

# EXPERT WITNESS QUALIFICATIONS AND ETHICAL GUIDELINES FOR EMERGENCY MEDICAL SERVICES LITIGATION: RESOURCE DOCUMENT FOR THE NATIONAL ASSOCIATION OF EMS PHYSICIANS POSITION STATEMENT

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## ABSTRACT

The clinical provision of medical care by emergency medical services (EMS) providers in the out-of-hospital environment and the operation of EMS systems to provide that care are unique in the medical arena. There is a substantive difference in the experience of individuals who provide medical care in the out-of-hospital setting and the experience of those who provide similar care in the hospital or other clinical settings. Furthermore, physicians who provide medical direction for EMS personnel have a clinical and oversight relationship with EMS personnel. This relationship uniquely qualifies EMS medical directors to provide expert opinions related to care provided by nonphysician EMS personnel. Physicians without specific EMS oversight experience are not uniformly qualified to provide expert opinion regarding the provision of EMS. This resource document reviews the current issues in expert witness testimony in cases involving EMS as these issues relate to the unique qualifications of the expert witness, the standard of care, and the ethical expectations. **Key words:** emergency medical services; legal; malpractice; expert witness

PREHOSPITAL EMERGENCY CARE 2011;15:426–431

## INTRODUCTION

Litigation against emergency medical services (EMS) agencies, EMS providers, and those who provide

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Received November 18, 2010, from the Department of Emergency Medicine (WAM), University of New Mexico Hospital, Albuquerque, New Mexico; Butt, Thornton & Baehr, PC (WAM), Albuquerque, New Mexico; the Department of Emergency Medicine (DFK), Geisinger Health System, Danville, Pennsylvania; the Section of Emergency Medicine (CG), University of Chicago, Chicago, Illinois; and AXA Assistance USA (CG), Chicago, Illinois. Revision received January 31, 2011; accepted for publication January 31, 2011.

The position statement based on this resource document appeared in the July–September 2009 issue: Expert witness qualifications and ethical guidelines for issues related to emergency medical services litigation [National Association of EMS Physicians position paper]. *Prehosp Emerg Care.* 2009;13:370.

The authors report no conflicts of interest. The authors alone are responsible for the content and writing of the paper.

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doi: 10.3109/10903127.2011.561413

medical direction and oversight of prehospital EMS providers is a serious concern. Expert witness testimony in the courtroom forms the foundation of lawsuits against health care providers—It is the place where law and medicine intersect. Courts rely on the testimony of expert witnesses to educate the jury on the standard of care in a given situation and to give opinions on whether a particular act or failure to act has caused harm to a patient. Expert witnesses have an obligation to the court and to the public to provide truthful and reliable testimony that is based upon personal knowledge and expertise of the standards involved.

As litigation in general grows, professional societies have taken an interest in monitoring and ensuring the ethical behavior of their members when testifying as expert witnesses in malpractice litigation. Because many expert witnesses use their memberships in these organizations to support their credentials as experts in their areas of specialty, it is in the interest of such organizations to ensure that their members act responsibly when testifying. Health care professionals and provider organizations in the United States practice in a legally “aware” society, and live with the fear of litigation against them as well as the potential financial, professional, and personal consequences of such litigation. Thus, it is critically important that expert witness testimony presented in medical malpractice cases be delivered by qualified physicians and other health care professionals with a full understanding of the issues being litigated, including the applicable standard of care.

