Neurology® Clinical Practice

Medical legal consultation in neurologic practice

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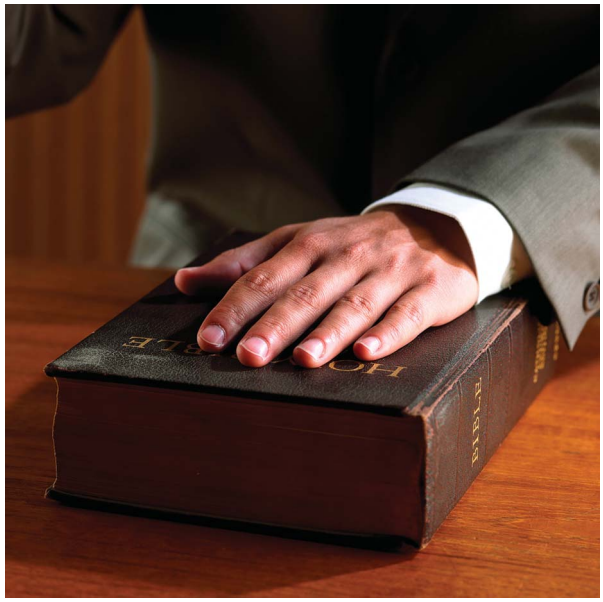
Summary

Responding to requests from attorneys concerning patients or providing independent consultations in the legal process may present unique challenges, particularly if special reports are needed or if there is to be testimony under oath. While the legal process is adversarial, the role of the physician consultant, whether acting as treating physician or independent expert, is not to advocate for one side or the other, or to persuade the trier of fact, but to state his or her professional opinion clearly and concisely. The American Academy of Neurology published a position statement on "Qualifications and Guidelines for the Physician Expert Witness" in 2005. Following professional practice guidelines allows the neurologist to participate in the legal process effectively and ethically. The larger the pool of neurologists available for consultation in legal matters, the more access the legal system will have to balanced expertise.



My clinical practice has emphasized cognitive and behavioral impairments associated with neurologic injury and illness. Treatment sometimes requires forensic assessments of capacities for decision making, self-care, and dangerousness, which are presented to the probate court in the hope of establishing substituted judgment and rehabilitation treatment. Other patients seek a medical opinion foundation for insurance reimbursement for specialized treatment or disability, the causal relationship between injuries and impairments and other losses, or the expected future course of disability and related treatments. I have been called on to predict the future course of illness, function, vocational capacity, treatment and assistance, and life expectancy. These experiences have led to referrals to my practice from attorneys representing neurologically injured clients. This article briefly summarizes some of the lessons I have learned in these experiences.

Roles

There are several distinct roles neurologists may take in the legal process.[1] The most common is that of the treating physician. While a fact witness is a person who testifies concerning his or her knowledge about what happened, i.e., the facts of a particular case, a treating physician will

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usually also be qualified as an "expert" in his or her practice area, as the "facts" of his or her findings, diagnoses, and treatment are based on his or her specialized knowledge and expertise.

The other potential role may be that of nontreating expert. An expert witness, professional witness, or judicial expert is a witness who, by virtue of education, training, skill, or experience, is believed to have expertise and specialized knowledge in a particular subject beyond that of the average person, sufficient that others may officially and legally rely on the witness's specialized scientific, technical, or other opinion within the scope of his or her expertise.

Whenever a physician is testifying in regard to a patient, there is a possibility of conflict in the purposes of the testimony and the role of the treating physician.[1,2] When it is impractical to avoid this dilemma, explicit discussion of this conflict with the patient and retaining attorney will be necessary, and may ameliorate the effect of the conflict on the physician-patient relationship.

The process

In all litigation, whether civil or criminal, the process is designed to be adversarial. One side initiates or brings an action, and then each side seeks to establish its position while discrediting that of the "adversary" in the eyes of the trier of fact, the entity that has the responsibility for determining the outcome, whether judge or jury. This adversarial aspect of the medical legal arena is probably the most disturbing and uncomfortable for physicians and probably everyone else, other than attorneys.

The challenge

Physicians may fear that the medical legal arena may compromise their professional conduct, as it takes them beyond their familiar practice arena into one with different rules, procedures, and authorities. Yet there are important reasons for neurologists to readily consider accepting medical legal consultations. The first and most obvious is that neurologic patients commonly need their physician to become involved, as the patient may be involved in litigation related to his or her neurologic injury, illness, or treatment.

