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The American College of Radiology will periodically define new practice guidelines and technical standards for radiologic practice to help advance the science of radiology and to improve the quality of service to patients throughout the United States. Existing practice guidelines and technical standards will be reviewed for revision or renewal, as appropriate, on their fifth anniversary or sooner, if indicated.

Each practice guideline and technical standard, representing a policy statement by the College, has undergone a thorough consensus process in which it has been subjected to extensive review, requiring the approval of the Commission on Quality and Safety as well as the ACR Board of Chancellors, the ACR Council Steering Committee, and the ACR Council. The practice guidelines and technical standards recognize that the safe and effective use of diagnostic and therapeutic radiology requires specific training, skills, and techniques, as described in each document. Reproduction or modification of the published practice guideline and technical standard by those entities not providing these services is not authorized.

Revised 2007 (Res. 40)\*

## **ACR PRACTICE GUIDELINE ON THE EXPERT WITNESS IN RADIOLOGY AND RADIATION ONCOLOGY**

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### **PREAMBLE**

These guidelines are an educational tool designed to assist practitioners in providing appropriate radiologic care for patients. They are not inflexible rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. For these reasons and those set forth below, the American College of Radiology cautions against the use of these guidelines in litigation in which the clinical decisions of a practitioner are called into question.

The ultimate judgment regarding the propriety of any specific procedure or course of action must be made by the physician or medical physicist in light of all the circumstances presented. Thus, an approach that differs from the guidelines, standing alone, does not necessarily imply that the approach was below the standard of care. To the contrary, a conscientious practitioner may responsibly adopt a course of action different from that set forth in the guidelines when, in the reasonable judgment of the practitioner, such course of action is indicated by the condition of the patient, limitations of available resources, or advances in knowledge or technology subsequent to publication of the guidelines. However, a practitioner who employs an approach substantially different from these guidelines is advised to document in the patient record information sufficient to explain the approach taken.

The practice of medicine involves not only the science, but also the art of dealing with the prevention, diagnosis, alleviation, and treatment of disease. The variety and complexity of human conditions make it impossible to always reach the most appropriate diagnosis or to predict with certainty a particular response to treatment.

Therefore, it should be recognized that adherence to these guidelines will not assure an accurate diagnosis or a successful outcome. All that should be expected is that the practitioner will follow a reasonable course of action based on current knowledge, available resources, and the needs of the patient to deliver effective and safe medical care. The sole purpose of these guidelines is to assist practitioners in achieving this objective.

### **I. INTRODUCTION**

For the purpose of this guideline, radiology is defined as diagnostic radiology, interventional radiology, nuclear medicine, radiation oncology, and medical physics.

Radiologists and radiation oncologists are frequently called upon to serve as medical expert witnesses in a variety of legal proceedings and have an obligation to do so in the appropriate circumstances. This obligation includes not only the review of documents, radiologic images, records of treatments, and/or procedures but also the willingness to give sworn testimony by deposition or in court. The public interest requires readily available, objective, and unbiased medical expert testimony. The expert witness should be qualified for the role and follow clear and consistent guidelines. The American College of Radiology (ACR) recognizes the decisive role of the judge in determining admissibility of expert testimony as well as the difficulty in setting the balance between variations of viewpoints and their reasonableness, which fairness requires. This document attempts to assist both the expert witness and the court in achieving that balance (see footnote 1).

## II. PURPOSE

Medical expert witness testimony is indicated in any legal proceeding in which the court needs an objective physician who is not a party to the case, has no personal interest in the outcome of the case, and has expertise in the matter at hand to help explain the issues.

## III. QUALIFICATIONS AND RESPONSIBILITIES OF THE EXPERT WITNESS

The expert witness should be a physician with the following qualifications:

Licensure and active engagement at the time of the incident under review and for a reasonable period of time in the practice of the radiologic specialty or subspecialty relating to the testimony.

