

Taming the Expert: Standards and Implications of Radiologist Expert Witness Testimony

Julie A. Muroff, JD^a, Leonard Berlin, MD^b

In light of the proliferation and pitfalls of expert witness testimony provided by radiologists, this article offers an overview of the standards for such testimony, as enforced by the courts, the relevant professional societies, and peer-review processes. The article also offers practical suggestions that encourage radiologist expert witnesses to be both ethical and effective in spite of the often inconsistent ambitions, expectations, and obligations of the expert's role.

Key Words: Expert witness, radiologist, regulation

J Am Coll Radiol 2005;2:418-423. Copyright © 2005 American College of Radiology

The provision of medical expert witness testimony has evolved from a professional obligation to a veritable industry. Empirical evidence, ranging from profitable medico-legal consulting firms to the unsolicited deliveries of films to radiology practices, indicates that the potential for professional and financial profit is eroding physicians' traditional reluctance to participate voluntarily in legal proceedings involving their peers. Although providing expert testimony has become a regular aspect of many radiologists' practices, the gravity of this responsibility must not be trivialized.

The testimony that is provided by an expert witness not only affects the parties involved in a medical malpractice matter but also may result in significant consequences, negative as well as positive, on the expert's own professional welfare. As the legal, ethical, and professional stakes have mounted, the regulation of medical expert witness testimony by the courts, medical societies, and peer-review processes has become increasingly prevalent. In turn, this regulation has generated a critical need for physician experts to reconcile their personal and pecuniary interests with the professional, legal, and ethical implications of their testimony for themselves as well as for the parties involved in medical malpractice matters.

Accordingly, this article provides an overview of the standards for expert witness testimony that are enforced by the courts; the relevant professional societies, includ-

ing the ACR and the American Medical Association (AMA); and peer-review processes. The article also offers practical suggestions that encourage radiologist expert witnesses to be both ethical and effective in light of these often inconsistent ambitions, expectations, and obligations.

THEORETICAL UNDERPINNINGS

The Courts

The judicial system has established criteria for the admissibility of scientific evidence and other "specialized knowledge," such as medical expert testimony. The courts, in conjunction with medical authorities, also have developed a standard of care to which a defendant physician in a medical malpractice action should be held. Radiologist expert witnesses must be cognizant of both of these standards to ensure that their testimony conforms to the appropriate legal parameters.

Standards of Admissibility. The current national standard for the admissibility of scientific evidence was articulated by the U.S. Supreme Court in 1993 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [1]. The holding in *Daubert* requires judges to determine the admissibility of expert testimony by assessing its reliability and validity. Although courts' interpretations of the terms *reliability* and *validity* have varied, the *Daubert* standard presumes that "there must be a logically relevant connection between the expert's reasoning and the facts at issue in a case, the reasoning must be sound, and the scientific methodology must be reliable" [2]. The holding in

^aSidley Austin Brown & Wood, LLP, Washington, District of Columbia.

^bRush Medical College, Department of Radiology, Chicago, Illinois.

Corresponding author and reprints: Julie A. Muroff, JD, Sidley Austin Brown & Wood, LLP, 1501 K Street, NW, Washington, DC 20005; e-mail: muroffj@hotmail.com.

Daubert was influenced by the Federal Rules of Evidence, as codified in 1975. Specifically, rule 702 provides that

if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The *Daubert* opinion displaced the paradigm of *Frye v. United States* [3], a case from 1923 that concluded that expert testimony is admissible only if it is generally accepted by the relevant scientific community. *Daubert* indicated that general acceptance within the relevant scientific community should not be dispositive in the determination of admissibility. Nonetheless, general acceptance remains an important consideration, because it is indicative of the reliability and validity of the evidence. This factor is particularly relevant for testimony that involves “specialized knowledge,” such as medical expert testimony. In a report of the Special Task Force on Professional Liability and the Advisory Panel on Professional Liability, the AMA [4] noted that

courts should admit into evidence only expert medical testimony that is shown through a proper legal foundation to be based on (a) widely accepted theories of medical science or (b) theories that are supported by a respectable minority of experts in the field at issue.

Daubert’s emphasis on scientific validity seems to impose an objective filter on admissible evidence. However, the provision of expert testimony is a fundamentally subjective process that is vulnerable to personal biases. The information that an expert conveys is inextricably connected to, and influenced by, the beliefs, opinions, and ulterior motives of the expert. This axiom has led to the criticism that experts “too often . . . are merely adding a veneer to a foregone, self-interested conclusion. . . . The result is a growing gap between scientific reality and what passes for it in the courtroom” [5].

