

The Physician As Expert Witness

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To uphold high professional standards, a growing number of specialty societies and medical boards have enacted “Expert Witness Affirmations” through which members affirm in writing to uphold their ethical obligations when providing expert witness services.

THE FOLLOWING EXCHANGE TOOK PLACE during cross-examination of a medical expert by defense counsel:

Q: “Doctor, you stated on direct examination that the plaintiff’s herniated disk is a direct result of the automobile accident. Did you ever treat the plaintiff before the incident?”

A: “No.”

Q: “So, you have no idea of the condition of his back shortly before the accident, right?”

A: “The patient told me he had no prior back problems.”

Q: “Did you contact his family doctor or obtain that physician’s records to verify that the plaintiff had no prior back problems before forming your opinion?”

A: “No. It was not necessary.”

Q: “Doctor, did you at least review the patient’s medical records from the other physicians who treated him for his accident related injuries?”

A: “I did not have to look at any other records to form my opinion. I have treated back patients for 25 years and I saw this patient for his accident-related injuries. Therefore, I am more than qualified to form a belief as to the cause of his herniated disk.”

Has this physician run afoul of any ethics rule regarding expert witness testimony issued by the medical board to which this doctor belongs and can this healthcare professional be sanctioned by that organization for failing to review all of the patient’s relevant medical records before appearing in court? The answer in many instances is yes. The information needed to treat a patient is much different and less strenuous than the documentation required to form an opinion in a legal proceeding that passes ethical muster. This article will provide an overview of the additional requirements involving expert testimony, and will offer practical tips on how these rules can be used by attorneys during the course of litigation.

THE PRACTICE OF MEDICINE INCLUDES TESTIFYING IN COURT • The role of a physician is much more complex than it was years ago. Government and insurance regulations permeate the practice of medicine and physicians are increasingly drawn into legal battles requiring their learned opinions. From the simple note excusing a patient

from employment to providing expert testimony in a malpractice case, doctors are participants in the personal injury and disability arenas.

Since medicine is beyond the understanding of the average person, counsel must present expert witness testimony to explain a medical condition or to offer an opinion as to the casual relationship between an injury and trauma or whether another physician has committed malpractice. In fact, as a precondition to the filing of a malpractice lawsuit, some states require a plaintiff’s attorney to secure a written statement from a physician opining that there is a reasonable probability that the care or knowledge exercised in the patient’s treatment fell outside of acceptable medical standards and that such conduct was the proximate cause in bringing about the harm. *See, e.g.*, Pennsylvania Rule of Civil Procedure 1042.3; Maryland Courts and Judicial Proceeding Code Annotated §3-2A-04.

THE MEDICAL PROFESSION AS SELF-REGULATING • The medical profession is self-regulating and is accordingly compelled to protect society from dishonest and incompetent health care providers. In a litigation setting, the public is harmed by physicians who offer tainted expert testimony. This is especially true in the medical malpractice context, in which physicians incur higher insurance premiums that in turn negatively affect the public’s ability to obtain healthcare services. Turner, *Going After the “Hired Guns”: Is Improper Expert Witness Testimony Unprofessional Conduct or the Negligent Practice of Medicine?*, 33 *Pepperdine Law Review* 275, January 2006. For instance, a growing number of doctors have dropped their malpractice insurance while others have abandoned high-risk procedures and specialties, such as neurosurgery and obstetrics, or have relocated to more physician-friendly states. Rachel Emma Silverman, *Doctors Take the Offensive. More-Aggressive Tack Used to Cut Frivolous Malpractice Claims*, Medical Justice Corp., <http://www.>

medicaljustice.com/medical-malpractice-crisis-det.asp?press-id=730210043.

ETHICS PRONOUNCEMENTS • The medical profession has recognized these problems by enacting pronouncements to regulate physicians when they testify in a legal proceeding. Many lawyers, however, are unaware of these expert witness guidelines and physicians do not fully appreciate the distinction between the information needed to treat a patient and that required when providing expert testimony.

