References


Address reprint requests to: David A. Herz, M.D., 833 Lake Drive Southeast, Grand Rapids, Michigan 49506.