

Task Force 5: Expert Testimony and Opinions

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INTRODUCTION

The American College of Cardiology Foundation (ACCF) and the American Heart Association (AHA), premier organizations in cardiovascular medicine, are considered trusted sources of consensus about matters related to cardiovascular health. It is important to make clear when one is or is not representing one of these organizations.

HOW DOES ONE DIFFERENTIATE AND DESIGNATE PERSONAL PROFESSIONAL OPINION FROM EXPRESSION OF THE POSITION OF THE ACCF OR THE AHA?

Members of the ACCF or the AHA have a variety of roles aside from their professional relationships with these organizations. Delineation of these varying roles may not always be entirely clear. A member's particular expertise in research or as a care provider naturally provides the impetus for his or her official contributions to the organization's programs, written position statements, and guidelines. Individuals may also serve each organization in a variety of official capacities, including as officers, board members, committee chairs, and members.

It is the responsibility of the individual member not to misrepresent or imply an opinion as being that of the ACCF or the AHA unless the person is functioning as an officially designated representative of either organization. This may require a formal statement by the individual to exclude any possibility that his or her personal opinion could be reasonably interpreted as being that of the organization (as may be the case if one's organizational service or contributions are highlighted as part of one's qualifications as an expert), unless organizational affiliation is absent from the stated qualifications. This is particularly important if the expert is an officer, board member, or committee chair of the ACCF or the AHA.

HOW SHOULD THE ACCF AND THE AHA DESIGNATE A SPOKESPERSON FOR A SPECIFIC ISSUE?

An individual's qualifications as an expert are often based on recognized clinical expertise, which is at times difficult to quantify, or on one's contributions to medical knowledge based on research productivity as reflected in peer-review publications. Both ACCF and AHA volunteers (and staff)

file annual conflict of interest declarations. Spokespersons for specific topic areas should have expertise in that area based on qualifications noted in the preceding text, and, wherever possible, should not have any actual or perceived conflicts of interest that could influence their opinions or call into question the independence or integrity of the organization's positions. If it is not possible to find a spokesperson without such conflicts, these conflicts must be clearly stated.

WHAT ARE THE RESPONSIBILITIES OF INDIVIDUAL MEMBERS ACTING AS EXPERT WITNESSES IN LITIGATION REGARDING INDUSTRY?

The ACCF supports the concept that the cardiovascular specialist has the obligation and duty as a citizen, a physician, and a member of a profession to act as an expert witness in litigation where issues appropriate to his or her training and expertise are involved to see that justice is done to both the plaintiff and the defendant. Undeniably, it is true that physicians may be wrongly accused of malpractice when a bad outcome not due to negligence has occurred. It is also true that physicians have injured patients as a result of negligence or malpractice. The interests of society and the medical profession are best served when scientific and unbiased expert witness testimony is available to both plaintiffs and defendants in medical malpractice litigation. Acting as an expert witness, the physician serves as a knowledgeable, experienced, impartial individual, presenting his or her own considered opinions of the case and not acting in any official ACCF capacity.

Suggestions to encourage physicians to act as expert witnesses and discourage the use of "professional expert witnesses" have been offered, each of which has merit. One suggestion is that medical schools include training of physicians in the skills required to act as an expert witness (1,2). Another suggestion is that the medical societies maintain a list of qualified physicians willing to act as expert witnesses so that the lawyers can use this as a pool of medical experts from which to draw (3,4).

The American Medical Association has written that medical expert witness testimony is effectively part of the practice of medicine (5). The expert witness either for the plaintiff or the defendant is not an advocate for the side that has engaged him or her; that is the duty of the lawyers. Before agreeing to act as an expert witness, the physician should assess the merits of the case and give an honest

opinion to the requesting attorney (6). The role of the expert witness is to assist the judge and jury to understand the medical facts of the case. As such, the expert witness acts both as a consultant to the court and as a teacher (7,8). The testimony must be honest, objective, and fully impartial regarding the medical information in the case. Because judge, lawyers, and jury are lay people, the medical testimony must be clearly stated, concise, and understandable. The expert witness should review all of the relevant records used to establish the facts of the case as well as the standard of practice as it existed at the time of the alleged occurrence. The expert witness has the ethical obligation to give truthful answers within the bounds of his or her expertise and must be able to sincerely and validly justify the position he or she believes. Consequently, physicians acting as expert witnesses should be willing to testify for plaintiffs or defendants in different cases depending on the merits of the case. Proper expert testimony is balanced, and where doubt exists, such doubt should be readily admitted (9).

In 1990, the Guidelines for the Physician Expert Witness were published by the American College of Physicians (ACP) (10). On October 15, 1995, the ACC Board of Trustees approved this policy statement, which is derived from the ACP guidelines (11).

Medicine, as a profession, has the obligation to police itself (3). Poor practitioners who are a danger to their patients should be held accountable, and good physicians mistakenly accused must be defended (9). The expert witness testifying to the standard of care should be of the specialty or field that is the same as the defendant physician or medical professional. An internist or family-practice physician should not be held to the same standard of care as a cardiologist. Within the field of cardiovascular disease, a general cardiologist can act as an expert witness in all aspects of the diagnosis and general management of patients with cardiovascular disease. Questions involving technical details of an interventional or electrophysiologic procedure should be the province of a practicing specialist who is board certified in these areas.