Federal Rule of Evidence 702 allows a party to call an expert witness to present “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.” In many cases, such expert testimony is required to present a cause of action or defense. Henry, *Necessity of Expert Evidence to Support an Action for Malpractice against a Physician or Surgeon*, 81 A.L.R.2D 597. Trials involving personal injury or medical malpractice claims, therefore, often turn into a “battle of the experts,” with each side hiring a physician to present evidence from which a jury can find in its favor. The large amounts of money at stake and the ability of lawyers to hand pick their experts has led to a perception that the judicial process is often distorted by professional witnesses who offer unreliable opinions in favor of the highest bidder. Eitel et. al., *Physicians’ Attitudes About Expert Medical Witnesses*, J. Legal Medicine 1997: 18(3): 345-360; Mossman et. al., *Courtroom Whores? — or Why Do Attorneys Call Us?: Findings from a Survey on Attorney’s Use of Mental Health Experts*, 26 J. Am. Acad. Psychiatry and Law, 27, 31-33 (1998).

JUDGES AS GATEKEEPERS • Trial courts are entrusted with a gatekeeper function under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (U.S. 1993), to prevent experts from offering unscientific testimony. Courts focus on the reasoning and validity of an expert’s methodology, rather than

their conclusions, while questionable conclusions are challenged though cross-examination and the presentation of contrary evidence. See *Ambrosini v. Labarraque*, 101 F.3d 129, 133-34 (D.C. Cir.1996). However, judges often lack sufficient knowledge of medicine to effectively perform their gatekeeper function. After all, judges are unlikely to second guess an expert’s seemingly valid specialty certification. Jurists simply don’t possess the medical background to decide if an expert has misrepresented his or her field of specialty. Feld & Carey, *Expert Witness Malfeasance: How Should Specialty Societies Respond?*, Am. J. Gastroenterol, 2005; 100:991-995.

While Fed. R. Evid. 706 allows a court to appoint independent experts, there is a widespread belief among the medical community that judges are still unable to effectively police expert testimony. See e.g., Kesselheim & Studdert, *Role of Professional Organizations in Regulating Expert Witness Testimony*, 298 JAMA 24, 2907 (Dec. 26, 2007); Struve, *Improving the Medical Malpractice Litigation Process*, 23 Health Affairs 4, 33 (July/August 2004).

The perception that dishonest experts are contributing to the medical malpractice crisis has led the AMA and various medical specialty societies to enact a host of proposals to tackle the problem. See Gunnar, *Is There an Acceptable Answer to Rising Medical Malpractice Premiums?*, 13 Annals Health L. 465, 498-499, Summer 2004.

THE AMERICAN MEDICAL ASSOCIATION

• In the mid-1980s, the American Medical Association recognized the need for a physician to act as a factual or expert witness and the Council on Ethical and Judicial Affairs issued an opinion on the topic entitled “Medical Testimony.” The AMA has revisited this topic several times and currently advocates that the rendering of medical testimony constitutes the practice of medicine. AMA Policy H-265.993, at 416. After all, that testimony requires a statement from the healthcare professional concerning the proper standard of care in treating

various maladies, and the doctor must rely upon his or her skill, expertise, and training in articulating that opinion. *Id.* and Brief of Amici Curiae, *American Medical Association, Austin, v. American Association of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001). This has prompted the issuance of an ethics opinion by the AMA requiring physicians who testify in court to accurately represent their qualifications and to testify honestly. AMA Code of Medical Ethics Opinion 9.07 – Medical Testimony. In fact, this prominent medical organization suggests that expert witness testimony be peer reviewed so that the expert's statements under oath can be evaluated by a group of doctors. Turner, *supra*.

MEDICAL SPECIALTY BOARDS • A number of medical specialty boards have followed this lead and issued pronouncements subjecting expert testimony to peer review and developing their own ethical codes to regulate members who testify as experts. Whether couched as ethics requirements or merely guidelines, these pronouncements generally have several points in common such as the expert possessing the appropriate background and credentials, having reviewed the necessary medical records, and testifying truthfully. The following are examples of medical organizations that have issued ethics statements or guidelines on the topic of the expert medical witness:

- American College of Radiology, http://www.acr.org/SecondaryMainMenuCategories/quality_safety/guidelines/dx/expert_witness.aspx;
- American Academy of Otolaryngology, <http://www.entnet.org/aboutus/Ethics.cfm>;
- American Association of Neurological Surgeons, www.aans.org;
- American Academy of Neurology, www.aan.com/globals/axon/assets/2687.pdf;
- American College of Occupational and Environmental Medicine, <http://www.acoem.org/guidelines.aspx?id=3874>;
- American College of Emergency Physicians, <http://www.acep.org/practres.aspx?id=29446>;
- American Academy of Emergency Physicians, <http://www.aaem.org/positionstatements/ethicalexpert.php>;
- American College of Medical Genetics, www.amcg.net;
- American College of Surgeons, <http://www.facs.org/fellowsinfo/statements/st-8.html>;
- Society of Breast Imaging, <http://www.sbi-online.org/displaycommon.cfm?an=1&subarticlenbr=4>;
- American Association for Thoracic Surgery, http://www.aats.org/Association/Policies/Statement_on_the_physician_Acting_As_An_Expert_Witness.html;
- American College of Medical Genetics, <http://www.acmg.net/resources/policies/pol-008.pdf>;
- American College of Cardiology, <http://www.acc.org/about/overview/ethics.htm>;
- Society of Thoracic Surgeons, <http://www.sts.org/sections/aboutthesociety/expertwitness/Statement>;
- American College of Chest Surgeons, <http://chestjournal.chestpubs.org/content/98/4/1006.full.pdf?ck=nck>;
- American Society of Anesthesiologists, <http://www.asahq.org/publicationsAndServices/standards/07.pdf>;
- American Board of Family Medicine, <http://www.aafp.org/online/en/home/policy/policies/p/physexpert.html>;
- American Academy of Allergy, Asthma and Immunology, http://www.aaaai.org/members/expert_witness_guidelines.pdf;
- American College of Physicians, see *Ann Intern Med* 1990; 113:789;

- College of American Pathologists, http://www.cap.org/apps/cap.portal?_nfpb=true&cntvwrPtlActionOverride=%2Fportlets%2FcontentViewer%2Fshow&_windowLabel=cntvwrPtl&cntvwrPtl%7BactionForm.contentReference%7D=policies%2Fpolicy_appZ.html&_state=maximized&_pageLabelcntvwr;
- American College of Rheumatology, <https://www.rheumatology.org/about/ExpertWitness-PolicyGuidelines.pdf>;
- American College of Radiology, http://www.acr.org/SecondaryMainMenuCategories/quality_safety/guidelines/dx/expert_witness.aspx);
- American Academy of Pediatrics, <http://aap-policy.aappublications.org/cgi/content/full/pediatrics;109/5/974>);
- American Board of Plastic Surgery, <https://www.abplsurg.org/documents/ABPS%20Code%20of%20Ethics%20appr%2011-12-03.pdf>, Code of Ethics, Section C;
- American Urology Association, <http://www.auanet.org/content/guidelines-and-quality-care/code-of-ethics/ethics.pdf>, Code of Ethics, Section 6;
- American College of Obstetricians and Gynecologists, http://www.acog.org/from_home/acogcode.pdf, Code of Professional Ethics, Section V(5);
- National Association of EMS Physicians <http://www.naemsp.org/documents/ExpertWitnessTestimonyPositionStatementJournal.doc.pdf>;
- American College of Occupational and Environmental Medicine, <http://www.acoem.org/guidelines.aspx?id=3874>;
- American College of Foot and Ankle Surgeons, <http://www.acfas.org/health/expwitness.htm>, requires members login);
- American College of Preventative Medicine, http://www.acpm.org/pol_ama_resolution_tobacco.htm;
- Infectious Disease Society of America, Guidelines for Infectious Diseases Expert Witness, CID, 2005;40, May 15, 1393;
- North American Spine Society, <http://www.spine.org/Pages/PracticePolicy/EthicsProf-Conduct/NASSexpertWitnessGuidelines.aspx>.

For example, the North American Spine Society makes it a point to reinforce that any member providing medical/legal testimony shall testify truthfully, accurately, and professionally regardless of whether the member is serving as a designated expert. This includes becoming familiar with all pertinent data in the matter at issue, including the review of all relevant medical records. The American College of Radiology concurs that its members have an obligation to render expert opinions but emphasizes the point that public interest requires that these opinions be objective and unbiased. ACR Practice Guideline on the Expert Witness in Radiology and Radiology Oncology, Revised 2007, http://www.acr.org/SecondaryMainMenuCategories/quality_safety/guidelines/dx/expert_witness.aspx. The American Academy of Pediatrics has issued a policy statement indicating that the interests of the public and medical and legal professions are best served when scientifically sound and unbiased expert witness testimony is readily available court proceedings. “As members of the medical community, patient advocates, and private citizens, pediatricians have ethical and professional obligations to assist in the administration of justice.” *Policy Statement: Expert Witness Participation in Civil and Criminal Proceedings*, Pediatrics, Vol. 124 No. 1 July 2009, pp. 428-438. These principles can be enforced by subjecting the testimony of its members to peer review and publishing the findings in scientific journals when appropriate and sanctioning members whose testimony is biased, inaccurate, incomplete or unscientific. *Id.*