What attorneys want from physicians

Given the adversarial nature of litigation, it is understandable that the physician may assume that the retaining attorney simply wants support for his or her side of the dispute. While this is always on the attorney's wish list, a competent attorney knows that he or she needs genuine, objective expertise. An opinion that is favorable but incorrect will be the most vulnerable to being discredited and the expert impeached in the subsequent adversarial process. The attorney wants to learn the medicine of the case, how the facts of the case establish the medicine, and any implications of the facts and the medicine in determining outcomes and damages. The retaining attorney will seek to determine the extent of the physician's knowledge of the facts and of the medicine of the case, as that is likely to be challenged by the opposing attorney later on.

It is best to first clarify the precise nature of the request in order to determine whether it is optimally structured from the medical perspective, the amount of effort and time that will be required, and whether the consultant has the information and expertise needed to competently respond.

Objectivity

The adversarial process raises important considerations regarding professional ethics. The ability to effectively put aside preconceptions, prejudices, and the pressure from the retaining party, the insurer, or the patient in order to consider the facts of the case independently is the foundation of professionalism in the medical legal arena, as in all of medicine. This foundation allows the professional to feel comfortable using the same methodology and reaching the same conclusions, regardless of which side retains the expert.

Often the consultant, whether as treating physician or nontreating expert witness, is encouraged to adopt the stance of advocate. The only position that consulting physicians should advocate for is their professional opinion, which is the conclusion reached concerning the matter at hand based on their review of all the facts presented to them, in light of their professional

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training and experience. Physician experts should not advocate for the patient, or for the position of the party that retained them, but only for their best and most objective analysis and understanding of the facts and implications of the facts in the case. If that professional analysis mostly supports the position of the retaining party, then the expert is likely to be retained through the litigation process. If it does not, then it is likely that the retaining party will move on and not use the expert further.

Frequently the complexities of a case require that the expert concede many issues raised by the opposing party. The professional stance requires that the expert allow the "cards to fall where they may." Denying the obvious, or that which may be established as probable or true by the opposing side, is never a way to establish credibility. The obligation to persuade the trier of fact is not the responsibility of the expert. That is the responsibility of the attorneys, the only advocates in the courtroom. The responsibility of the professional expert is to express his or her most objective opinion as clearly and concisely as possible.

The standard for opinion testimony

Many physicians assume that in medical legal situations they are required to express their opinions with an absolute degree of certainty. Other physicians may fear that expressing an opinion with any lesser degree of probability might lead to misunderstanding of a complex issue, or leave them open to professional criticism and potentially censure. In most circumstances, the requirement is that expert medical testimony be offered with a "reasonable degree of medical certainty or probability," which in practical terms means "more likely than not." This might appear to be a somewhat loose standard, but while the legal process does seek to establish justice in light of the truth, it has evolved practical mechanisms to accomplish this goal that do not always correspond very obviously to either common sense or medical culture.

In federal court, standards regarding the admissibility of expert witness testimony have become more explicit as they have evolved through a series of cases, beginning with *Daubert v Merrell Dow Pharmaceuticals* in 1993, which led to what is known as the Daubert standard.[3,4] This requires that experts tie their conclusions to established scientific evidence. An expert opinion that is unsupported by scientific evidence (the "reliability" requirement) or that is not clearly related to the facts of the case (the "relevance" requirement) may be excluded. The Daubert standard is now accepted in most, but not all, state courts. The criteria of the Daubert standard, however, should be considered a minimal foundation for all expert testimony.

Guidelines for medical legal consultation

The American Academy of Neurology position statement on "Qualifications and Guidelines for the Physician Expert Witness" (2005)[5] summarizes important aspects of the professional approach to expert testimony:

- "A medical expert should carefully and thoroughly review relevant medical and scientific data before offering an opinion. If an expert believes that information that has been provided is incomplete or inaccurate, the expert should request additional information or clarification from attorneys or other relevant parties before agreeing to render an opinion."
- "The expert should also be prepared to state whether an opinion is based on personal clinical experience, published information, practice guidelines, or prevailing expert opinion."

Definition of the consultant's role The consulting physician should discuss his or her specific role with the retaining attorney. Possibilities include providing direct examination of the

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client; testing; providing a report; consultation on the merits of the case, the medicine, or cross-examination of the other side's experts; and rebuttal testimony. Subjects may include, or exclude, mechanism of injury, pathophysiology, need for treatment (past, current, and future), medical necessity and reasonableness, and cost of treatment provided and life expectancy. Specific issues may need to be apportioned between direct, preexisting, and subsequent pathologies. The retaining attorney can be expected to wish to discuss all of the issues reviewed.

