The Louisiana Physician as Witness

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As part of its continuing education mission to promote understanding among judges, lawyers and physicians, the Medical/Legal Interprofessional Committee of the Louisiana State Bar Association and the Louisiana State Medical Society has published a number of works that may be found in the journals of the Louisiana State Medical Society and the Louisiana State Bar Association and on their web pages. Topics covered include medical records, the medical review panel process and subpoenas.

This article is the culmination of the committee's effort to outline sources of conflicts and tensions produced within the justice system when physicians are called upon to testify. It is an attempt to provide the two professions with an overview of salient issues and rules that should govern physician testimony in Louisiana. Opinions or committee consensus are identified as such. This article also was published in the *Journal of the Louisiana State Medical Society* (Volume 162, Number 4, July/August 2010).

The Duty to Testify

The Interprofessional Code for Physicians and Attorneys, State of Louisiana,[1] clearly establishes that a physician has an obligation to give testimony concerning his or her patient's medical condition. If subpoenaed, the physician must respond just like any other citizen.

The Interprofessional Code states that a function of physicians in the legal system is to enlighten the court as impartial witnesses. Physicians are providers of facts and opinions; they are not advocates. The Code emphasizes the sentiment, presumably echoed by all medical and legal professional organizations, that physician-witnesses should be fully familiar with the patient's case and records before their court appearances and should be prepared to respond to questions about relevant facts and opinions concerning the patient.

The physician should remember that the function of the attorney is to place before the court all proper evidence favorable to the client's case. Cross-examination may test the qualifications, competence, credibility and opinions of medical witnesses within the framework of proper legal procedure. There has seemingly been a rise in physicians becoming "advocates" by repeatedly testifying for only one side, and this practice has been criticized by a number of medical and legal organizations.

The Medical/Legal Interprofessional Committee offers the following guidelines for physicians who assume the role of an expert witness:

1. The physician must have experience and knowledge in the areas of clinical medicine that enable him or her to testify about the standards of care that apply to the time of the occurrence that is the subject of the legal action.

2. The specialty of the physician witness should be appropriate to the subject matter or the case.

3. The physician's review of the medical facts must be thorough, fair and impartial and must not exclude any relevant information. It must not be biased to create a view favoring either the plaintiff, the government or the defendant. The goal of a physician testifying in any judicial proceeding should be to provide testimony that is complete, objective and helpful to a just resolution of the proceedings.

4. The physician's testimony must reflect an evaluation of performance in light of generally accepted medical standards.

5. Physician expert witnesses should adopt and maintain an objective, unbiased position and demeanor, with the lofty goal of assisting the judge and/or jury to learn the truth.

6. It is unethical for physicians to accept compensation for expert testimony that is linked to the outcome of the case.

7. The physician expert witness should be aware that transcripts of deposition or courtroom testimony are public records. With these principles in mind, the committee recommends the following areas to the attention of both professions.

Compensation to Physicians for Testimony

Louisiana law and the Interprofessional Code recognize that physicians are entitled to compensation for time spent for patient examinations, report preparation, conferences, consultations, testing, expert testimony by deposition or in court, and other requested services. "Time spent" may include time for review of records, telephone conferences and travel. The Interprofessional Code explicitly mandates that physician fees should be reasonable in light of the time required, the complexity of the task, and the skill involved. The fee should not be punitive or designed to discourage use of the physician in the litigational process.

Attorneys and physicians should agree, in advance, preferably in writing, as to the fees for such services.

Louisiana law and the Interprofessional Committee recognize the distinction between a fact witness and an expert medical witness. One definition of a fact witness is found in the Interprofessional Code: "Any person, including a physician**,** who has had contact with a patient or has knowledge of the facts and circumstances surrounding the patient's condition and treatment." The Interprofessional Code defines an expert medical witness as: "Any person, including a physician, who, based on professional qualifications, is permitted by the court to express medical opinions as to diagnoses, prognosis, causation, rehabilitation, anticipated cost of future treatment, and other similar medical subjects."

Physician/Patient Privilege

Louisiana Code of Evidence article 510 is the statute that provides the health care provider/patient "privilege." Article 510A(1) defines the patient as a person who consults or is examined or is interviewed by another for the purpose of receiving advice, diagnosis or treatment in regard to that person's health. Article 510A(2) defines a health care provider as a person or entity defined as such in La. R.S. 13:3734(A)(1), and includes physicians.