Certification in Radiology or Diagnostic Radiology, Therapeutic Radiology, Nuclear Radiology, or Radiation Oncology by the American Board of Radiology, the American Osteopathic Board of Radiology, the Royal College of Physicians and Surgeons of Canada, or Le College des Medecins du Quebec (see footnote 2).

Education, training, and practical experience, as well as current knowledge and skill, concerning the subject matter of the case, including in a medical liability case the relevant standard of care (see footnote 3).

Should the physician defendant be required by federal or state statute to fulfill certain educational or practice experience requirements, the expert witness should also meet these same requirements.

## IV. REQUISITES OF AN EXPERT WITNESS

A. The role of the expert witness is to help the fact finder analyze the issues in dispute necessary to decide the case. The expert witness is expected and should be able to render an opinion regarding the reasonableness of the conduct of the parties in the circumstances at hand. Depending on the legal issues being tried, this may include an opinion about a defendant doctor's training and experience; the relevant standard of care; the relevance of particular imaging findings, interventional procedures, or radiation therapy treatment to causation of damages; or the adequacy of the technical equipment used.

In a medical liability case, the expert opinion should be based on the information available at the time of the incident now under review. Information, facts, and results of imaging studies performed after the incident generally should not be used to formulate an opinion. It should be recognized that physicians with different levels of

expertise may still practice within the standard of care (see footnote 4).

## B. Recommended Guidelines of Conduct for the Radiologist and Radiation Oncologist Expert Witness

1. Although the nature of legal proceedings is adversarial, the expert witness must be as impartial and objective as possible.
2. In a medical liability case, the expert witness should be familiar with the relevant standard of care.
3. The expert witness should review the relevant materials sufficiently to assure an informed and fair opinion. Images and other relevant materials reviewed by the expert witness should be the original images and other relevant materials utilized by the interpreting or treating physician in the case. If original images or other relevant materials are not available, good-quality copies of the originals may be acceptable. In cases involving images originally interpreted using a PACS, the expert witness review should consider the original algorithm and format (PACS or hardcopy) utilized by the interpreting physician.
4. The 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 facts at issue, can be or has been tested, and has withstood or reasonably could withstand a peer review. The expert witness should be familiar with and be prepared to address the known or potential limitations regarding his or her opinion, as well as the degree to which that opinion is accepted in the medical community (see footnote 5).
5. Compensation of the expert witness should reflect the time and effort involved. Linking compensation for expert testimony to the outcome of the case (contingency fee) is unethical.

An individual holding an official capacity with the College who testifies in a legal proceeding must exercise great care to distinguish between his or her personal opinions and the policy positions of the College (see footnote 6).

The expert witness can be held accountable for statements made during a legal proceeding.

## ACKNOWLEDGEMENTS

This guideline was revised according to the process described in the ACR Practice Guidelines and Technical Standards book by the Guidelines and Standards Committees of the Commission on General, Small, and

Rural Practice and the Commission on Radiation Oncology with the assistance from the Medical Legal and Ethics Committees.

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Suggested Reading

1. Berlin L, Hoffman TR, Shields WF, Cox J. When does expert witness testimony constitute a violation of the ACR Code of Ethics? *JACR* 2006;3:252-258.
2. Berlin L. Bearing false witness. *AJR* 2003;180:1515-1521.
3. Berlin L. The miasmatic expert witness. *AJR* 2003;181:29-35.

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<sup>1</sup>These guidelines are not meant to apply to percipient witnesses such as a doctor who is a party to the case. However, in some jurisdictions (California, for example) a defendant doctor can be deposed both as a defendant and as an expert.

