Professionalism in court

The neurologist as expert witness

William P. Cheshire, MD

John C. Hutchins, JD

Summary

Serving as an expert witness can be a rewarding experience. It affords the neurologist the opportunity to contribute expertise to the legal system's pursuit of justice and benefits the public interest. However, serving as an expert witness without understanding and incorporating relevant professional and specialty guidelines concerning expert witness testimony can place the neurologist at risk. The American Academy of Neurology has established standards governing expert witness testimony and a disciplinary process to respond to complaints of violation of its standards. Increased understanding of and adherence to these qualifications and guidelines, coupled with an awareness of how the legal system differs from clinical practice, will better equip neurologists serving as expert witnesses and minimize their professional risk when doing so.

Medical professionalism includes the ethical responsibility to participate in the legal system.¹ Neurologists, because of their special training and experience in evaluating disorders of the nervous system, are uniquely qualified to assist judges and juries in understanding complex and technical aspects of neuroscientific evidence relevant to legal cases. By serving the court, neurologists as expert witnesses serve the public interest.

John Woodcock,² in this issue of *Neurology® Clinical Practice*, argues that if the legal system is to have access to balanced expertise, more than a scarce number of neurologists must be available for consultation in legal matters. In response, we agree that greater participation would assist in minimizing bias in the pool of available expert witnesses. To that end, we would add that appropriate participation requires that neurologists have an understanding of their ethical duties to their colleagues and society, applicable codes of professional conduct, and how the legal process differs from the more familiar environment of clinical practice.

Neurologists who provide legal consultation should be aware that their testimony is subject to peer review. For many years, professional societies such as the American Academy of Neurology (AAN) have focused increasingly on the conduct and discipline of physician expert witnesses in order to maintain the integrity of expert testimony.³⁻⁶ The lessons learned from the

Mayo Clinic (WPC), Jacksonville, FL; and American Academy of Neurology (JCH), Minneapolis, MN.

Funding information and disclosures are provided at the end of the article. Full disclosure form information provided by the authors is available with the **full text of this article at Neurology.org/cp.**

Correspondence to: cheshire@mayo.edu

The role of the expert is to remain neutral and objective.

history of the AAN disciplinary process can be instructive to neurologists who bring their expertise into the legal arena.

Defining and accepting the role of expert witness

There are 4 principal ways in which neurologists participate in litigation.⁷ The neurologist may be called upon as a fact witness to testify about the care he or she has provided, as a nonwitness consultant providing nontestimonial advice to attorneys about the strength of neuroscientific evidence, as a party to an *amicus curiae* providing a written academic perspective to a case before the court, or as an expert witness.⁷ *Black's Law Dictionary* defines an expert witness as one “qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact issue.”⁸ The neurologist as expert witness may be asked to testify about prevailing standards of practice or the appropriateness of care or competence of another physician.

Typically a neurologist is asked to participate as an expert witness at the request of an attorney, with the request likely based on the neurologist's clinical practice or recognized expertise in a particular area of neurology. The role of the attorney is to ask the expert witness questions that establish the reliability of or explicate clinical neuroscientific evidence. Frequently the attorney's questions will lead to answers that the expert witness wishes to give, while others are intended to give the expert the opportunity to defuse or refute answers to questions asked by the opposing attorney. Other questions may be intended to establish the expertise or objectivity of the expert witness or, if in cross-examination by the opposing counsel, to discredit that expertise or objectivity.⁷

Law and medicine speak different languages

In the evaluation of evidence, there are important methodologic differences between the courtroom and the clinical setting that the neurologist serving as an expert witness should understand. This is because the law has a different purpose and pursues truth differently than in medicine. Whereas medicine seeks to heal the sick by applying scientific knowledge pertaining to health and disease, law aims to resolve disputes in accordance with standards and rules that derive from legislation or prior judicial decisions.⁷ Whereas medicine pursues truth through an empirical process of progressive hypothesis-testing done for the benefit of the patient, the legal system seeks truth through the advocating of 2 opposing teams that represent competing interests.⁷

These epistemic and procedural dissimilarities have considerable implications for how neurologists experience the courtroom. The customary ways in which expert clinicians gather and evaluate evidence in the clinical setting do not seamlessly translate into the courtroom and can potentially lead the neurologist astray of professional guidelines governing expert witness testimony.

