

Understanding Rule 16 of the Academy's Code of Ethics

Background

In recent years, the Academy's Ethics Committee has seen an increase in the number of challenges and inquiries about potentially inappropriate expert testimony. Prior to 2004, absent of a Rule of Ethics addressing this matter, challenges were returned to the submitter noting that the Code of Ethics is silent on the ethics of expert testimony and that the Ethics Committee has no authority to investigate such cases.

In light of the 7th U.S. Circuit Court of Appeals decision in *Donald C. Austin, MD v. American Assn. of Neurological Surgeons*, the Ethics Committee determined there was sufficient legal precedent for a Rule of Ethics defining appropriate expert testimony. The Academy Board of Trustees agreed, and in June 2003 approved a proposed Rule. The Rule was approved by the membership in December 2003, and went into effect January 1, 2004. The Rule is as follows:

Rule of Ethics 16

Expert Testimony. Expert testimony should be provided in an objective manner using medical knowledge to form expert medical opinions. Nonmedical factors (such as solicitation of business from attorneys, competition with other physicians, and personal bias unrelated to professional expertise) should not bias testimony. It is unethical for a physician to accept compensation that is contingent upon the outcome of litigation. False, deceptive or misleading expert testimony is unethical.

What is Expert Testimony?

The courts generally depend on experts to establish the standards of care in questions of medical malpractice, and help identify conformance with or breaches in those standards and whether or not a breach caused injury. Expert testimony therefore plays an essential role in establishing medical negligence. In addition, an expert may be needed to testify about the current clinical status of a patient as part of the process of determining damages.

In civil litigation, the expert's testimony is much different from that of other witnesses. In proceedings involving allegations of medical negligence, "witnesses of fact" (those testifying because they have personal knowledge of the incident or people involved in the lawsuit) are restricted to testimony on the facts of the case. The expert witness is given greater latitude to compare the applicable standards of care with the facts of the case, and offer opinions as to whether the evidence indicates a deviation from or conformance with the standard of care. The medical expert also provides opinions as to whether the breach in standard of care was, to a reasonable degree of medical certainty, the most likely cause of the patient's injury. Without the expert's explanation of the range of acceptable treatment modalities within the standard of care and interpretation of medical facts, juries would not have the technical expertise needed to distinguish malpractice (an adverse event caused by negligent care or "bad care") from mal-occurrence (an adverse event or "bad outcome").

Standards of admissibility of expert testimony vary with state and federal rules of procedure and evidence. Although most state laws conform to the federal rules of procedure and evidence, some do not. The same testimony from a given expert witness therefore may be admissible in some state courts but not in federal court, and vice-versa.

Ideally, expert witnesses should be unbiased conveyers of information: The pivotal factor in the medical tort process is the objectivity and integrity of the expert witness. The testimony should be reliable, objective, and accurate and should provide a truthful analysis of the standard of care.

Limitations of the Rule and the Submission Process

Academy members should be aware that only testimony/depositions provided on or after January 1, 2004 are actionable under Rule 16. Because the Academy does not have the resources to hold a hearing in every case, the Ethics Committee carefully screens each submission and may decline to adjudicate "close calls."

Inquiries or challenges on this topic or others relating to Rules of the Code of Ethics may be [submitted](#) to:

Ethics Committee
American Academy of Ophthalmology
655 Beach Street
San Francisco, CA, 94109

For the full text of the Code of Ethics, visit http://www.aao.org/about/ethics/code_ethics.cfm.

General questions may be posed to the Ethics Committee via ethics@aao.org.