The National Association of EMS Physicians (NAEMSP) is a unique organization, in that its members comprise both physicians and nonphysicians involved in the medical direction, oversight, and provision of out-of-hospital EMS. The NAEMSP has a position statement on this topic entitled “Expert witness qualifications and ethical guidelines for issues related to emergency medical services litigation.”<sup>1</sup>

Physicians who professionally focus on EMS have unique qualifications in this field as a result of their specialized experience and training that has endowed them with a specific body of knowledge in the area of out-of-hospital care. In addition to their specialized EMS training, physician experts in this area typically have dedicated experience and responsibilities

for policy and protocol development, EMS instruction, curriculum design, system oversight and design, and other administrative duties, including the supervision of nonphysician providers who deliver EMS care. It is important that expert witness testimony on the subject of EMS be of the highest quality and that expert testimony given in the courtroom accurately represent the current standards and practice of the profession. Medical organizations generally have an interest in ensuring that their members provide expert witness testimony only in their areas of expertise and that the testimony they give is above reproach. It is important that physicians, as well as paramedics, nurses, and emergency medical technicians, not give testimony that is questionable or unreliable or that is outside their scope of expertise.

This review will begin by examining the approach that other professional medical organizations have used with regard to expert witness testimony. We will then discuss three categories of principles related to the attributes of a competent EMS expert witness—qualifications, standard-of-care issues, and ethical principles. First, the expert witness must be qualified to give the testimony he or she proposes to give. This means that his or her experience and knowledge base in the specific issue being litigated must be personal and current and must have considerable depth. Second, the expert witness must give testimony that is scientifically reliable when describing the standard of care. This means that the testimony must be based on a thorough and objective review of all available information about the case, along with a broad and deep understanding of the literature relative to that specific issue. The expert witness must have an adequate scientific basis in medicine for the opinion that he or she renders in court. The scientific reliability of medical testimony may be tested by courts under the *Daubert* standard,<sup>2</sup> which is discussed later. Last, but certainly not least, is the ethical component, requiring that expert witnesses be objective, and free of conflicts of interest such as personal or professional affiliations that may cause bias.

## REVIEW OF EXISTING ORGANIZATIONAL GUIDELINES

Many professional associations have taken positions for their own specialties regarding expert witness testimony.<sup>3–9</sup> We reviewed some of the applicable case law addressing various issues related to the approach of associations to expert testimony. Some of these cases explored the question of the authority of professional associations to discipline members for inappropriate expert testimony. Others looked at the limits of immunity for expert witness testimony in malpractice actions.

The various professional societies whose positions we reviewed vary broadly in how they handle different aspects of their positions and guidelines on expert witness testimony. However, their criteria for qualifications for experts are often very similar. The positions differ most widely on the more difficult issue of sanctioning or disciplining members who provide testimony inconsistent with the organization's principles.<sup>10,11</sup>

The American Academy of Orthopaedic Surgeons/American Association of Orthopaedic Surgeons (AAOS) has published standards for expert witness testimony.<sup>12</sup> While the AAOS cautions that failure to provide complete and truthful testimony may result in prosecution for perjury, it also notes that a failure to maintain high ethical standards may result in censure, suspension, or expulsion from both bodies of the AAOS. The AAOS has a members-only expert witness program that espouses the organization's commitment to high ethical standards. The program involves education and advocacy components and promotes the integrity of expert witness testimony provided by orthopedic surgeons. The AAOS also asks its members to execute an Expert Witness Affirmation Statement that affirms the duty of each member to uphold the standards set by the organization.

The American College of Emergency Physicians (ACEP) takes the approach that expert witness testimony falls within the definition of the "practice of emergency medicine."<sup>13</sup> This view has been upheld by appellate courts in the District of Columbia in *Joseph v. District of Columbia Board of Medicine*.<sup>14</sup> The ACEP position paper defines criteria for expert witnesses, as well as providing guidelines for the testifying expert. However, ACEP is somewhat vague on the issue of discipline, stating only that "Misconduct as an expert, including the provision of false, fraudulent or misleading testimony, may expose the physician to disciplinary action." ACEP recently initiated its process for this disciplinary action. To educate members about questionable expert witness testimony, ACEP has organized a Standard of Care Review Panel. Members of ACEP may attest to their willingness to abide by the principles of the organization's position statement on expert witness testimony by signing an expert witness reaffirmation statement provided by the College.<sup>13</sup>

