



THE SCALES OF JUSTICE

Becoming an expert witness takes a balance of certification and ethics.

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Our society is filled with increased litigation. In some cases, the only way to be compensated is to litigate. In many cases, expert witnesses play a role in this litigation process.

Some of the issues relating to expert witness testimony are admissibility of evidence, qualifications, legal bases of opinions and ethical concerns. The trends are: 1) certification process of the expert, either by the courts or professional organizations; 2) expert witness testimony in medical malpractice cases; and 3) ethical concerns.

If you are not involved in the legal aspect of healthcare, you may not even be aware of these trends or concerns until you go to court and the defense or plaintiff's attorney seeks to disallow your testimony, or in the worst-case scenario, not allow you to testify at all.

Certification

There are more than 1,000 professions and occupations regulated nationwide and published in the National Clearinghouse of Licensure. A recent study looked at a list of each occupation to determine which state and certifying agency licenses that profession. The study found that fewer than 60 professions were regulated by all 50 states. Some are only regulated in one state and only a dozen professions including law, medicine and engineering are licensed and regulated in all 50 states. The study recommended that each state move toward more regulation, which would include certification of various fields and cover the expert witness.

In a 1990 Supreme Court case, *Peal (vs.) Attorney Registry*, the Supreme Court overturned a lower Court decision upholding disciplinary action brought against an attorney who held himself out as a specialist. The Supreme Court ruled that the attorney had the right to advertise as a specialist once certified in that specialty. The Court also noted that the states may consider screening certifying organizations and concluded that the public interest would be better served by regulation or certification in which one practices that specialty.

In Florida, attorneys are certified in areas such as tax law, family law and criminal law. For an attorney to be certified in Florida, he or she must engage a full time practice, be in good standing with the Florida Bar, have at least five years of practice and have substantial experience in the area in which he or she seeks certification. The attorney must engage in continued education in that area of expertise every three years. Most state's certification programs require re-certification every five years. It appears that the U.S. Supreme Court has put a stamp of approval on certification of professionals, including the expert witness.

This realization of certification may limit your testimony in court. Many states have adopted the Dubert Standard or rule, which is a Federal rule that pertains to an expert witness in court. Under rule 702, it assigns the trial judge the task of assuring that an expert's testimony is reliable and relevant to the case. Many attorneys in the court systems are successfully challenging expert witnesses and limiting the ability of many to testify (Rule 702, Dubert vs. Dow Pharmaceutical).

There are pros and cons to certification. From the pro standpoint, an expert, who is certified, increases his or her professionalism. Certification weeds out incompetent experts and protects litigants. The certification process should be fair, but should be more stringent than the minimal qualifications for your profession or a similar healthcare provider. He or she should be certified by in the appropriate board, and the certification should be open to all who wish to become certified in their field of expertise.

Expert Witnesses in Medical Malpractice Cases

The second area and legal trend for the expert is the area of medical malpractice. Medical malpractice cases involve complex issues and expert testimony is usually required to establish the probability that an injury resulted from someone's negligence. The plaintiff and defense attorneys are using the Dubert rule, and other means, to challenge expert witnesses based upon their experience, qualifications, education and training. If the physician is not certified by the appropriate board and is not trained or experienced in that specialty, he or she may not be allowed to testify at all. On the other hand, if the physician is trained, experienced and certified, he or she could not only testify from a Chiropractic standpoint but also in the specialty he or she is certified in.

There are many opportunities for Chiropractors to be certified outside of traditional diplomat or certifying programs. Accident investigation or reconstruction offers certifications in basic accident investigation, advanced accident investigation and accident reconstruction.

Expert witness testimony in medical malpractice cases (negligence) is not uncommon. Each state differs in how it looks at the expert witness in negligence cases. Presently there is little authority that addresses how victims of expert witness' negligence may seek redress.

Most authorities allow expert witnesses immunity from suit while some allow negligent actions to proceed against an expert witness. Most courts hold that expert mistakes do not constitute perjury and hold that testimony, reports, IMEs, etc., are privileged.

Many courts hold that expert witnesses are the court's witnesses and enjoy immunity against all post-trial damages or defamation. Any expert witness must be aware of the elements of malpractice and able to justify his or her testimony.

Many courts are allowing discovery and admission at trial of standards of policies that govern expert witnesses. In the certification of expert witnesses, there are standards of care that can be easily applied to the establishment of certified expert witnesses. Many

certifying boards have ethical codes concerning standards of care that could be used in the certification process. The expert witness carries a great weight by jurors and quality expert witness are essential to the litigation process.

Ethics

As expert witnesses, the source of your ethical responsibilities are certifying boards, professional organizations and work policies. Jurors increasingly need qualified, experienced, educated and certified ethical expert to sort through often complex information. Some courts are only using experts certified through the courts or certifying boards to testify on scientific and technical matters. Many states now allow expert witness testimony only if the court determines the information will assist the facts of the case.

Expert witnesses are like other witnesses, with one exception: They are permitted to give an opinion and that opinion is only deemed reliable in the witness' area of expertise.

Conclusion

Legal medical trends in the Courts are moving toward certification of expert witnesses in all areas of litigation and more expert witnesses are being challenged. Expert witnesses, when qualified, promise to be of great benefit when used properly. If used improperly, it threatens, not only the individual case, but also the entire the judicial system. Experts owe their clients certain duties relative to the testimony of their professional knowledge and skill.

Presently the law does little to regulate the quality of the expert witness testimony. The only safeguard against improper expert testimony is the opportunity for opposing counsel to cross-examine. Ultimately, this is not an adequate safeguard.

Solutions offered to the courts and expert witnesses include capping expert witness fees, prescreening experts, using only court-appointed expert witnesses and adhering to strict codes governing the experts. To date, these remedies have not been applied across the board. Therefore, medical malpractice causes of action against experts are more likely.

Given the weight of the expert opinion, actions of liability against experts may be justified. These actions help ensure that experts are held accountable while individuals are adequately protected.

About The Author

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