First, although in clinical practice the neurologist is used to asking questions, the role of the neurologist expert when under oath is to answer rather than ask questions. The neurologist may, however, request clarification of a question that is unclear.

Second, whereas the neurologist in clinical practice strives to serve the patient's interests, the neurologist as expert witness should not advocate on behalf of the plaintiff or the defendant. The role of the expert is to remain neutral and objective.

Third, what counts as evidence may differ in the courtroom as compared to the clinic. Established rules of evidence determine what information is admissible in a court of law. In *Daubert*, the Supreme Court decided that, while admissible scientific evidence need not be known with certainty, it must rest on a valid foundation of scientific knowledge.⁹ The Court issued guidelines to assist judges in evaluating the admissibility of medical scientific evidence. Admissibility of scientific evidence, according to *Daubert*, should consider whether the evidence

is relevant to the case, has been derived by the scientific method, is supported by appropriate validation by generally accepted scientific methods, and has been subjected to peer review and publication.^{9,10}

Fourth, law and medicine differ in their approaches to making decisions in the face of uncertainty. Whereas in medicine diagnostic determinations are often based on statistical confidence intervals, in law the range and contexts of uncertainty can be broader. Courts must reach a decision regardless of how imperfect the available information is and without the option of following the course of a disease over time to establish how it develops.⁷ In general, the more consequential the verdict, the higher the burden of proof must be. In a civil trial, when monetary claims are at issue, a preponderance of the evidence or similar standard, such as greater than 50%, is often required to make a case, and the neurologist's testimony can be instrumental to assisting the court in evaluating the weight and relevance of medical evidence. In criminal cases or when life or liberty is at issue, a higher standard of certainty reaching proof beyond a reasonable doubt or a similar standard is required.¹⁰ The expert witness should be prepared to be asked whether his or her neurologic conclusions are certain beyond a reasonable doubt, or a similarly phrased high standard of proof. Answering that question requires careful judgment, as the reasonable doubt standard is not scientifically defined; neither is its precise definition a matter of firm consensus in law.^{11,12} Finally, where medical causation is at issue, testimony establishing correlation alone is insufficient, but the pathophysiologic process by which the conditions of the case led to a particular outcome must be substantiated.

Observations from the AAN's disciplinary process

One of the attributes of a profession is that its members determine and enforce its standards. In the interest of upholding medical professionalism, the AAN and other professional organizations have established policies governing their members who provide expert medical testimony.¹³ The AAN's Code of Professional Conduct formalizes the standards of professional behavior for AAN members in many areas of their practice, including a general standard regarding what constitutes ethical expert testimony.¹⁴ This standard is expanded upon, along with additional detailed requirements of an expert witness, in the AAN's Qualifications and Guidelines for the Physician Expert Witness (Expert Witness Guidelines).⁵ Any neurologist serving as an expert witness should review and understand the Expert Witness Guidelines in full. AAN members found to have violated the Expert Witness Guidelines will be subject to disciplinary action by the AAN.

The AAN has a formal process to examine and respond to allegations against members who may have improperly provided expert medical testimony or otherwise violated the professional expectations of the AAN.^{3,15,16} It should be noted that the authority of the AAN in these matters is categorically restricted to the discipline of AAN members. The need for this process has grown in response to the volume of medical malpractice litigation and increasing scrutiny of medical errors, which are among the factors that drive the demand for expert medical testimony.¹⁷

The AAN's Disciplinary Action Policy provides a multilevel, confidential review process consisting of multiple review groups comprising AAN member neurologists (table 1), which ensures impartiality and brings to bear relevant scope of expertise.¹⁵ Complaints and related documents initially come to the Grievance Committee and, following careful review, may be dismissed or forwarded to the Fair Hearing Panel Committee via a formal complaint. The policy ensures due process by allowing the respondent to issue a response in writing and, if necessary, to participate in a hearing with members of the panel. Weighing this additional evidence, the panel then may decide to dismiss the complaint or make its recommendation for disciplinary action to the Executive Committee of the AAN Board of Directors.