A more strict approach to discipline is taken by other professional societies. The American Association of Neurological Surgeons (AANS) has established a code of conduct and an ethics policy that deal with issues of expert witness testimony. The AANS has also established a professional conduct committee that reviews complaints of unethical expert testimony by its members. This professional conduct committee has the authority to recommend sanctions against its members that include censure, suspension, or expulsion from membership. Findings of the committee are

published in the *AANS Bulletin*.<sup>15</sup> In 2001, the Seventh Circuit addressed the issue of whether professional societies could sanction their members for improper expert witness testimony.<sup>16</sup> The AANS suspended one of its members for six months. The disciplined member filed suit, alleging that the suspension was in retaliation for taking a position for the plaintiff in a malpractice suit against another member of the organization. The testimony the member gave was not considered reliable by a majority of the neurosurgeons. The court found that the studies the expert referenced did not actually support his position, as he claimed. Ultimately, the court upheld the discipline, finding that it served an "important public policy."

In addition to signing attestations to follow an organization's ethics policies, some professional organizations have developed certifications for their members to become trained expert witnesses. The American Society of General Surgeons began an expert witness certification program in 2004, saying that "By virtue of this program, the American Society of General Surgeons is on the record that it will not tolerate false testimony by physicians during medical legal proceedings."<sup>17</sup> The program requires the completion of a course and requires continuing education. In addition to professional medical societies, some certifying boards have developed ethics policies that include expert witness expectations. The American Board of Plastic Surgery has an ethics policy that informs its members that any communications that are false, deceptive, or misleading may lead to disciplinary action.<sup>18</sup>

## DISCUSSION

### Emergency Medical Services Expert Witness Qualifications

Expert witnesses should be well qualified and have recent experience in the particular issue being litigated. One of the most straightforward qualifications is licensure. Physicians providing expert witness testimony should be currently licensed to practice medicine in a legal jurisdiction of the country. Nonphysician EMS expert witnesses should similarly be either licensed or certified to practice as an EMS provider in a legal jurisdiction of the country. Since local EMS policies and practices vary and since the out-of-hospital environment may be very specific in terms of demographics, physical challenges, safety, and other factors, it is preferable that any expert witness be familiar with the EMS system's rules and practice setting.

Physician witnesses should give expert witness testimony only within their areas of expertise. Physicians should not testify about the propriety of procedures they do not perform, or have not performed since their residencies, or decisions they do not make on a regular basis. Furthermore, some procedures familiar to an ex-

pert witness may have different indications or degrees of difficulty in the austere environments encountered by EMS practitioners compared with the surroundings in which the professed expert normally practices. Experts should only testify about procedures performed under circumstances consistent with their experience and practice setting. Some professional medical society ethics/expert witness position statements suggest that board certification in their society's specialty is necessary in order to provide credible expert testimony.<sup>12,13</sup> Emergency medical services physicians and medical directors may have backgrounds in several medical specialties, so it is not possible to suggest that all physicians who serve as EMS expert witnesses have board certification in any specific primary medical specialty. However, physician expert witnesses should be certified by a recognized certifying body in a specialty related to EMS.

The American Board of Medical Specialties approved EMS as a subspecialty board certification within the specialty of emergency medicine in 2010. Since the process of certifying physicians in the subspecialty of EMS has not been completed, it is premature at this time to expect that expert witnesses in EMS cases be board certified in EMS. In the future, such subspecialty certification in EMS may be the highly preferred qualification for a physician expert providing opinion related to the delivery of EMS care.

