

Expert Medical Testimony for *Your Injured Patient*

Gerald J. Lang, MD

OTA Young Practitioners Symposium

October 10, 2013 Phoenix, AZ

Legal Issues for Physicians

Different Sets of Rules

Criminal Law

Some law has been broken

Police involved

Civil Law

Injury with loss occurring

Filed by injured

Request being made whole

Burden of Proof

Large disconnect between Lawyers and MDs

Scientific burden of proof

<0.05

95 % certain or sure

Civil litigation burden of proof

"More likely than not"

>50.1% certain

Reasonable degree of medical certainty

Deposition

Out-of-court oral testimony of a witness that is reduced to writing for later use in court or for discovery purposes

Depositions are a part of the discovery process in which litigants gather information in preparation for trial

Judge not present

Subrogation

Subrogation in its most common usage refers to circumstances in which an insurance company tries to recoup expenses for a claim it paid out when another party should have been responsible for paying at least a portion of that claim

Anatomy of a Personal Injury Claim

Injury/ event has occurred

Measurable loss has occurred (missed work, medical expenses, permanent loss of function)

Responsible party clearly identified

Recoverable assets

Money available (insurance company)

Plaintiff

Your patient. Represented by plaintiff's lawyer.

Defendant

Alleged guilty party. Often an insurance company represented by counsel

What is My Role in All of This?

Written response to questions posed by the patient's (plaintiff) attorney
Give a narrative of injury and medical care

Brief synopsis

How has this affected the patient? What do you see in the future?

Payment for Services

In civil litigation it is entirely appropriate to request adequate compensation for your time and effort in meeting these needs. Payment contingent on the outcome of litigation is ***inappropriate***.

Have a fee schedule and stick to it

Discovery Deposition

Expert Witness

Expert Witness vs Treating Physician

You are obliged to be a treating physician or factual witness. You are not required to provide any opinions. If you are an expert witness you may have to file a written legal report to support your opinions and potentially review outside documents. You can be both

Alt Privilege (Wisconsin only)

You cannot be forced to give opinions (expert witness) against your will

You can elect to be a treating physician only (provide details of injury and treatment)

Illustrative case - Head on crash with Utility Truck

21 yo female, MVA, splenic rupture, liver lac, 1st responders thought patient was dead

Orthopedic Injuries

Right femoral neck fracture, open fractures of right femur, femoral condyle, patella and ankle

Legal Follow Up

Loss had occurred. Fault identified. Claim thought to be in \$1 million range.

I provided details of injuries. Helped quantitate degree of loss and tried to predict future medical needs. Answered a list of written questions (legal letter) and participated in a discovery deposition. Settled in mediation.

\$500,000 up front

\$800/month for next 20 years

Take Home Points

1. You or your medical care is ***not*** on trial! No need to be testy about it. Often you are assisting the parties in understanding what the medical record actually means or says.
2. You have information that the attorney needs to do his/ her job (for your patient). Providing information and well thought out opinions can help getting these matters resolved (often with no trial being needed).
3. Orthopedic Surgery as a profession is based on helping the patient. Working to resolve these claims fulfills that mission. You have a patient story to tell. You were there from beginning to end. ***Patients feel better once claim resolved.***
4. Expert witness? I would bristle a little bit when I would be referred to as the plaintiff's expert witness (hired gun). I would explain that the only reason I was testifying is because I am the treating MD. I often function as both (you have a choice!)