Between 2004 and 2013, the AAN Grievance Committee reviewed 77 allegations, 33 (43%) of which alleged improper expert witness testimony (table 2). The allegations were directed against individuals at all career levels, from residents to senior neurologists, and in both private practice and academic settings. Disciplinary action, including reprimand (either through a

Table 1 American Academy of Neurology disciplinary process

Five-step process to resolve complaints Step	Possible outcomes
1. Complaint and related documents are submitted to the Grievance Committee for review.	Dismiss or step 2
2. Grievance Committee recommends review of the complaint by the Fair Hearing Panel Committee. The respondent is asked to reply in writing. The panel reviews the complaint and the respondent's written reply.	Dismiss or step 3
3. Respondent is invited to participate in a hearing with the members of the panel.	Dismiss or recommend disciplinary action
4. Respondent may appeal recommendations of disciplinary action to the Executive Committee of the AAN Board of Directors.	Appeals hearing or recommended disciplinary action sent for final approval if no appeal
5. Panel's recommendation for disciplinary action, whether appealed or not, is reviewed by the Executive Committee. Decisions of the Executive Committee are final.	Dismiss, approve alternative disciplinary action, or approve recommended disciplinary action as submitted by panel
First published in Hutchins JC, Sagsveen MG, Larriviere D. Upholding professionalism. <i>Neurology</i> 2010;75:2198-2203.	

private letter or public notice in an AAN publication), suspension, or expulsion from AAN membership, was ultimately recommended for 7 (21%) of the 33 cases involving expert witness testimony, and of those, 3 members resigned from the AAN in lieu of disciplinary action.

The types of allegations submitted to the Grievance Committee are diverse, yet trends have emerged with regards to which aspects of the Expert Witness Guidelines are most often invoked by complainants and are the focus of the disciplinary review committees. Some of the most frequent categories of allegation have involved the following: (1) loss of objectivity by advocating for the plaintiff or defendant; (2) incomplete review of relevant records or images; (3) testifying outside one's area of expertise or level of experience; (4) advancing an inadequately supported theory of medical causality; and (5) making inaccurate or dogmatic statements about the prevailing standard of care.

Loss of objectivity

In keeping with the neurologist's ethical obligation to be truthful and objective, the Expert Witness Guidelines instruct the medical expert to "strive to provide testimony that is accurate, impartial and relevant with respect to disputed medical facts or issues ... and to avoid the role of advocate for the party on whose behalf the expert is providing testimony."⁵

The neurologist should guard the integrity of his or her testimony by disclosing potential conflicts of interest and, if necessary, by declining to participate in cases where clear conflicts of interest would preclude the ability of the expert to render an objective opinion. The expert should also be prepared to be scrutinized during cross-examination for any inconsistencies with his or her publications or track record of testimony on similar past cases. Compensation for medicolegal consultation or testimony should be reasonable in proportion to the time and effort spent and under no circumstances be tied to the outcome of a particular case.⁶ Although more experience in clinical practice usually enhances a neurologist's credibility, an extensive record of prior medicolegal service may not invariably strengthen jurors' perceptions of the neurologist expert's objectivity.¹⁸ The AAN advises neurologists who devote more than 20% of their professional time to medicolegal activities "to be prepared to demonstrate competence to provide an opinion that is objective, relevant, and not biased by financial considerations."⁵ AAN members failing to demonstrate such competence have been subject to AAN disciplinary review.

Table 2 Complaints per year received by the American Academy of Neurology and the types of allegations made

Year	Improper expert witness testimony	Substandard care or unprofessional conduct	Total number of complaints received
2004	3	0	3
2005	5	0	5
2006	7	5	12
2007	1	5	6
2008	3	13	16
2009	3	13	16
2010	4	3	7
2011	1	3	4
2012	4	2	6
2013	2	0	2

The neurologist who chooses to advertise or solicit employment for medicolegal services should ensure that the information presented be accurate and contain truthful representations about the neurologist's qualifications, experience, and background. Advertising constitutes a public representation, which the AAN Code of Professional Conduct (Section 7.1) stipulates should not be "untruthful, misleading, or deceptive."