The general rule of privilege in civil proceedings is that a patient has a privilege to refuse to disclose, and thus prevent another person from disclosing, a confidential communication made for the purpose of advice, diagnosis or treatment of his health condition between or among himself or his representative, his health care provider, or their representatives. La. C.E. art. 510(B)(1). There are exceptions to this privilege in non-criminal proceedings, and there are rules that must be followed in order for a party or an attorney or other representative to avail him or herself to the exception. The exceptions set forth below anticipate that these rules, *e.g.*, La. R.S. 13:3715.1, 40:1299.96, and Louisiana Code of Civil Procedure articles 1421, *et. seq.*, have been followed:

1. When the communication relates to the health condition of a patient who brings or asserts a personal injury claim in a judicial or workers' compensation proceeding.

2. When a communication relates to the health condition of a deceased patient in a wrongful death, survivorship or workers' compensation proceeding brought or asserted as a consequence of the death or injury of the deceased patient.

3. When the communication is relevant to an issue of the health condition in any legal proceeding in which the patient is a party and relies upon the condition as an element of the claim or defense.

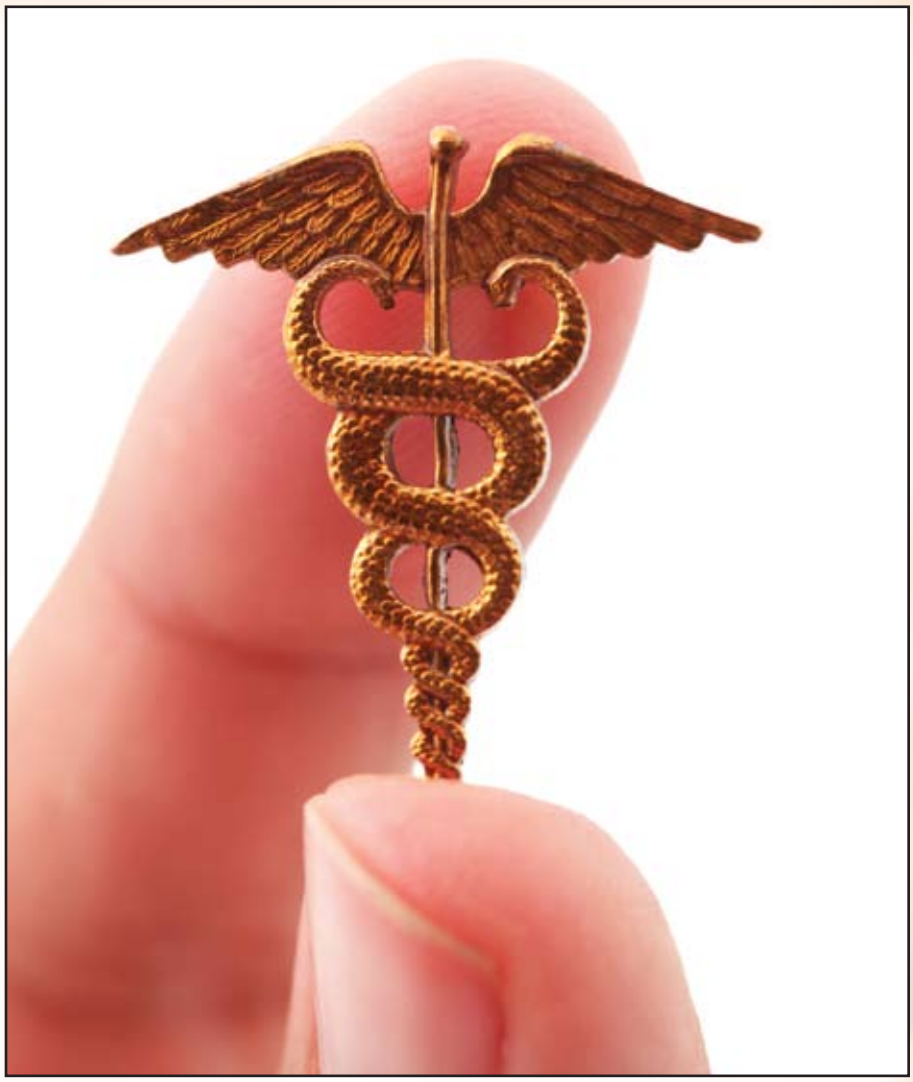
4. When the communication relates to the health condition of a patient when the patient is a party to a legal proceeding for custody or visitation of a child and the condition has a substantial bearing on the fitness of the person claiming custody or visitation rights.

5. When the communication made to the health care provider was intended to assist the patient or another person to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud.

6. When the communication is made in the course of an examination ordered by the court with respect to the health condition of a patient.

7. Communications made by patients who are subject to interdictions or commitment proceedings when such patient has failed or refused to submit to an examination by a health care provider appointed by the court.

8. When the communication is relevant in proceedings held by peer review committees and other disciplinary bodies to determine whether a particular health care provider has deviated from applicable professional standards.



9. When the communication is one regarding the blood alcohol level or other test for the presence of drugs of a patient and an action for damages or injury, death or loss has been brought against the patient.