Some commentators, however, have raised concerns about these attempts at self-regulation by the

medical specialty boards. For example, Kesselheim & Studdert maintain that professional associations have a conflict of interest in self-regulation because of their concern for reducing medical malpractice liability premiums. *Role of Professional Organizations in Regulating Expert Witness Testimony*, 298 JAMA 24, 2907, Dec. 26, 2007.

The best known case in this area is *Austin v. American Ass'n of Neurological Surgeons*, F.3d 967 (C.A.7, Ill., 2001), cert. denied, 534 U.S. 1078 (U.S. 2001), in which Judge Richard Posner wrote: "professional self-regulation rather furthers than impedes the cause of justice.... It is no answer that judges can be trusted to keep out [unreliable] testimony. Judges are not experts in any field except law.... Judges need the help of professional associations in screening experts." The *Austin* court went on to note that the AANS could suspend one of its members for providing misleading testimony, but the court expressed concern that it may not always be clear "that professional self-regulation is wholly trustworthy. Professional associations have their own axes to grind. No doubt most members of the AANS are hostile to malpractice litigation, and this may impart a subtle bias to the Association's evaluation of members' complaints." *Id.*

EXPERT WITNESS AFFIRMATIONS • A growing number of specialty societies have gone beyond the mere issuance of a pronouncement on the topic and have enacted "Expert Witness Affirmations" through which their members are asked to issue a written pledge to affirm their ethical obligations when providing expert witness services. At least 12 specialty associations have issued expert witness affirmations that can be found on their Web sites. Some of these include the:

- American Academy of Orthopaedic Surgeons, <http://www3.aaos.org/member/expwit/statement.cfm>;
- American College of Obstetrics and Gynecology, http://google.acog.org/search?site=acogpublic & client=acog& proxystylesheet=acog&output=xml_no_dtd&proxyreload=1&filter=0&q=expert+witness+affirmation;
- American College of Surgeons, http://www.facs.org/education/ethics/wa_certificate.pdf;
- American Academy of Pediatrics http://search2.aap.org/search?site=Searchallsites&client=default_frontend & proxystylesheet =default_frontend& output=xml_no_dtd&q=Expert+Witness;
- American Urology Association, http://www.auanet.org/content/guidelines-and-quality-care/policy_statements/e/expert-witness-testimony-in-medical-liability-cases.cfm;
- American College of Cardiology, <http://www.acc.org/about/overview/ethics.htm>;
- American Society of Plastic Surgeons, http://www.plasticsurgery.org/site_map/index.cfm;
- American College of Emergency Physicians, <http://www.acep.org/NR/rdonlyres/2921BCEE-DA21-4784-94F9-A9198BA61399/0/Reaffirmation.pdf>;
- American College of Foot and Ankle Surgeons, <http://www.acfas.org/health/expwitness.htm>;
- American Academy of Ophthalmology, <http://www.aao.org/about/ethics/articles.cfm?RenderForPrint=1&>.

These expert witness affirmations tend to include basic, common-sense standards that an expert must follow in order to provide honest, complete, and impartial testimony. For instance, the affirmations typically include a promise to conduct a full and impartial review of all relevant information, to testify only in areas in which the expert has clinical experience, and to decline contingency fee agreements.

The following is a sample witness affirmation statement utilized by the American College of Orthopedic Surgeons, which identifies the responsibilities of an orthopedic surgeon when testifying as an expert witness. <http://www3.aaos.org/member/expwit/request.cfm>:

“As a member of the medical profession and a Fellow or Member of the American Academy of Orthopaedic Surgeons/American Association of Orthopaedic Surgeons (AAOS), I affirm my duty, when giving evidence or testifying as an expert witness, to do so solely in accordance with the merits of the case. Furthermore, I declare that I will uphold the following professional principles in providing expert evidence or expert witness testimony:

1. I will always be truthful.
2. I will conduct a thorough, fair and impartial review of the facts and the medical care provided, not excluding any relevant information.
3. I will provide evidence or testify only in matters in which I have relevant clinical experience and knowledge in the areas of medicine that are the subject of the proceeding.
4. I will evaluate the medical care provided in light of generally accepted standards, neither condemning performance that falls within generally accepted practice standards nor endorsing or condoning performance that falls below these standards.
5. I will evaluate the medical care provided in light of generally accepted standards that prevailed at the time of the occurrence.
6. I will state where my opinion honestly varies from generally accepted standards.
7. I will provide evidence or testimony that is complete, objective, scientifically based, and helpful to a just resolution of the proceeding.
8. I will make a clear distinction between a departure from accepted practice standards and an untoward outcome, making every effort to determine whether there is a causal relationship between the alleged substandard practice and the medical outcome.
9. I will submit my testimony to scrutiny, if requested, by professional organizations, hospitals, peer review bodies and state medical and/or licensing boards, as appropriate.
10. I will not accept compensation that is contingent upon the outcome of the litigation.”

To learn if an orthopedic surgeon has signed this witness affirmation statement, counsel merely has to send a written request on firm letterhead to the AAOS Expert Witness Program, 6300 N. River Road, Rosemont, Illinois 60018-4262. The letter may also be faxed to (847) 823-8028.

The American College of Radiology has resolved to publish its own affirmation statement in the near future, (http://amclc.acr.org/LinkClick.aspx?fileticket=p4Rdt6bs_ZTI%3D&tabid=173&mid=699), while the American Society of General Surgeons requires its members to sign an affirmation statement in order to become certified by the society as expert witnesses. http://www.theasgs.org/education/expwit/expwit_02.html.

MEDICAL SCHOOLS AND STATE LICENSING BOARDS

• Some medical schools have considered the issue and require their faculty members to sign affirmation statements before serving as expert witnesses. The Washington University School of Medicine is one of these institutions. Their guidelines and affirmation statement are available at <https://fpp.wusm.wustl.edu/fppolicies/Pages/ExpertWitnessTestimony.aspx>. Even some state medical societies believe that this is an important endeavor. The Massachusetts State Medical Society, for example, has issued an affirmation statement, which includes a promise to “acknowledge and comply with expert witness testimony standards ... established by the national specialty society for the testifying physician’s specialty, and sign, if such exists, an affirmation of compliance.” <http://www.massmed.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=11330>. The Florida Medical Association has also spoken on the topic and notes that it is crucial that expert medical testimony be accurate, unbiased and available to all litigants. Florida Medical Association Guidelines for Expert Witness Testimony, <http://www.hcma.net/Docs/EXPERT-WITNESS-TESTIMONY-GUIDELINES.doc>.

JUDICIAL REVIEW OF SELF-REGULATIONS

• Several courts have scrutinized the efforts of state medical societies to discipline physicians for their expert testimony, with differing degree of success. One court noted that medical societies have limited ability to punish their members for misleading testimony. *Missouri Bd. of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 443 (Mo. App. W.D. 1991). In this decision, the court held that a non-treating physician cannot be disciplined by his state medical licensing board for expert testimony under Missouri's Medical Practice Act because such testimony does not constitute the "practice of medicine." *Id.* As the court noted:

"...under the plain language of "function" and "duty," testifying as a non-treating medical expert is not an "obligatory task," nor "a moral or legal obligation," nor even an act "expected of" a person. This court holds that acting as a non-treating expert medical witness does not constitute the practice of medicine or the function or duty of a licensee and that (the doctor) is not subject to discipline."

On the other hand, some judges have been favorably impressed at such efforts of self-regulation. For example, in *Joseph v. District of Columbia Bd. of Medicine* 587 A.2d 1085 (D.C. 1991), the court held that providing false testimony by a physician serving as an expert in a medical malpractice action constituted a false report "in the practice of medicine." Another court held that the state's medical board had statutory authority to suspend a physician for unprofessional conduct in providing improper expert testimony even though it did not find such evidence in that case. *In re Lustgarten* 177 N.C. App. 663, 629 S.E.2d 886 (N.C. App. 2006). See also *Missouri Board of Registration for the Healing Arts v. Levine*, supra; *Hayes v. State Med. Board of Ohio*, 138 Ohio App.3d 762, 742 N.E. 2d 238 (2000). In fact, the State Board of Licensing in Ohio has statutory authority to suspend, limit or revoke the license of any physician who violates the Code of Ethics, such as providing

false expert testimony, of the American Medical Association, the American Osteopathic Association, the American Podiatric Medical Association, or any other national professional organization. Ohio Code 472.31.22 (B) (18).