Testifying outside one's expertise

Just as in clinical care the neurologist should practice within his or her area of training and experience, the neurologist as expert witness should limit testimony to his or her realm of expertise. The AAN recommends that the neurologist expert witness be fully trained in the specialty and a diplomate of a specialty board recognized by the American Board of Medical Specialties or the American Osteopathic Association or by a board with equivalent standards. Expert competence may be demonstrated by active clinical practice or teaching during 3 of the 5 years immediately preceding the testimony or relevant publications in medical or scientific journals.⁵ Based on prior AAN disciplinary review experience, neurologists not actively practicing or teaching should be diligent in ensuring they can demonstrate competence to testify as the Expert Witness Guidelines require. Additionally, many states have enacted laws defining the necessary qualifications of an expert witness.^{19,20}

Incomplete review of records

The expert "should carefully and thoroughly review relevant medical and scientific data before offering an opinion."⁵ Review of the relevant medical literature is advisable. The expert should not assume that medical information provided by attorneys is inclusive or accurate but should be diligent in requesting additional information, such as a complete and unedited set of medical records, and medical images, prior to agreeing to render an opinion.

The expert should also keep in mind that, as in medicine, privileged knowledge of sensitive legal matters entails responsibility for discretion. The neurologist expert should respect the privacy and preserve the confidentiality of all patients, health care professionals, and other persons identified in the course of reviewing medical records or depositions.⁶

Inadequately supported theory of causality

When advancing a theory of causality, the neurologist expert "should be prepared to testify as to mechanisms of injury and whether the opinion is based on personal clinical experience, published information, or prevailing expert opinion. Where the expert's opinion represents a minority view as to mechanisms of injury, the expert should volunteer this information."⁵

Experts stray from this guideline when their testimony consists of statements that, although individually plausible, lack evidentiary support and, when taken together, present a one-sided partial view of the case.

Inaccurate or dogmatic statements

The neurologist has the obligation to uphold the integrity of the medical profession for the sake of the quality and safety of care delivered to patients. Where the standard of care is at issue, the expert “should become familiar with the relevant standards of practice at the time and practice setting of the occurrence and be prepared to provide detailed, informed and accurate testimony as to whether a defendant has violated these standards ... and be prepared to state whether an opinion is based on personal clinical experience, published information, practice guidelines, or prevailing expert opinion.”⁵ The expert should maintain an attitude of humility in areas of clinical practice where the evidence is ambiguous or consensus does not exist and refrain from arguing that his or her own approach is the only correct way. Strongly held beliefs do not constitute incontrovertible scientific fact, which is why the Expert Witness Guidelines insist that reasonable and evidence-based alternative views be expressed where they exist.

DISCUSSION

Neurologists have a privileged opportunity to serve society by contributing special knowledge and expertise to legal proceedings. The legal environment by its nature is contentious and carries risk,¹⁰ including the potential for expert witness liability if professional boundaries are transgressed. The neurologist should, therefore, enter into expert witness testimony with a high degree of diligence and caution. The neurologist as expert witness should also be thoroughly familiar with and adhere to relevant professional and specialty guidelines concerning professional conduct and expert witness testimony in order to maintain the integrity of the profession.