<sup>2</sup>The current state of the law on the subject of qualifications to be an expert does not require such a criterion and is probably well stated in this quotation from a standard legal text: “The law defines an expert witness as basically one who possesses special knowledge or skill on a subject that is beyond common experience. Thus, the medical profession may consider that only a radiologist is an ‘expert’ to interpret X-rays, but under the rules of evidence a physician who is a general practitioner is considered qualified as an expert witness on the subject of X-ray interpretation, because he has special knowledge and skill in the subject sufficiently beyond common experience to assist the trier of fact in reaching a determination of the disputed facts.” (Jefferson, Bernard S, *California Evidence Benchbook, 2nd ed*, California Judges Association, Regents of the University of California 1972, 1975, 1978, 1982, at p. 985.) The College suggests that the usually highly technical nature of testimony involving radiology requires a more refined criterion for admissibility of expert testimony in order to satisfy the mandate of Rule 702 of the Federal Rules of Evidence that the expert testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.”

<sup>3</sup>This reflects the wording of Rule 702, the specific federal rule regarding expert witness testimony, but tightens it up by adding the words “current” and “as well as.” Rule 702 says, “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.” The U.S. Supreme Court has stated clearly that Rule 702 is the basic rule and that “rigid” requirements for admissibility are “at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony.” (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 1993). The guidelines incorporated in this guideline take the position that as a practical matter, knowledge, skill, experience, training, and education are all required to one degree or another in order to qualify as an expert sufficient to truly “assist the trier of fact to understand the evidence” in a case involving radiology.

<sup>4</sup>For example, an Illinois Court has stated: (1) “If a doctor has given a plaintiff the benefit of his best judgment, assuming that judgment to be equal to that ordinarily used by reasonably well-qualified doctors in similar cases, he is not liable for negligence, even if that judgment is erroneous.” A Wisconsin Appellate Court has stated: (2) “Errors in perception by radiologists viewing X-rays occur in the absence of negligence.” Jury instructions given by judges in North Carolina courts include the following statement: “The law does not require of a healthcare provider absolute accuracy, either in his practice or in his judgment. It does not hold him to a standard of infallibility, nor does it require of him the utmost degree of skill and learning known only to a few in his profession.” (1) *Spike vs. Sellett* 430 NE2d 597 (III App 1981). (2) *Department of Regulations and Licensing vs. State of Wisconsin Medical Examining Board* 572 (App 1997).

<sup>5</sup>This incorporates the so-called “Daubert criteria” stated as dicta in *Daubert, op. cit note 2*. They are: 1) Is the reasoning or methodology underlying the testimony scientifically valid and applicable to the facts at issue? 2) Is the theory or technique scientific knowledge that can be (and has been) tested? 3) Has the theory or technique been subjected to peer review and publication? 4) What is the known or potential error rate of the particular scientific technique? 5) What is the degree of acceptance of the proffered theory or technique in the relevant scientific community? Criterion #5 is the so-called “Frye Rule,” which had been the basic rule for admissibility of expert testimony in both federal and state courts since 1923 (*Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 1014, 1923). *Daubert* overrules this rule for federal courts and suggests that the Frye Rule is only one of several factors to be considered, rather than the only factor. State courts may follow *Daubert* but are not obligated to do so. The College views the *Daubert* criteria as reasonable and incorporates them in this standard.

<sup>6</sup>The policies of the College are a matter of public record and, if relevant, may be appropriately cited in testimony. Also, the fact that an individual holds an official position with the College may be an appropriate part of his or her qualifications as an expert witness. However, the College, except pursuant to specific action by the Board of Chancellors, does not take a position on the merits of particular cases. A witness who holds an official capacity with the College must therefore be at pains

to make clear that his or her testimony expresses his or her personal views and must not state or imply in a written opinion or deposition or trial testimony that he or she is speaking as a representative of the College or is testifying to the views of the College on the merits of a particular case. (1987, 1997 - ACR Resolution 35-K).

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\*Guidelines and standards are published annually with an effective date of October 1 in the year in which amended, revised or approved by the ACR Council. For guidelines and standards published before 1999, the effective date was January 1 following the year in which the guideline or standard was amended, revised or approved by the ACR Council.

#### Development Chronology for this Guideline

2002 (Resolution 43)

Revised 2007 (Resolution 40)