THE CHIROPRACTOR AS EXPERT WITNESS

• The American Chiropractic Association notes that "chiropractic is a health care profession concerned with the diagnosis, treatment, and prevention of neuro-musculoskeletal disorders, and the effects of these disorders on the nervous system and general health." In the United States, an appreciable number of people receive medical treatment from chiropractors especially in trauma-related matters and these doctors offer expert opinions on causation and injury. However, a search of the literature could not locate anything specifically addressing standards, guidelines, or ethics requirements when chiropractors testify in court. Several contact people listed on the American Chiropractic Association's Web page were contacted by email requesting a clarification on this issue but no response was received to these inquiries.

Apparently, the closest thing on point is contained in the American Chiropractic Association's Code of Ethics, paragraph XII which notes:

"As professions are self-regulating bodies, doctors of chiropractic shall protect the public and the profession by reporting incidences of unprofessional, illegal, incompetent and unethical acts to appropriate authorities and organizations and should stand ready to testify in courts of law and in administrative hearings."

The College of Chiropractic Forensics, however, does state that a forensic examiner is qualified to provide an expert opinion to the fact finder and that the doctor can be retained as an expert witness if he or she has the knowledge, training, and experience within the area of controversy. That expert opinion, however, must be based on scientific

or document investigation and not circumstantial or unreliable testimony, or junk science.

NEED TO OBTAIN AFFIRMATION STATEMENTS

• Affirmations are typically presented in succinct bullet points that can be easily incorporated by lawyers into a line of questioning during trial. See Davis & Ajanaku, *The Expert Witness Affirmation: An Affirmative Tool for Impeachment*, 24 No. 4 Med. Malpractice L. & Strategy 3, Jan., 2007. When faced with a physician who is expected to serve as an expert witness, an attorney should routinely ascertain whether the expert belongs to a medical organization that has issued a pronouncement on expert testimony and whether that physician has signed a witness affirmation statement. As a litigation tool, a lawyer can use these affirmation statements to bolster the expert's credibility by having the witness authenticate the document and explain its provisions. See, American College of Surgeons, Letter from Executive Director Thomas Russell, http://www.facs.org/education/ethics/ewa_letter.pdf. Alternatively, an affirmation statement can be an extremely effective tool for attacking questionable testimony from an opposing medical expert. For example, it is a useful tool to use on cross-examination when the expert did not review all of the relevant medical records in forming an opinion. This would include the records from other treating doctors and certain pre-accident or malpractice documentation. Counsel, therefore, is well served to make sure that a testifying doctor has been provided with all of the necessary medical records to avoid this simple line of attack.

An expert is generally not required to sign the affirmation statement of his or her respective medical specialty board. However, a physician's failure to execute the document can be a very effective tool for undermining his or her credibility. This is especially true when one considers the straightforward nature of the affirmation, such as the promise that "I will always be truthful." If the expert has signed the witness affirmation statement, it can be used to restrict the type of opinion that the expert can of-

fer. For instance, in *Snapp v. Jean-Claude*, 2006 WL 120146 (Wisc. App. 2006), *review denied*, 292 Wisc. 2d 411, 718 N.W.2d 725 (Wis. 2006), a retired orthopedic surgeon wanted to testify on behalf of the plaintiff that a vascular surgeon had negligently performed an operation. Defense counsel, however, used the physician's affirmation statement at a deposition to force the expert to admit that he did not have current clinical experience concerning the bypass surgery at issue, and that his orthopedic experience did not qualify him to opine on the standard of care for a vascular surgeon. The Court of Appeals affirmed the grant of summary judgment on behalf of the defendant based on the expert's lack of qualifications.

