

The Physician Expert in Legal Proceedings

This Policy Statement has been reviewed and approved by the Executive and Council of the Society of Obstetricians and Gynaecologists of Canada.

This document replaces document number 117, July 2002.

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Abstract

Physicians are frequently asked to give written or oral expert evidence on matters relating to the regulation of the medical profession and other proceedings integral to the functioning of the health care system. This policy statement is intended to guide those who choose to assist in the administration of justice and in the affairs of the profession in this way.

J Obstet Gynaecol Can 2006;28(10):913-915

INTRODUCTION

Physicians are frequently asked to assist in the administration of justice, the regulation of the medical profession, and other proceedings integral to the functioning of the health care system by giving written or oral expert evidence on matters within their specific expertise. The SOGC recognizes that its members have taken time from clinical, administrative, and teaching duties to serve the public interest in this fashion. Although accepting the request to provide an expert opinion is a matter for each member to

Key Words: Medico-legal, expert opinion, expert witness, liability

consider, the SOGC endorses the CMA's statement that its members should "recognize the profession's responsibility to society in matters relating to public health, health education, environmental protection, legislation affecting the health or well-being of the community and the need for testimony at judicial proceedings."¹

The SOGC encourages its members to consider accepting requests for an expert opinion when members are competent to give the requested opinion and when members are confident they have the skill, experience, training, and time necessary to make a thorough and impartial assessment. In light of the increasing frequency of requests made to members to give expert opinions, the SOGC has prepared this policy statement to guide those who choose to assist in the administration of justice and in the affairs of the profession in this way.

The expert evidence of physicians can be influential and, when accepted, can have serious and far-reaching effects not only on patients, other members of the public, physician colleagues, and other health professionals but also on the various systems and structures that support the delivery of health care.

SUMMARY STATEMENTS

Generally

1. A member assisting in a judicial, regulatory, or other legal proceeding, for either side, has a duty to the participants and to the profession to be honest, thorough, impartial, and objective.
2. Members should consciously try to identify any potential biases they may have prior to accepting a request to provide an expert opinion. Members with direct personal knowledge of events or participants or with strong views on matters directly relevant to the request should consider whether their ability to be impartial and objective might possibly be impaired. The role of the expert is to clarify the medical circumstances of a given case in the context of best practice standards. Members should

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- strive to avoid becoming advocates for one side or another in an adversarial proceeding.
3. When asked to give an expert opinion, members should take steps to determine whether they have had any previous involvement in the matter concerned, whether as a treating physician or as an expert asked to act for another party. Previous involvement as a treating physician should be disclosed promptly to the party approaching the physician; when a member has previously been approached to act as an expert in the same case, the second invitation should be declined without explanation.
 4. Physicians may be asked to give expert evidence on standard of care, causation, prognosis/outcome, or some combination of these. Members should ensure that they have a clear understanding of the nature of the question(s) they are being asked to address. Members should ensure that they request and receive all the information, pertinent records, and other documents relevant to the matter upon which they are asked to render an opinion, and they must conduct a thorough and careful review of the relevant material prior to the preparation of a report.
 5. Members should avoid being pressured by other participants in legal proceedings to adopt opinions they do not honestly hold, to abandon honestly held opinions, or otherwise to give their opinions or evidence in a misleading or biased fashion.
 6. Members should recognize that in adversarial proceedings their opinions may be tested under rigorous cross-examination by other participants or their legal counsel. Members should strive to retain their objectivity and impartiality and to give their evidence fairly and candidly, notwithstanding what they may perceive as aggressive and unwarranted attacks on their opinions and qualifications.
 7. Information provided to an expert for the purpose of providing an opinion in a legal proceeding should always be treated as strictly confidential. Reports, draft reports, and oral discussions with counsel should also be considered confidential and should not be disclosed to other persons without clear instructions from the party retaining and instructing the expert.
 8. When members are asked to provide a written report, it is recommended that they follow the format previously set out in the SOGC Committee Opinion, "Providing Opinion in Medico-Legal Cases."² At a minimum, a written report should include:
 - a summary of the author's qualifications;
 - a restatement of the matters upon which the author was asked to express an opinion;
 - a description of all the material available to and reviewed by the author;
 - a summary of the relevant facts;
 - a clear summary of the author's opinions; and
 - a discussion of the reasons underlying the opinions.
 9. The SOGC understands that providing expert opinions can be time-consuming and recognizes that its members may appropriately request reasonable remuneration for providing those services. However, members should not enter into arrangements that could be perceived as impairing their objectivity and impartiality. Payment for acting as an expert should not be contingent on the outcome of the proceeding, and an expert should not demand or accept success fees or bonuses if the party retaining the member is successful.
 10. Instances of members allegedly having breached the principles and guidelines set out in this Policy Statement may be brought to the attention of the SOGC.

Opinions on the Standard of Care

11. Members are frequently asked, in the context of malpractice claims, regulatory proceedings, and hospital matters, to evaluate the medical care given by another physician or health professional. The standard of care against which a physician's conduct should be measured has been expressed in Canadian law as follows:

"Every medical practitioner must bring to this task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, under the same or similar circumstances."³
12. In order that members accurately and fairly express a well-founded opinion on standard of care, they should undertake to give an opinion reflecting the circumstances of what a peer would do in a similar circumstance. To be peers, the expert and the physician whose care is being considered must:
 - have a similar or equivalent knowledge, skill, experience, education, and training; and
 - have been engaged, at or around the time of the events in question, in similar practices.
13. Members should consider the clinical facts that were known or readily ascertainable at the time that the care in question was being provided in light of contemporaneous standards. Members should be aware of and avoid the potential bias produced by knowledge of outcomes or subsequent medical advances.
14. Opinions should refer to relevant evidence-based criteria, relevant clinical practice guidelines, standard textbooks, and other authorities widely accepted in practice. Where a member honestly and in good faith dissents in

his/her views from widely accepted authorities, the member should indicate this dissent and explain the reasons for it.

Opinions on Causation and Outcome/Prognosis

15. Members may be asked, in conjunction with a request to give a standard of care opinion or separately, to provide an opinion on causation or on outcome/prognosis. Causation opinions require the expert to give an opinion on the relationship between the timing and mechanism of an event, and any harm a person may have suffered. An outcome/prognosis opinion requires the expert to give an opinion on the degree of impairment a person may suffer as the result of a medical condition, her prospects of improvement, and any special needs she may have as the result of a particular medical condition. The expert providing an opinion about causation should use all of the best available information, including that which has become available after the case that is the subject of the opinion.
16. The member should have specialized knowledge of and training and experience in scientifically and clinically relevant areas.
17. When providing a causation or prognosis/outcome opinion, a member should reference epidemiological or other generally accepted scientific evidence relevant to the opinion being given. When a member honestly and in good faith dissents in his/her views from generally

accepted scientific evidence, the member should indicate this and explain the reason for it.

CONCLUSION

Providing an opinion in a medico-legal case or any kind of legal proceeding requires a high degree of objectivity, integrity, and truthfulness from a physician. An expert opinion should be based on all the available relevant information, records, and documents. In forming and expressing an opinion, physicians should refer to generally held opinions of the profession and accepted scientific standards or methods; when the physician deviates from these opinions and standards, he or she should so indicate and explain the reason for the deviation. Physicians should not compromise their own integrity or that of the profession by entering into arrangements where payment is in some way linked to a particular outcome, or by permitting themselves to be pressured to alter their honestly held opinions.

REFERENCES

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