



Expert Witness: To Be or Not To Be

The expert witness in medical negligence cases plays a vital role in the American system of jurisprudence. Nearly every medical negligence case requires expert witnesses to establish the standards of care, identify any breaches of those standards and to render an opinion as to whether those breaches are the most likely cause of the injury.¹ The sense of “doing your duty,” advocacy on behalf of injured patients, the lure of money and/or prestige are just some of the factors that can influence a PPM policyholder to offer their service as an expert witness. However, the role of expert witness should not be taken lightly and PPM policyholders face potential conflicts if they provide expert testimony against another PPM policyholder.

In this regard, your PPM policy provides:

The Policyholder agrees not to serve as an expert witness in a claim against any Policyholder of the Company without prior written consent of the Company.²

The purpose of this provision is to alert and provide PPM with an opportunity to discuss the potential for conflicts and the impact such conflicts may create. Failing to notify PPM in advance of undertaking the role of plaintiff’s expert against another policyholder prevents PPM from addressing these concerns in a timely fashion.

Whenever a PPM policyholder provides testimony as a plaintiff’s expert against another PPM policyholder, several issues are presented. First, by agreeing to testify against another PPM policyholder, the PPM policyholder providing expert testimony contributes in some measure to the increased losses of PPM. These increased losses are eventually passed on to other policyholders in the form of higher premiums.

Second, it should come as no surprise that PPM’s other policyholders (against whom expert witness testimony has been offered) become understandably upset that a fellow policyholder is offering testimony against them. In the past, such testimony has created public relations problems that jeopardize PPM’s ongoing business relationship with the offended policyholder(s) and can potentially lead to the loss of valuable policyholder groups. As an alternative to losing their business, PPM can be forced to consider other options for addressing these concerns, including the continued insurability of the PPM policyholder who has offered expert witness testimony against another PPM policyholder.


Third, the testimony may also raise questions in terms of its compliance with the ASA guidelines on expert witness testimony.³ In this regard, it may become necessary for PPM to assist in referring this

In this Issue

Preferred Physicians Medical (PPM) policyholders are sometimes asked to serve as expert witnesses in medical negligence cases. While there are many factors that can attract a physician to assume the role of an expert witness, there are also potential pitfalls and conflicts that may arise in that role. For example, potential conflicts can develop when one PPM policyholder offers expert witness testimony against another PPM policyholder. In this newsletter, we examine these potential conflicts.

We also remind PPM policyholders that the American Society of Anesthesiologists (ASA) and several state societies have implemented procedures to peer review expert witness testimony. Sanctions may be levied against anesthesiologists whose expert testimony is found to fall outside the generally accepted practice standards and/or is inconsistent with relevant medical literature. Finally, we list the current most prolific plaintiff’s experts in cases defended by PPM.

Thanks for reading,


Brian J. Thomas, Editor

matter to the ASA Administrative Council.⁴ Obviously even contemplating such an action against a PPM policyholder is troubling, but may be unavoidable.

Fourth, consistent with PPM's standard approach, both our newsletter *Anesthesia & the Law* and our website routinely report the outcome of jury trials. Our case discussions include routine identification of the plaintiff's anesthesia expert and a summary of the plaintiff's anesthesia expert's testimony. Such reporting creates additional potential that other PPM policyholders will become aware of and respond negatively to a PPM policyholder's involvement as a plaintiff's expert and demand that PPM take some action.

Fifth, the nature of the testimony in any lawsuit may present some additional challenges for both the PPM policyholder and PPM in the event that PPM policyholder is ever sued. By offering critical expert testimony, the PPM policyholder will ultimately be held to those opinions offered, regardless of whether those opinions are an accurate reflection of the standard of care. In other words, the PPM policyholder's own expert testimony may hinder our ability to defend that same PPM policyholder in the future. PPM must take this concern into account in terms of determining the PPM policyholder's insurability and insurance rates.

In conclusion, while PPM has never instituted an outright ban on a PPM policyholder providing expert testimony against another PPM policyholder, the potential for conflict appears unavoidable. For this reason, PPM policyholders wishing to offer testimony against another PPM policyholder will need to carefully consider the impact of their testimony and be prepared to accept the consequences that may logically follow. In order to minimize or avoid the potential conflicts highlighted in this newsletter, PPM reminds its policyholders to check with PPM prior to agreeing to such an arrangement.