Moreover, both the plaintiff and the defendant will have retained experts to promote their perspectives in a medical malpractice matter. Therefore, medical issues often become ammunition for a “battle of the experts,” in which the experts’ education, experiences, personalities, or appearances may be more compelling than the substance, reliability, or validity of the testimony that is offered. This “battle” is inevitable until viable alternatives to the current expert paradigm are implemented. In the meantime, restrictions imposed by courts, professional societies, and peer-review processes ensure a fairer fight.

Standard of Care. In contrast to the relatively recent development of the judicial standard of scientific admissibility, the concept of a “standard of care” evolved from

medical malpractice actions dating back to the 18th century [6]. The basic formulation of that era has not substantively changed to date: “to find a physician liable, the plaintiff had to prove that the lack of reasonable and ordinary care led to a bad result” [7]. Although the feasibility of a national standard has been questioned, given the potential for significant differences in resources and technological advancements between urban and rural communities, the fundamental comparison between the defendant physician and his or her “reasonable and ordinary” peer has remained the focal point of medical malpractice actions.

Thus, a defendant physician is not expected to possess the advanced knowledge or skills of a medical expert. Instead, the expert must determine whether the defendant exhibited the behavior of the “average” physician under the circumstances at issue. This principle is important because it forces the medical expert as well as the judge or jury to acknowledge the potential fallibility of the defendant physician. As the Wisconsin Supreme Court [8] opined in 1974,

A physician is not an insurer of the results of his diagnosis or procedures. He is obliged to conform to the accepted standard of reasonable care, but he is not liable for failing to exercise an extraordinary degree of care. . . . The question . . . is not whether a physician has made a mistake; rather, the question is whether he was negligent. Unless the untoward result was caused by a failure to conform to the accepted standard of care, he is not liable for negligence.

Thus, a radiologist expert is enlisted as a spokesperson for the ordinary and average radiologist.

It should be noted that this article presumes that a medical expert witness is a radiologist in cases involving radiologic issues. However, not all states require an expert witness to share the same specialty as that of the defendant physician [9]. As discussed below under “Professional Societies,” professional societies often impose more rigorous requirements on the qualifications of expert witnesses than are legally mandated.

Professional Societies

The AMA. The AMA’s [10,11] policy on expert witness testimony promotes the impartiality of expert witnesses, the discipline of physician experts who provide false testimony, and the prohibition of contingent fee arrangements for medical experts. Significantly, the AMA also advocates for the implementation of minimum statutory requirements for the qualifications of an expert witness. According to the AMA, these requirements should involve comparable education, training, and occupational experience, including an active medical practice or teaching experience within the previous 5 years in the same field as the defendant physician. Moreover, the AMA [12] specifically provides that the provision of expert witness testimony will be considered the practice of med-

icine and should be subject to peer review. The above policies are incorporated in the AMA's [13] model state reform legislation for expert witness regulation and for expert testimony and disciplinary actions.

Recently, the AMA House of Delegates [14] adopted a resolution that would require AMA members who provide expert witness testimony to sign an affirmation of their intention to follow the AMA's principles regarding expert witness testimony. This type of requirement already has been implemented by the American College of Obstetricians and Gynecologists, the American Academy of Orthopaedic Surgeons, the American Society of Plastic Surgeons, and the American College of Surgeons. However, a recent survey indicated that 80% of the 36 medical specialty organizations that were polled had not articulated definitive disciplinary policies or procedures to address the provision of false or improper expert witness testimony [15]. Therefore, the AMA's resolution may help compensate for the relative lack of progress by medical specialty organizations in this regard.

The American Association of Neurological Surgeons (AANS). The AANS has taken the lead among medical specialty organizations in monitoring expert witness testimony that is offered by its members and in instituting disciplinary action when such testimony is deemed inaccurate or otherwise inappropriate. Over the past 16 years, the AANS has reviewed more than 50 allegations of possible misconduct regarding expert witness testimony given by its members and has taken disciplinary action resulting in suspension or expulsion in more than 10 cases [16,17]. One Michigan neurosurgeon who was suspended from the AANS under these circumstances sued the AANS for allegedly violating public policy by discouraging physicians from testifying for plaintiffs in medical malpractice cases.