RECOMMENDED CRITERIA FOR EXPERT WITNESSES IN MALPRACTICE LITIGATION

1. The cardiovascular expert witness must have a current, valid, and unrestricted license within his or her area of professional practice.
2. For medical testimony in the field of cardiovascular disease, the expert witness should be board certified by the American Board of Internal Medicine or the American Board of Osteopathic Internal Medicine in the specialty of cardiovascular disease or equivalency in pediatric cardiology or cardiovascular surgery. The cardiovascular expert should be actively and primarily engaged in the practice of the specialty or subspecialty under consideration. Similar criteria apply to the car-

diovascular subspecialties, such as electrophysiology and interventional cardiology.

3. For testimony by other health care professional expert witnesses, the experts should have equivalent qualifications appropriate to their area of practice.
4. The expert must be knowledgeable, familiar with, and qualified in the specific area in which he or she is testifying, and with commonly accepted clinical practice standards as they relate to the case and locale.
5. Compensation for expert testimony should be reasonable and commensurate with the time and effort expended. It is unethical for an expert witness to accept compensation that is contingent on the outcome of litigation.
6. The expert witness should be willing to submit transcripts of prior and current depositions and courtroom testimony for peer review.
7. Expert witness testimony should be fair, thorough, and objective. It should not exclude any relevant information that has a bearing on the case.

WHAT ARE THE RESPONSIBILITIES AND/OR OBLIGATIONS OF INDIVIDUAL MEMBERS ACTING AS EXPERT WITNESSES IN OTHER LITIGATION, CLASS ACTION LITIGATION, OR PATENT ISSUES, REGARDING THE PHARMACEUTICAL AND MEDICAL DEVICE INDUSTRIES?

The expert witness should testify in the area of his or her expertise. Unfortunately, not all expert witnessing is done by experts (12). There are physicians who have become "professional expert witnesses" or "hired guns" and make their entire living testifying as "medical experts" (3). Their testimony may not always be objective and unbiased, and they may function as partisans rather than scholars (1,8). They exist because physicians have been reluctant to testify as expert witnesses for several reasons: distrust of lawyers, uneasiness with the legal system and the process of testifying, not wanting to encourage malpractice or other types of lawsuits, and fear of being censured by other physicians (13). The AMA, the ACP, and the ACCF have all made strong recommendations that it is the duty of physicians to act as expert witnesses in their areas of expertise (9,11,14). With the availability of adequate numbers of physicians willing to act as expert witnesses, it is hoped that the use of the "professional expert witness" will decrease (10).

Expert witnesses must be truthful, and violators should be sanctioned. The question remains as to what mechanism should exist to perform the necessary function of developing disciplinary steps to deal with the physician who gives false expert witness testimony. Numerous suggestions have been made (12). Among these is that the ACCF should have a panel to review cases where physicians have been accused of giving false or misleading expert testimony, as has been done by other organizations (i.e., American Academy of Neurology) (12). It is possible that this could lead to

controversy among the Fellows of the ACCF and litigation against the organization and could entail significant investment of time and money. The issue is an important one and requires additional discussion to determine the best approach. If such a panel is created, it is suggested that the review of cases be narrowly focused on the contested testimony of the expert witness. Another suggestion is to include independent court-appointed, expert filing of opinion letters by experts with supporting documentation, and a sanction process by courts and/or authoritative boards for testimony that is deemed inaccurate, false, or contradictory to the standard of care (15). This, too, requires further discussion.

In product liability litigation, class action litigation, and patent issues regarding the pharmaceutical and medical device industries, court-appointed neutral expert witnesses identified by the appropriate medical societies could play a constructive role in providing unbiased testimony in medical legal disputes. All of the professional and ethical behavior characterizing the conduct of an expert witness should apply.

Experts in the media. When an expert is contacted by the media for an opinion, he or she must make it clear whether the opinions expressed are the individual's personal opinions or whether the expert is acting as a spokesperson for the ACCF and/or the AHA. If the latter, the individual must be certain that he or she accurately expresses the position of the organization.

Experts providing public testimony. When an expert is asked to testify before Congress or another government body, a different level of responsibility exists. If the expert is acting only as a witness in the area of his or her expertise and not representing an official position of the ACCF and/or the AHA, then the expert should clarify that he or she is expressing a personal/professional opinion. However, if the expert is testifying about the position of the ACCF and/or the AHA, then this testimony carries the weight of the community that is represented by the ACCF and/or the AHA. Such a witness either should be appointed by the organization to represent its official position, or he or she

should make clear that the views expressed do not represent the organization.

When an expert witness is testifying about what is said in an ACC/AHA guideline, if what he or she quotes is directly from the guideline, then that has the imprimatur of the ACCF and the AHA. It makes no difference whether the physician was or was not on the writing committee for that guideline. It is what is in the guideline that has the official endorsement of the ACCF and the AHA.

TASK FORCE 5 REFERENCES

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