References:

1. Localio, AR, Lawthers AG, Brennan TA, et al. Relation between malpractice claims and adverse events due to negligence. Results of the Harvard Medical Practice Study III. N Engl J Med. 1991; 325:245-251 [Abstract]
2. PPM Physicians Professional Liability Insurance Policy, Part 5-14.
3. See http://www.asahq.org/Newsletters/2006/06-06/whatsNew06_06.html. "The [expert] physician's review of medical facts should be truthful, thorough and impartial ... testimony should reflect an evaluation of performance in light of generally accepted standards, reflected in relevant literature, neither condemning performance that clearly falls within generally accepted practice standards nor endorsing or condoning performance that clearly falls outside accepted medical practice ... The physician should be willing to submit such testimony for peer review."
4. See <http://www.asahq.org/Newsletters/2003/12-03/scott.html>. ❖

Expert Witness Testimony Peer Review Programs Reduce Questionable Testimony

PPM has noted a decline in plaintiff's expert testimony that is inconsistent with medical literature and mainstream opinion regarding the standard of care. This decline coincides with the implementation of the ASA Administrative Procedures and Guidelines for Expert Witness Qualifications and Testimony in 2003 and similar state society peer review programs. The imposition of sanctions as well as the threat of sanctions appears to have moderated the tone of the most extreme expert criticism.

In Texas, for example, a plaintiff's anesthesiology expert withdrew from a recent PPM case after being sanctioned by the Texas Society of Anesthesiologists for testimony that was determined to be "misleading, biased, and [that did] not reflect generally accepted standards of care in the practice of anesthesiology."

PPM routinely instructs defense counsel to ask plaintiff's anesthesiology experts during their depositions if they are aware of the ASA Guidelines for Expert Witness Qualifications and Testimony. In several instances, plaintiff's anesthesiology experts changed their testimony and in a few cases withdrew completely when reminded of the ASA guidelines on expert testimony. PPM will continue to monitor plaintiff's expert testimony and assist PPM policyholders by providing deposition and trial testimony to submit to the ASA Administrative Council with any complaint alleging a violation of the ASA guidelines on expert testimony. ❖

Most Prolific Plaintiff's Experts¹

Name	PPM cases (last 5 years)	Total PPM cases	Total IDEX cases
Brian G. McAlary, MD	4	29	294
William C. Berger, MD	7	25	197
Ronald H. Wender, MD	6	24	140
David J. Cullen, MD	1	15	186
Mitchel B. Sosis, MD, PhD	6	12	116
Joseph A. Stirt, MD	4	12	79
Miles H. Dinner, MD	2	8	72
Elizabeth A. Frost, MD	3	8	65
Alan Lisbon, MD	3	7	55
John W. Patton, III, MD	2	6	85

References:

1. These figures compiled by PPM reflect the number of cases defended by PPM and recorded in our electronic database initiated in 1999. Total IDEX cases reflect the number of medical malpractice cases (plaintiff and defendant) in which the expert has testified as compiled by IDEX, a national clearinghouse for expert witness testimony. ❖

In the News

Nevada Hepatitis Scare Focuses on Anesthesia Techniques

The recent hepatitis outbreak in Nevada has focused on anesthetic techniques at a Las Vegas endoscopy clinic. According to the Centers for Disease Control and Prevention (CDC) and the Southern Nevada Health District (SNHD), investigators observed practices at the endoscopy center that had the potential to transmit the hepatitis C virus (HCV). According to SNHD, these practices included:

- Utilizing a syringe (not a needle) to administer medication and reusing the same syringe to draw up additional medication. Redrawing medication using the same syringe could have contaminated the vial from which the medication was drawn with the blood of the first patient.
- Using the same medication vial, which was not labeled for use on multiple patients, for subsequent patients (using a clean needle and syringe) could have exposed these patients to blood borne pathogens.

Since beginning their investigations, the CDC and SNHD have identified six cases of HCV infection among patients who underwent procedures at the endoscopy center. SNHD is notifying approximately 40,000 additional patients who were potentially exposed to HCV and other infectious diseases. Patients are encouraged to undergo testing for HCV, HIV and hepatitis B. In addition, numerous lawsuits surrounding these events have been filed and plaintiff attorneys are actively soliciting these patients.

The situation in Nevada highlights the importance of adhering to sound infection control measures. In light of these reports, PPM is encouraging its policyholders to review their own policies and procedures regarding infection control and the administration of single-use medications. Recommendations from the American Society of Anesthesiologists (ASA) are available online at: <http://www.asahq.org/publicationsAndServices/infectioncontrol.pdf>.

No PPM policyholders from Nevada have been implicated in the ongoing investigation. Therefore, the impact of any resulting litigation will not be borne by PPM policyholders. ❖

Visit PPMRRG.com

PPM's updated website provides PPM policyholders with up-to-the-minute news, an events schedule and access to our risk management newsletter, *Anesthesia & the Law*. There is also a secure area on the website for the exclusive use of our policyholders. In this restricted area, policyholders have access to an archive of *Anesthesia & the Law*, recommended forms and protocols, discussion papers referencing "hot topics" in anesthesia and other timely risk management materials. PPM policyholders should visit the MyPPMrrg area of the website to obtain their personal password.

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In This Issue

The potential pitfalls and conflicts that may arise when a physician becomes an expert witness in medical negligence cases.

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Note: The purpose of this newsletter is to provide information to policyholders and defense counsel regarding professional liability issues. Risk management analysis is offered for general guidance and is not intended to establish a standard of care or to provide legal advice.

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