REFERENCES

1. Bernat JL. *Ethical Issues in Neurology*, 3rd ed. Philadelphia: Lippincott Williams & Wilkins; 2008: 62–69.
2. Woodcock JH. Medical legal consultation in neurologic practice. *Neurol Clin Pract* 2014;4:329–334.
3. Sagsveen MG. American Academy of Neurology policy on expert medical testimony. *Neurology* 2004;63:1555–1556.
4. Beresford HR, Williams MA, Sagsveen MG. The neurologist as expert witness. *Neurology* 2006;66:1.
5. Williams MA, Mackin GA, Beresford HR, et al. American Academy of Neurology qualifications and guidelines for the physician expert witness. *Neurology* 2006;66:13–14.
6. Freeman JM, Nelson KB. Expert medical testimony: responsibilities of medical societies. *Neurology* 2004;63:1557–1558.
7. Jones OD, Wagner AD, Faigman DL, Raichle ME. Neuroscientists in court. *Nature* 2013;14:730–736.
8. Garner BA, ed. *Black’s Law Dictionary*, 9th ed. New York: Thomas West; 2009.
9. *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 US 579, 1993.
10. Johnston JC, Sartwelle TP. The expert witness in medical malpractice litigation: through the looking glass. *J Clin Neurol* 2013;28:484–501.
11. Diamond HA. Reasonable doubt: to define, or not to define. *Columbia L Rev* 1990;90:1716–1736.
12. Corwin M. Defining “proof beyond a reasonable doubt” for the criminal jury: the third circuit accepts an invitation to tolerate constitutionally inadequate phraseology. *Vill L Rev* 2001;46:829. Available at: <http://digitalcommons.law.villanova.edu/vir/vol46/iss4/4>. Accessed March 10, 2014.
13. Larriviere D, Williams MA, Sagsveen M. Regulating physician expert witness testimony. *JAMA* 2008; 299:1667.
14. American Academy of Neurology. Code of professional conduct. *Neurology* 1993;43:1257–1260. Current version as approved by the AAN BOD is available at: <https://www.aan.com/membership/professionalism-and-disciplinary-program/>. Accessed March 10, 2014.
15. American Academy of Neurology. Disciplinary action policy. 2011. Current version as approved by the AAN BOD is available at: <https://www.aan.com/membership/professionalism-and-disciplinary-program/>. Accessed March 10, 2014.
16. Hutchins JC, Sagsveen MG, Larriviere D. Upholding professionalism. *Neurology* 2010;75:2198–2203.
17. Studdert DM, Mello MM, Brennan TA. Medical malpractice. *New Engl J Med* 2004;350:283–292.

18. Kutnjak Ivkovic S, Hans VP. Jurors' evaluations of expert testimony: judging the messenger and the message (2003). Paper 385. Cornell Law Faculty Publications. Available at: <http://scholarship.law.cornell.edu/facpub/385>. Accessed March 10, 2014.
19. Gallegos A. Qualifications of medical expert witnesses come under fire. American Medical News, May 13, 2013. Available at: <http://www.amednews.com/article/20130513/profession/130519985/2/>. Accessed March 10, 14.
20. Guglielmo WJ. How expert witness rules may harm defendant doctors, and more. Medscape, June 10, 2013. Available at: <http://www.medscape.com/viewarticle/805271>. Accessed March 10, 2014.

STUDY FUNDING

No targeted funding reported.

DISCLOSURES

W. Cheshire has received honoraria for writing CME questions for courses and has received research support from NIH Autonomic Rare Diseases Clinical Research Consortium, and the Program in Professionalism & Ethics at Mayo Clinic. J. Hutchins is an employee (Deputy General Counsel) of the American Academy of Neurology. Full disclosure form information provided by the authors is available with the **full text of this article at Neurology.org/cp**.

Related articles from other AAN physician and patient resources

Neurology[®] ● Neurology.org

Upholding professionalism: The disciplinary process of the American Academy of Neurology
December 14, 2010;75:2198-2203.

Restoring medical professionalism
August 2012;79:820-827.

Continuum[®] ● ContinuumJournal.com

An approach to preoperative neurologic consultation for non-neurologic surgery
February 2011;152-158.

Ethical perspectives in neurology: Sports-acquired traumatic brain injury
December 2010;161-165.

Neurology Today[®] ● Neurotodayonline.com

Legal-ease: Medicine on the stand: States set standards for expert witnesses
October 20, 2011;11:40-42.

Pharma settlement spotlights potential for financial conflicts: How the AAN monitors MD industry relationships
June 2, 2011;11:8-9.