More importantly, expert witnesses should be involved in the active clinical practice of EMS—not just the treatment of emergencies within a hospital or clinic—or the medical direction of EMS prior to the date of the incident involved in the lawsuit. The provision of medical care in the unique environment of the out-of-hospital setting is very different from performing the same care in an emergency department, surgical suite, or other traditional clinical setting; therefore, physicians providing testimony related to EMS care should have experience providing or directing similar care in the out-of-hospital setting. For example, it would be inappropriate for a non-EMS physician to provide expert opinion regarding endotracheal intubation by an EMS provider if that physician had never performed or provided oversight for airway management in similar situations in the field. Furthermore, it is not sufficient for a physician witness to have functioned simply as a base physician in an emergency department, providing only online medical direction over the radio or by telephone. Such a function generally requires limited incidental knowledge of the EMS system and principles of EMS oversight. Regarding EMS operations issues, only those physicians with a current understanding of the specific issue relevant to a case should give an opinion on that issue. To that end, NAEMSP recognizes there is an important difference in the knowledge base between physicians who are familiar with the prehospital EMS setting

and those who work solely in the emergency department or some other hospital setting. For example, an emergency physician or trauma surgeon who has never supervised or been involved with emergency medical dispatch systems should not provide expert testimony in the highly specialized area of ambulance dispatching.

In comparison with hospital and office-based practice, EMS system approaches vary significantly from region to region and community to community. This is in large part due to geographic differences, distribution of resources, and other regionally determined variations of practice. Any person testifying to the adequacy of care provided in a particular EMS system must understand the standards applicable in that community, the attributes of the local EMS system, and the system's policies and infrastructure when rendering an opinion. For example, an expert witness whose practice is in an urban system in which presumptive myocardial infarct patients are preferentially diverted to hospitals with immediately available cardiac catheterization facilities should not apply this expectation to a rural EMS system whose protocols dictate that such patients be taken to the closest hospital because the nearest catheterization facility is a significant distance away.

Physicians can obtain experience in the medical direction and oversight of EMS systems in various ways. Accreditation Council for Graduate Medical Education (ACGME)-approved residency programs in emergency medicine include EMS principles within the model emergency medicine curriculum, but individual emergency medicine residency programs vary widely in the EMS-related experiences they provide.<sup>19,20</sup> The American Board of Emergency Medicine also uses the model curriculum to develop content for its certification examinations,<sup>21</sup> but EMS and administrative issues receive a relatively small amount of weight in the overall examination content. Emergency medical services training in residency programs other than emergency medicine is virtually nonexistent. Completing an emergency medicine residency and passing the certification examination alone generally do not confer significant expertise in EMS or define an EMS expert.

Physicians can obtain structured and specific EMS-related education by completing an EMS fellowship. Those who have not completed a fellowship can obtain initial EMS medical direction education at such courses as the three-day NAEMSP National EMS Medical Directors Course and Practicum or courses based on the National Highway Traffic Safety Administration's EMS medical director curriculum. Some states offer courses for EMS medical directors and some, including Montana, New Mexico, North Carolina, Pennsylvania, Utah, and Wisconsin, require completion of medical director education prior to approval to func-

tion as an EMS medical director within the state.<sup>22–27</sup> These courses do not in isolation qualify an individual to be an expert witness, but they contribute to the EMS-specific education of a qualified expert witness.

Expert witnesses must also maintain currency in EMS by completing continuing education. In short, specialty education in EMS beyond that typically needed to qualify as an emergency physician is required to be considered an expert in the field of EMS.

## Scientific Reliability/Standard of Care

The scientific reliability of medical testimony is often put to the test in the courtroom under the *Daubert* standard.<sup>2</sup> The *Daubert* case recognized the need for testimony that reaches a jury to be scientifically reliable and consistent with the most current scientific studies and literature, as well as up-to-date medical practice. Expert witness testimony should take into consideration the standard of care at the time the incident in question took place, as lawsuits often deal with medical care that took place years earlier, when acceptable practice was different.