An affirmation statement seems like a sensible approach to the problems posed by unqualified or dishonest expert witnesses. It reminds them of their professional and ethical obligations when testifying and encourages physicians to be more careful in the formulation of opinions. The threat of disciplinary actions within the individual's medical society can deter expert witnesses from stretching the truth, and courts on the whole seem unsympathetic to the expert's legal attempts to fight the charges brought by their respective medical organizations. For instance, in *Bundren v. Parriott*, 245 Fed. Appx. 822, 2007 WL 2405258 (Kan. C.A. 10, 2007), an expert witness sued another doctor for defamation after the latter physician lodged a complaint with the American College of Gynecology (ACOG) alleging that the witness had violated the ethical provisions of that organization's affirmation statement. The court found that no defamation existed and noted that the reporting doctor and ACOG would likely have statutory immunity for a disciplinary peer review action undertaken in the furtherance of quality health care. A contrary result, however, was reached in *Fullerton v. Florida Medical Ass'n, Inc.*, 938 So.2d 587, 592 (Fla. App. 1 Dist. 2006), in which the court held that a medical association, which disciplined a non-member physician for unprofessional testimony by publishing a letter

criticizing his conduct through peer review, did not have immunity from a suit for defamation.

Affirmation statements are primarily geared toward the medical expert, but they can also serve to dissuade lawyers from calling experts who might give faulty testimony, by making it more likely that the flaws will be exposed during litigation by a knowledgeable opponent. Lawyers are unaffected by disciplinary actions taken against their experts subsequent to trial but lawyers now have an incentive to go over the affirmation statement with a potential expert to make sure that the witness is appropriately qualified, has reviewed the necessary records, and can sign the statement without being

impeached by its terms. The overall effect should be not only to encourage experts to provide more reasoned and accurate testimony but to entice lawyers to retain better experts.

The import of expert witness affirmations, however, should not be overstated. They do contain some wiggle room that allows experts to defend the ethics of their testimony if they are prepared to argue the point. However, these affirmation statements and ethics pronouncements remain an excellent litigation tool to show that the witness has complied with the appropriate medical society's mandates when offering an opinion or to impeach that medical expert when appropriate.

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PRACTICE CHECKLIST FOR The Physician As Expert Witness

- The medical profession is self-regulating and compelled to protect society from dishonest and incompetent health care providers.
- Federal Rule of Evidence 702 allows a party to call an expert witness to present "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue."
- Trial courts are entrusted with a gatekeeper function under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (U.S. 1993), to prevent experts from offering unscientific testimony. However, judges often lack sufficient knowledge of medicine to effectively perform the gatekeeper function.
- Federal Rule of Evidence 706 allows a court to appoint independent experts, but there is a widespread belief among the medical community that courts are unable to effectively police expert testimony.
- The perception that dishonest experts are contributing to the medical malpractice crisis has led the AMA and various medical specialty societies to enact a host of proposals to tackle the problem.
- The AMA considers the rendering of medical testimony to be the practice of medicine. This has prompted their issuance of an ethics opinion requiring physicians who testify to accurately represent their qualifications and to testify honestly.

- A number of medical specialty boards have followed this lead and issued pronouncements subjecting expert testimony to peer review and have developed their own ethics codes to regulate members who testify as experts. As a whole, these statements, whether coached as ethics requirements or mere guidelines, have several points in common such as the expert possessing the appropriate background and credentials, reviewing the necessary medical records, and testifying truthfully.
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- Some medical schools have considered the issue and require their faculty members to sign affirmation statements before serving as expert witnesses, and even some state medical societies believe that this is an important endeavor.
- Expert witness affirmations tend to include basic, common-sense standards that an expert must follow in order to provide honest, complete, and impartial testimony. For instance, the affirmations typically include a promise to conduct a full and impartial review of all relevant information, to testify only in areas in which the expert has clinical experience, and to decline contingency fee agreements.
- As a litigation tool, a lawyer can use these affirmation statements to bolster the expert’s credibility by having the witness authenticate the document and explain its provisions. However, a key by-product is its usefulness in attacking questionable testimony from an opposing medical expert.
- Counsel is well served to make sure that a testifying doctor has been provided with all of the necessary medical records before forming an opinion.
- The witness affirmation statement can be used to impeach an expert who fails to abide by its terms and counsel should always inquire whether one has been executed.
- An affirmation statement reminds expert witnesses of their professional and ethical obligations when testifying and encourages physicians to be more careful in the formulation of opinions. Hopefully, the threat of disciplinary actions within the individual’s medical society should deter expert witnesses from stretching the truth.
- While affirmation statements are primarily geared towards the medical expert, they can also serve to dissuade lawyers from calling experts who might give faulty testimony, by making it more likely that the flaws will be exposed during litigation.