10. When disclosure of the communication is necessary for the defense of the health care provider in a malpractice action brought by the patient.

11. When the communication is relevant to proceedings regarding issues of child abuse, elder abuse, or abuse of disabled or incompetent persons.

12. When the communication is relevant after the death of a patient concerning the capacity of the patient to enter into the contract which is the subject matter of the litigation.

13. When the communication is relevant in an action contesting any testament executed or claimed to have been executed by the patient now deceased.

The law also states that the exceptions to the privilege constitute a waiver of the privilege only after testimony at trial or to discovery of the privileged communication by any authorized discovery method.

The committee recognizes that there is a controversy concerning a portion of the Louisiana Code of Evidence involving medical malpractice litigation. La. C.E. 510(F) states:

1. There shall be no health care provider-patient privilege in medical malpractice claims as defined in R.S. 40:1299.41 *et seq.* as to information directly and specifically related to the factual issues pertaining to the liability of a health care provider who is a named party in a pending lawsuit or medical review panel proceeding.

2. In medical malpractice claims information about a patient's current treatment or physical condition may only be disclosed pursuant to testimony at trial pursuant to one of the discovery methods authorized by the Code of Civil Procedure….

The committee recognizes in recent years the tension between HIPAA[2] privacy rules, which protect all "individually identifiable health information" transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral, and counsel's use of La. C.E. 510(F). The basic principle of the privacy rules of HIPAA is to define and limit the circumstances in which an individual's protected health information may be used or disclosed by covered entities. HIPAA did little to change the method by which health care information is transmitted during normal court-ordered administrative proceedings.[3] The fact that HIPAA has no provision for unauthorized disclosure as described in La. C.E. 510(F) and that HIPAA preempts state law has led to troubling outcomes in medical negligence litigation.

While there appears no reported case in Louisiana on point, there have been at least two decisions of lower courts that have spoken on the matter. One decision upheld a broad interpretation of La. C.E. 510(F), and the other strictly limited it. Thus, the potential problem of ex parte communications (communication with a patient's physician who is not a defendant) by anyone who does not have the patient's authorization remains. It is the consensus of the Medical/Legal Interprofessional Committee that ex parte communications have a vast potential for abuse, and, because of HIPAA's preemption over state law, it is the committee's opinion that they are to be avoided.

Daubert-Foret

In 1993, the United States Supreme Court, followed by the Louisiana Supreme Court, stated that trial courts must tighten their gatekeeping function relative to admitting expert testimony into evidence. The focus is not on the outcome or conclusion of an expert, but rather on the methodology used by the expert to arrive at the outcome or conclusion.

In ensuring that an expert's testimony rests on reliable methodology and is relevant to the task at hand, courts will consider:

1. Whether or not the expert's methodology or technique has been tested;

2. Whether it has been subjected to peer review;

3. The known or potential error rate of the expert's methodology;

4. Whether the methodology is generally accepted in the field, although such general acceptance is not a prerequisite.[4]

These criteria are not necessarily exclusive. For example, whether an expert's methodology has been developed for the purposes of litigation also may be considered.

To carry out their gatekeeping functions, courts commonly conduct "*Daubert* hearings*"* prior to or during a trial. The hearing is only necessary when the methodology used by an expert is challenged. Such a hearing is usually conducted prior to trial and is always conducted out of the presence of the jury. A *Daubert* hearing also may be lengthy and highly contested.

Conclusion

Louisiana physicians have duties and responsibilities as health care professionals with special knowledge to assist the legal field in explaining treatment, diagnosis, prognosis and cause. As outlined in the Interprofessional Code and numerous legal and medical professional articles, medical witnesses should avail themselves of all relevant factual material before testifying, testify objectively and clearly on the issues before them, and not become "advocates." Physicians are entitled to be compensated for their testimony and time, and agreements should be clearly explained and in writing prior to giving testimony. Attorneys have a duty properly and timely to notify physicians that their time or testimony is required and make the necessary arrangements to facilitate the physician's appearance.

The committee recognizes that while the Interprofessional Code is not legally binding on physicians or attorneys, and does not create a standard of care, it is intended as a guideline by which physicians and attorneys may serve patient-clients and the public more effectively and with a minimum of conflict.

FOOTNOTES

1. Approved by the House of Delegates of both the Louisiana State Bar Association and the Louisiana State Medical Society in 1994.

2. Health Insurance Portability and Accountability Act 1996, PL104-191.

3. 45 C.F.R. §164.512(e).

4. Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993); State v. Foret, 628 So.2d 1116 (La. 1993). *See also*, Davis, "Admissibility of Expert Testimony after *Daubert* and *Foret*: A Wider Gate, A More Vigilant Gatekeeper," 54 La. L. Rev. 1307 (1993-94).

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