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Ethical Legal

Expert Testimony: Implications for Life Care Planning

Contributors: Richard T. Katz, MD, Richard Paul Bonfiglio, MD, Richard D. Zorowitz, MD
Feature Editor: Kristi L. Kirschner, MD

Feature Editor Introduction

For better or worse, the U.S. malpractice justice system relies on physicians who are willing to provide expert witness testimony. Historically this task has fallen into a no-man's land, in that it is not under the auspices of either state medical licensing boards or professional associations. In the past, doctors could hang out their shingle advertising themselves as "experts," and the onus fell on lawyers to establish or discredit expertise and testimony. In the past 2 decades this practice has begun to change, prompted by a series of 3 U.S. Supreme Court cases that challenged the pre-existing standards for establishing scientific evidence in the courtroom [1].

In 1997, the American Medical Association (AMA) passed a resolution stating that expert witness testimony is considered to be under the practice of medicine and therefore is subject to peer review [2]. The subsequent scope and purview of state licensing boards in disciplining medical expert witnesses for unprofessional or fraudulent testimony have been mixed [3]. Some states are enacting restrictions with regard to who can testify as an expert (for example, Florida requires that out-of-state physicians apply for a certificate). In 2011, the AMA proposed further restrictions, outlining model legislation for expert testimony and recommending that experts be "recognized by the American Board of Medical Specialties or an equivalent board, be in active medical practice in the same discipline as the defendant or have devoted a substantial portion of time teaching at an accredited medical school in relation to the medical care at issue within five years of the defendant's alleged negligence" [4].

Professional associations have also gotten involved in varying degrees. The American Association of Neurological Surgeons [5], American Academy of Orthopedic Surgeons (AAOS) [6], and American College of Emergency Medicine [7] have been quite active in adopting guidelines and peer review for expert witness testimony. AAOS has gone so far as to establish an Expert Witness Program that launched in 2004 with easily accessible materials on the Web site to clarify the duties of the expert orthopedic surgeon witness, specifically regarding AAOS' goal "of providing complete, objective and scientifically based opinions in legal matters that affect patients and AAOS members" [6]. The American College of Emergency Medicine explicitly recommends that expert witnesses be willing to submit their testimony for peer review. The American Academy of Physical Medicine and Rehabilitation (AAPM&R) was among the first to address the issue, with a 1992 position paper addressing general guidelines and standards; this position paper was most recently revisited and renewed without changes by the Board of Governors in August 2012 [8]. The AAPM&R code of conduct further specifies that "when called upon to serve as an expert witness, the physiatrist may testify as desired but only within her/her approved areas of expertise and within the scope and knowledge of his/her training and practice" [9].

Not surprisingly, physiatrists are particularly in demand when a case involves questions of extent of disability or life care planning and future expenses. I was pleased to be approached by Dr Richard Katz, a physiatrist on the faculty of Washington University School of Medicine in St Louis, Missouri, who has been involved in expert witness testimony for more than 20 years. He proposed the following case and questions for discussion:

> *A malpractice case involves a prototypical story of a young boy we will call Billie, whom the plaintiff alleges sustained a brain injury as a result of obstetrical malpractice.*
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> *Billie, who was born with hypoxic ischemic encephalopathy (HIE), is now 4 years old. He had neonatal seizures, and early magnetic resonance images showed lentiform and ventral thalamic nuclei changes*

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suspicious for HIE. He was managed acutely in the neonatal intensive care unit (NICU) with ventilator management, fluids, antibiotics, phenobarbital, and hyperalimentation. Procedures included peripherally inserted central catheter placement, umbilical line, percutaneous endoscopic gastrostomy (PEG) tube placement, and circumcision. He remained in the NICU for 3 weeks. Subsequent examinations revealed that Billie has spastic quadriplegia, as well as severe developmental delay. He rolls in both directions, reaches for objects with both hands, and sits up briefly, but he cannot sit without support. He is dependent on others for all activities of daily living. He likely has ongoing seizures but is taking no anti-seizure medication. He continues to receive PEG tube feedings. He takes a proton pump inhibitor for gastroesophageal reflux disease. Other complications include spasticity, otitis media, dental grinding, left esotropia, drooling, hospitalizations for respiratory infections, and constipation. He sleeps through the night without awakening. A physiatrist is asked to prepare a life care plan.

Questions for Consideration

- What credentials should be required to be considered an expert witness, including life care planning? What is the proper role for professional societies or licensing with regard to regulating expert witness testimonies?
- What type of medical evidence is acceptable within a court of law?
- What is the proper scope of life care planning and the benchmarks that should be used in estimating future costs (particularly given the wide fluctuations and notorious difficulties in uncovering health care costs in general)?
- What is the proper methodology for estimating life expectancy, given the limitations of actuarial tables and the evolving treatment and changes in health care technologies?

To help us address these questions, I have invited the following commentators:

1. Dr Richard T. Katz, professor of Clinical Neurology (PM&R), Washington University School of Medicine; Fellow, American Board of Physical Medicine and Rehabilitation; fellow, American Board of Independent Medical Examiners; fellow, American Board of Electrodiagnostic Medicine; Section Editor, *AMA Guides,* sixth edition
2. Dr Richard Paul Bonfiglio, clinical assistant professor of Physical Medicine and Rehabilitation, Temple Medical School, Philadelphia, PA
3. Dr Richard D. Zorowitz, associate professor of Physical Medicine and Rehabilitation, The Johns Hopkins University School of Medicine, Baltimore, MD; chairman, Department of Physical Medicine and Rehabilitation, Johns Hopkins Bayview Medical Center, Baltimore, MD; chairman, Clinical Practice Guidelines Committee, American Academy of Physical Medicine and Rehabilitation

As always, we welcome your comments or suggestions for future columns!

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Commentary from Richard T. Katz, MD

Life Care Planning and the Physiatrist

The legal system frequently depends on medical expertise for evidence. Life care planning is a type of medical witness testimony that recently has begun to be provided by physiatrists who may enter the field of forensic medicine. Most life care plans are prepared by professionals other than physicians. In my experience in life care planning over dozens of years, nurses and vocational rehabilitation professionals make up the