The lawsuit eventually reached a federal appellate court, which sustained the neurosurgeon's suspension from the AANS [18]. The court's opinion was authored by Chief Judge Richard Posner, who emphasized the need to have reliable medical expert testimony on which judges can depend:

It is no answer that judges can be trusted to keep out [false or misleading medical] testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field such as neuro-surgery. When a member of a prestigious professional association makes representations not on their face absurd, such as that a majority of neurosurgeons believe that a particular type of mishap is invariably the result of surgical negligence, the judge may have no basis for questioning the belief, even if the defendant's expert testifies to the contrary.

Judge Posner proceeded to praise the AANS for disciplining the neurosurgeon for his improper testimony:

By becoming a member of the prestigious Association of Neurological Surgeons . . . [the neurosurgeon] boosted his credibility as an expert witness. The Association had an interest—the community at large had an interest—in [the neurosurgeon's] not being able to use his membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves.

As Russell M. Pelton [19], general counsel for the AANS, has recognized, "The Austin decision stands today as the definitive Court opinion supporting the right, and arguably the duty, of professional associations to discipline their members who engage in unprofessional conduct while testifying as expert witnesses in litigation."

The ACR. Long before the *Austin* decision, the ACR [20] released a policy that established recommended qualifications and guidelines for radiologist expert witnesses. This policy evolved into the ACR Standard on the Expert Witness in Radiology, which was passed by the ACR Council at its 2002 annual meeting and became effective January 1, 2003 [21, pp. 7-9]. At its annual meeting in 2003, the ACR Council voted to change the title ACR Standards to ACR Practice Guidelines. The designation of these principals as "guidelines" is significant, because there is a risk that juries may confuse the alternative term *standards* with the legal standard of care that was discussed above. Courts continue to grapple with the weight to which ACR promulgations should be given in a medical malpractice matter, generally agreeing that they are worthy of notice but should not be dispositive [22-24].

The Expert Witness Practice Guidelines acknowledge the obligation of radiologists to serve as medical expert witnesses in legal proceedings. Significantly, the guidelines also recognize the need to regulate expert testimony by stating that "the public interest requires readily available, objective, and unbiased medical expert testimony" [25, pp. 9-11]. Accordingly, the guidelines impose stringent qualifications on the radiologist expert witness. For example, the ACR recommends that experts have active radiology practices, certification in radiology, familiarity with the clinical practice of the subject matter of the case, and current knowledge of the relevant standard of care. The guidelines further state that an expert witness "should be prepared to explain the basis of his or her opinion and should take care that his or her proffered testimony will be scientifically valid and applicable to the fact at issue . . . and could withstand a peer review." Furthermore, the guidelines note that the compensation of an expert witness should reflect the time and effort invested and should not be contingent on a favorable outcome of the case.

In addition to the ACR Practice Guidelines, the college also includes in its bylaws a code of ethics [26]. The code urges radiologist expert witnesses "to exercise extreme caution to ensure that the testimony provided is

non-partisan, scientifically correct, and clinically accurate.” Violation of the code may result in disciplinary action by the ACR, ranging from censure to suspension or expulsion from the ACR.

American College of Radiology bylaws delegate to the ACR Ethics Committee the responsibility of investigating allegations of code violations by ACR members, as well as instituting disciplinary measures when appropriate. Over the past 2 years, the committee has devoted considerable time and effort to investigating allegations of improper expert witness testimony. This heightened attention to improper expert witness testimony was prompted by a combination of related factors, including an increase in the number of complaints against ACR members for allegedly inappropriate expert witness testimony as well as the recent *Austin* decision discussed above.

The committee follows a standard procedure for processing and investigating complaints against ACR members. On receiving a complaint of unethical conduct, the committee requests an objective opinion as to the validity of the claim by one or more independent consulting radiologists who are familiar with the subject matter of the complaint. The committee then evaluates all available materials, including the report of the independent consultant(s), to decide whether an investigation should be pursued. If further investigation is warranted, a hearing date is set. The subject of the complaint is invited to attend the hearing and may be accompanied by legal counsel if he or she desires. At the conclusion of the hearing, the committee deliberates over all of the submitted materials and decides whether there has been a violation of the code.

If the committee determines that a violation of the code has occurred, it may levy disciplinary action ranging from censure to suspension or expulsion from the ACR. Once the committee has made its decision, the member is notified and is given a 60-day period during which he or she can file an appeal. Appeals are heard by the ACR’s Judiciary Committee, which is composed of past presidents of the ACR. It should be noted that no member of the Ethics Committee can be a member of the Judiciary Committee. If censure becomes final, a letter of censure will remain in the member’s ACR membership file, but the information will not be made public. However, if suspension or expulsion becomes final, the name of the member will be made public, and the action will be reported to the National Practitioner Data Bank.

