



78. The physician as an expert witness

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Background

The ethics board received a complaint regarding a medical opinion submitted to the court. The case involved a woman who sued the physician who treated her for medical damage caused, in her opinion, by the physician's medical negligence. The plaintiff submitted to the court a medical opinion given by another physician in the same specialty.

The opinion contains legitimate criticism of the medical treatment that the plaintiff received, but also contains many insulting expressions against the physician being sued. I shall quote only a few of them: "The miserable records indicate the poor professional standard of the physician being sued, as well as contempt and lack of professionalism"; "The medical sheet of the operation is confusing, the diagnosis and the headings of the operation are confusing and of a partial nature, the description of the course of the operation is partial, confusing, and illogical"; "The operation report indicates lack of professionalism on the part of the surgeon"; "The summary letter is written in incoherent language"; "All these indicate the lack of professionalism and the negligent approach of the physician being sued".

The members of the Ethics Board were convinced that this is not a proper way in which to criticize a professional colleague, and that the language used may harm the dignity and status of the physician. The members of the Ethics Board also felt that every physician is entitled to criticize the medical treatment provided by another physician, but should do so in a restrained and relevant manner.

The physician who wrote the offensive opinion was invited to a clarification committee of the Ethics Board, where he apologized for the wording he employed in his opinion.

The members of the Ethics Board decided to write ethical rules for the conduct of an expert physician in the Court. The wording of the proposal was also sent for review and comments by the "Torts forum" at the Israeli Bar Association before its final formulation. We hope that these rules will guide us in our work and avoid in the future complaints of the type that we discussed here.

Position paper

a) General

- The provision of a medical opinion to the Court is a civil and moral obligation imposed on the physician by virtue of his being a professional in the field. The opinion will constitute evidence in a trial and will aid the judge in determining the truth and giving judgment.



- A physician shall agree to serve as an expert witness only in a case in which he believes that there is a solid foundation for the complaint of the plaintiff or the position of the defendants.
- The provision of a professional, reliable, and objective opinion, based on science and on accepted medical standards, is of value in the specific case in which it is requested and will also lead to improvement of medical treatment in similar cases in the future.

b) The qualifications required from the physician giving testimony

- The medical expert witness shall have the qualifications to fulfill this role pursuant to Israeli law.
- The medical expert shall have the relevant expertise in accordance with the circumstances in which he testifies.
- The medical expert shall be familiar with the level of knowledge and practice customary in medicine and in the various schools of thought, if any, in the field and at the time relevant to the subject of the action.

c) Due diligence

- The medical expert shall indicate at the beginning of his opinion, as required by law, details of his identification, qualifications, and professional and academic status.
- The medical expert shall indicate if he has or had a personal interest with any of the litigants, including the medical institution involved, the insurer, or any of the lawyers involved in the case.

d) Directions for the medical expert

- The medical expert shall objectively, fairly and truthfully provide all the medical and scientific information related to the issue in question and shall make a reasonable effort to obtain all the documentation relevant to the case.
- If the medical expert finds it necessary to rely on medical literature, he shall attach it to his opinion or shall indicate its reference in a clear and correct manner, as is customary.
- The medical expert shall give his professional opinion only after he has examined the plaintiff in the claim. In exceptional cases in which an examination was not conducted, this shall be indicated in the opinion. An opinion regarding a simulation examination or a laboratory examination is possible without examination of the plaintiff.
- The medical expert shall refer to the medical standards customary at the time the cause of claim was created, including all the schools of thought that existed at that time.



- The medical expert shall write his opinion and give his testimony in relevant, modest, and restrained language, based only on the facts and the medical and scientific truth.
- The medical expert shall be entitled to dispute other medical opinions given to the Court. This shall be done in relevant and restrained language. No personal criticism shall be made of other medical experts.

e) Fees

- The payment to the medical expert shall be reasonable and shall be based on the professional status of the expert and the time spent in preparation of the opinion and in giving testimony in Court.
- The fee of the medical expert shall not be conditional on the results of the legal hearing.
- The medical expert shall not share his fee with anyone else, including the person who referred the examinee to him.