While it is critically important for experts to rely on the most rigorous and objective scientific evidence relevant to the case, it is equally important to note that much specialty-specific or hospital-based research and practice has not been scientifically validated in the out-of-hospital setting. A practice that has proven efficacy in the emergency department or in another specialty's practice setting may not be practical or efficacious in the out-of-hospital setting. For example, an expert might claim that scientific literature would indicate that a conscious patient in severe respiratory distress be endotracheally intubated in the emergency department using paralytics and sedation with ample nursing and adjunctive support. However, it would not necessarily be safe or practical to expect out-of-hospital caregivers to perform the same procedure on an identical patient in the home or ambulance. Unless specific literature has examined the same approach in the prehospital setting, it would be presumptuous for a witness who is primarily hospital-based to automatically apply the same expectations to EMS providers.

## Ethical Considerations

Expert witness testimony should always be truthful, and never false, misleading, or lacking in medical foundation. In reviewing legal cases, it is important for the expert witness to consider all factors involved in the out-of-hospital care rendered that may have had an influence on the actions under scrutiny. These facts should always be reviewed in an objective manner, and the expert witness should not exclude relevant information in order to create a favorable opinion for a particular side in the litigation.

Experts should not represent an act as being within the standard of care when it is not, or that it is outside the standard of care when it is generally considered to be within it, simply because one side is compensating them to review the case. It is important that expert witnesses remember that their ultimate responsibility is to the court: to help the jury understand technical subject matter, not to distort it.

In order to consider all factors, it is critical for expert witnesses to review the entire medical chart and legal file, and not permit attorneys to pick and choose the documents they review. The expert should carefully review all medical records, EMS patient care reports, protocols, witness depositions, discovery responses, dispatch logs, dispatch tapes, photographs and other documentation in the case. Since many external factors may affect the conditions under which out-of-hospital providers must deliver care, relevant documentation may extend well beyond standard medical documentation to such materials as police and traffic reports, descriptions or photographs of buildings and other structures, and weather records. If an expert witness is not given all relevant documents, he or she should request them from the attorney. An incomplete review of a case file is an invitation to an unreliable expert witness opinion and subject to impeachment by the opposing attorney in deposition as well as in the courtroom.

Further expert witnesses should not testify in cases in which a conflict of interest exists, for example, where a witness is related, by blood or marriage, to the parties, their attorneys, or other significant witnesses in the case.

### Unique Nature of the Out-of-Hospital Environment

The NAEMSP has taken the position that expert witnesses who testify regarding issues of patient care in the out-of-hospital setting should have experience in providing care in that setting. The legitimacy of an EMS physician serving as an expert regarding the care provided by an emergency medical technician (EMT) in the out-of-hospital setting is based on the supervisory relationship between the EMS physician and field providers. Field EMS providers in most situations may function only under the supervision of a physician medical director. Therefore, the physician providing testimony either in support of or against EMS personnel should have a full and current understanding of the situations and personal exposure to the unique challenges faced by field providers working in the out-of-hospital environment.

Physicians who have obtained credentials in the subspecialty of EMS, by virtue of training, practice, or administrative responsibility, should be recognized as experts qualified to opine on the standard of care in the delivery of medical care in the out-of-hospital environ-

ment. In many jurisdictions, by statute, EMS physicians, usually serving as EMS medical directors, are responsible for defining and overseeing the roles and responsibilities of EMS practitioners (including various levels of EMS providers). As such, they are qualified to give expert testimony on the medical conduct and actions of such providers, even though they may not hold the same medical credential. If EMS physicians are medically responsible for the EMS system, for defining the practices of EMS personnel and setting the medical standard of care in an EMS system, it follows that EMS physician experts are qualified to give expert testimony in such cases.

### CONCLUSION

As the subspecialty of out-of-hospital emergency care continues to evolve and mature, NAEMSP, like many specialty medical organizations, is taking the important step of setting standards for expert witnesses within its organization. The recognition of the unique knowledge, credentials, and experience possessed by EMS physicians, nurses, paramedics, and EMTs is critical to ensure that only those professionals with legitimate expertise serve as expert witnesses in EMS cases.

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