As of the date that this article was written, the committee has held hearings concerning allegations of inappropriate expert witness testimony by four different ACR members. In two of the cases, the committee determined that no violation of the code had occurred.

The other two cases involved censure and expulsion, respectively. The committee is in the process of reviewing additional complaints against ACR members who may have violated the code by providing improper expert testimony. The ACR’s attention to this issue, and the severity of the potential repercussions, reinforce the significance of members’ compliance with all applicable regulations pertaining to the provision of expert witness testimony.

Peer Review

The ACR Ethics Committee represents one facet of the peer review of medical expert witness testimony on a national level. However, there is a need for more active involvement at the local level by state medical licensing boards. Although approximately two-thirds of state medical licensing boards have the authority to discipline a medical expert for providing fraudulent testimony, few of the boards have initiated such proceedings [27,28].

One challenge to local peer-review efforts is the common practice of retaining out-of-state medical expert witnesses. The AMA has recognized that visiting experts have been relatively successful in circumventing local peer-review processes. To ameliorate this situation, the AMA [29] has suggested that state medical licensing boards grant temporary licenses to visiting medical experts at a nominal charge. The AMA also has encouraged each state medical society to assist its state licensing board in the peer review of expert witnesses by implementing an expert witness committee program. The program that has been established in Florida has been recognized as a model for states’ efforts in this regard, because disciplinary action taken by the Florida Medical Association against one of its members is reported directly to the Florida Board of Medicine for the consideration of further action regarding the subject’s license.

It should be noted that the peer-review process often operates as a double-edged sword. The confidential nature of the proceedings may facilitate a more candid dialogue regarding the controverted issues [30]. However, committee members inadvertently may hold their peers to unnecessarily high standards, because there is a tendency to evaluate a colleague’s actions with a level of knowledge that exceeds what is required by law [31].

PRACTICAL APPLICATION

Given the complex legal, professional, and ethical issues that are involved in the provision of medical expert witness testimony, it is important to be mindful of several basic principles that encapsulate the regulations dis-

cussed above. Although not exhaustive, these general principles reinforce the need for radiologist expert witnesses to balance the professional and financial advantages of providing expert witness testimony with the disadvantages that may inure to the parties to a medical malpractice action and to the professional stature of the experts.

- Know the specialty: the AMA and the ACR have expressed a clear preference that an expert witness share the same specialty as the defendant physician. Although this qualification may not be a legal mandate in every state, it reinforces the credibility of the expert, both in the eyes of his or her peers and in the eyes of the opposing counsel, judge, and/or jury.
- Know the testimony: an expert must be prepared to substantiate the factual and medical bases of his or her testimony. Although it is neither necessary nor desirable to memorize testimony, the expert must convey confidence in the foundation of his or her opinion.
- Know the rules: a medical expert is not expected to have extensive legal knowledge. However, the expert will benefit from observing the legal parameters that were outlined above under "The Courts." A radiologist expert also should be cognizant of the expert witness testimony guidelines of the AMA and ACR, as discussed above under "Professional Societies."
- Know the roles: an expert should not permit either party's attorney to influence his or her medical judgment or opinion. However, familiarity with the roles of both parties' counsel will facilitate the expert's understanding of the expectations pertaining to the expert's own role. This familiarity typically is gained through meetings with the client's counsel, depositions with opposing counsel, and general experience as an expert witness.
- Know the audience: an expert must be conscious of how he or she is perceived by the judge, jury, counsel, and parties to the case. In the battle of the experts referenced above under "Standards of Admissibility," the expert's presentation of the testimony may be as important as the substance of the testimony.
- Know the limitations: an expert must understand that he or she is not an advocate. The expert is retained to hold the defendant physician to the standard of the ordinary and average physician under the circumstances at issue. In turn, the expert must be held to the relevant legal, professional, and ethical standards that shape his or her own role. With an appreciation of these standards and of their implications, a radiologist will be better equipped to perform the duties of expert witness with personal and professional integrity.

ACKNOWLEDGMENT

We gratefully acknowledge the generous contributions of Lawrence Muroff, MD, Robert Berlin, JD, Thomas Hoffman, JD, Leonard Nelson, JD, and Peter Lesburg, JD, MBA.

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