Fees Consultants should choose a fee structure they are comfortable sharing with a jury. It is useful to know what other local experts are charging. The consultant can decide where to charge within that range. Charges should never be made on a contingency basis, based on the outcome of the case. Charges are based on the consultant's time, not his or her opinion. Time spent should be tracked carefully and used efficiently so that consultants will be comfortable defending their charges when the issue is raised in cross-examination. The consultant may request that the retaining attorney bring up the issue of fees in direct testimony, decreasing the effect of the issue under cross-examination.

Depositions Depositions provide the opposing attorney the opportunity to explore the consultant's opinions and are always requested by the opposing attorney. Standard depositions involve only a verbatim transcript of the deposition. In that case, it is best to take time in formulating answers so that the transcript will reflect exactly what the consultant wants entered into the record. It is best to speak directly to the court reporter. There is much more latitude regarding body language and verbal inflections as compared to a hearing or trial in view of the judge, hearing officer, or jury. At times, video recording of the deposition will be arranged. It is helpful to ask ahead of time whether any deposition will be video recorded. During video recording, it is important for consultants to present themselves as they would before a jury, maintaining eye contact with the camera lens (which becomes the jury), minimizing visual attention to other activities in the room, and looking only incidentally at notes. Those behaviors can be misinterpreted when the recording is viewed, as it may be used at trial in lieu of physical testimony.

In testimony, consulting physicians should[1,6]:

- Stay within their area of expertise, being certain they can support and defend every statement made, both in terms of the facts of the case and the scientific or medical literature.
- Speak clearly and slowly, without professional jargon. Any necessary technical terms should be explained, with the explanations targeted to the consultant's best understanding of the level of medical sophistication of the trier of fact.
- Think of themselves as teacher, and the judge, hearing officer, or jury as the learners. The consultant should address them, maintaining good eye contact, and not the attorney asking the questions.
- Avoid an imperial demeanor. It may be helpful for consultants to imagine themselves doing their best to establish rapport and trust with an anxious new patient and family in their practice.
- Generally avoid humor. Unfortunately, humor can easily be misinterpreted as a lack of respect or seriousness regarding the issues at hand. A general rule is to limit humor to the self-deprecating category.
- Dress in comfortable, well-broken-in, professional clothing.

In direct testimony, consultants should:

- Review the outline of their direct testimony with the retaining attorney, which some attorneys will want to do in detail.
- Become familiar with the reports and disclosures of the opposing experts.
- Discuss likely topics for cross-examination testimony with the retaining attorney.

In cross-examination testimony, examining attorneys are likely to ask questions the answers to which they are certain the consultant will not know. Straightforward admissions of areas of weakness or ignorance are most effective. The consultant should be prepared for the following possible categories of questions:

- Confusing questions: Either explicitly restate the question that the consultant suspects was meant to be asked ("If you are asking…, then my answer is…"), or simply state that the question was not understood.
- Compound questions: Either break the question down or ask the deposing attorney to break it down.
- Questions with erroneous foundations: Point out the basis of the disagreement with the foundation of the question.
- Tautologies: These are definitions or equivalences presented as questions. The consultant may simply agree (since all tautologies are true), or respectfully point out that the structure of the question ensures its truthfulness and therefore the consultant's assent.
- Questions about the consultant's assumptions: Generally the assumptions made prior to evaluating a matter are simply that the documents reviewed are what they were presented to be, and that the parties are indeed the parties to the case.[2]
- Comments from the deposing attorney: Testimony is designed to follow a question—answer format. It is the responsibility of the deposing attorney to formulate questions that will elicit the consultant's opinions. The question should be identified and addressed as specifically and succinctly as possible. If a question is not identified, the temptation to engage in a conversation or debate should be resisted. It is better to respectfully point out that a question was not identified.
- Scope of the consultant's opinions: Generally each side of the dispute is required to disclose all the opinions of their experts that may be presented at trial. Therefore, the consultant's written reports or the disclosures of his or her opinions prepared by the retaining attorney should include all of the consultant's opinions to be presented at trial. The deposition is an opportunity for the other side's attorney to clarify the consultant's opinions and their scope. It is common to be asked at the end of a deposition whether the consultant has stated all the opinions that may be presented at trial, as a way to limit any topics not covered in the deposition. I generally respond that I have attempted to present all my opinions in my written reports and to be forthcoming in the deposition but that I cannot know what specific questions might be asked at trial in response to which I may have related opinions.

DISCUSSION

Wyatt Earp is reported to have quipped, "Nothing focuses the mind like a hanging in the morning." The same can be said of an imminent cross-examination. While formulating opinions for presentation in the legal arena can be intimidating, a modicum of experience will lead to greater comfort in meeting the challenge. Hopefully involvement in this process will lead to a greater appreciation of our justice system for us and a greater understanding of complex medical issues for the triers of fact and the public.

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