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The Interprofessional Code 1987

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THE INTERPROFESSIONAL CODE 1987

Drafted by the Interprofessional Committees of the Colorado Bar Association, Colorado Medical Society, Denver Bar Association and Denver Medical Society.*

PREFACE

The purpose of the *Interprofessional Code* is to provide attorneys and physicians with a guide for harmonious interprofessional relations, promote better understanding between the professions, and aid in the resolution of interprofessional disputes. The best interests of the public and the two professions require that each profession develop an enlightened and tolerant understanding of the other.

The *Code* is successor to *The Guide for Interprofessional Relations*, which was published by the Colorado Bar Association and Colorado Medical Society in 1979. The principles contained in the new *Code* have evolved from previous guides and numerous dispute resolutions. Reference to the principles contained in the *Code* would avoid many disputes between the respective members of our professions.

The Colorado Bar Association, Denver Bar Association, Colorado Medical Society, and Denver Medical Society have each endorsed the *Interprofessional Code*.[1]

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* The contributions of all committee members to the creation of the *Interprofessional Code* are gratefully acknowledged, with special thanks to the following: William Babich, Co-Chairman of the Colorado Bar Association Interprofessional Committee and member of the Denver Bar Association Interprofessional Committee; John V. Buglewicz, M.D., Chairman, Council on Professional Relations and Medical Service, Colorado Medical Society; David M. Charles, M.D., Chairman, Liaison Committee, Denver Medical Society; David M. Haggerty, Director of Professional Services, Colorado Medical Society; Arlen D. Meyers, M.D., member of the Denver Medical Society; Alan E. Richman, Co-Chairman of the Colorado Bar Association Interprofessional Committee and member of the Denver Bar Association Interprofessional Committee; Larry Schoenwald, member of the Colorado Bar Association and Denver Bar Association Interprofessional Committees; and William J. Hansen, member of the Colorado Bar Association and Denver Bar Association Interprofessional Committees. Mr. Hansen deserves special recognition for his substantial contribution.

The organizations involved also wish to acknowledge and thank *The Colorado Lawyer*, which first published the *Interprofessional Code* and the *Joint Medico-Legal Plan For Arbitrating Professional Liability Cases*.

1. John V. Buglewicz, M.D., Chairman Council on Professional Relations and Medical Service, Colorado Medical Society. William Babich and Alan E. Richman, Co-Chairmen Interprofessional Committee, Colorado Bar Association. David M. Charles, M.D., Chairman Liaison Committee, Denver Medical Society. Stephen C. Kaufman and Don D. Jacobson, Chairman and Vice Chairman Interprofessional Committee, Denver Bar Association.

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INTRODUCTION — OVERVIEW OF THE LITIGATION PROCESS

There are generally two types of legal cases. Criminal cases involve a charge prosecuted by a governmental body that some individual broke a criminal law and should be punished. Civil cases involve private disputes between individuals where damages or some other remedy is requested. Administrative claims such as worker's compensation or social security claims are resolved through a form of civil proceeding conducted by an administrative body. These different types of cases involve different burdens of proof, different rules of procedure, and different roles for the physician witness.

The physician is most often asked to become involved in a civil lawsuit — often involving personal injuries of some kind.

In civil cases, the "plaintiff" is the party who brings the lawsuit and the "defendant" is the party who is being sued. Before a lawsuit is commenced, the injured party may be referred to as the "claimant." A civil action is started by filing a "pleading" called a "Complaint" with the court, which is then "served" on the defendant along with a "Summons." The defendant must then timely file a pleading called an "Answer." Depending upon the complexity of the lawsuit, other pleadings and parties may be added. The purpose of this pleadings stage is simply to determine the legal claims, defenses and other legal issues involved. The pleadings serve as a framework for later proceedings.

The parties may then conduct discovery, where each side seeks to discover the facts and evidence relevant to the legal issues involved and which tend to support or contradict a given party's position. Various discovery devices are allowed under the Rules of Civil Procedure. These include "Interrogatories" (written questions regarding information provided under oath); "Requests for Production of Documents or Things" (written requests for documentary or tangible evidence in the possession or control of the other party); "Requests for Medical Examination" (an examination by a physician or health care specialist of a party's own

choosing of some physical or mental condition which has been placed "in controversy" by the opposing party); and "Depositions" (sworn testimony taken before a shorthand reporter wherein the attorneys can personally ask questions of a party or witness).

Thus, in the discovery phase, a "treating physician," i.e., one who has provided care and treatment to a party, may be asked to provide medical records, medical reports, and patient billing. A treating physician may also be asked to give a deposition. Further, a physician who has never treated a party may be asked to perform a mental or physical examination and provide a report on behalf of a party to the lawsuit solely for litigation purposes and not for treatment purposes.

Much of today's litigation involves complex factual issues concerning such areas as medicine, psychiatry, engineering, economics, rehabilitation, and law. When issues are sufficiently complex that they are beyond the common knowledge or understanding of the judge or jury, "expert testimony" by "expert witnesses" may be necessary to assist the judge or jury in determining the case.

Therefore, a physician may become an "expert witness" who is called to testify as to certain facts within his or her knowledge and give "expert opinions" on certain medico-legal issues. For example, a treating or examining physician may be called as an expert witness to testify concerning the examination, care, and treatment of a party and may be requested to give opinions on such issues as diagnosis, causation, prognosis, permanency, disability, need for future treatment and reasonableness of costs of past or future treatment.

In investigating or evaluating a case involving medical issues, a nontreating physician may also be asked simply to assist an attorney or party in understanding the medicine involved. In doing so, the physician may become an "expert consultant" or "specially retained expert." Such an individual does not thereby agree to become an "expert witness" for that party and can limit his or her review or involvement in the case simply to that of a consultant with no obligation to give expert testimony. He or she can also condition his or her involvement upon anonymity such that his or her name will not be disclosed to opposing counsel or to the court, unless compelling circumstances justify a court order requiring disclosure. If such a limited or conditional role is requested, it should be clearly understood between the physician and the attorney, and preferably reduced to writing, to avoid future confusion or disputes.

A treating physician may also be asked to become an "expert witness" on issues not specifically incidental to the care and treatment of the patient. Similarly, an "expert consultant" or "specially retained expert" may agree to become an "expert witness" on the issues he or she has reviewed. These may involve complex issues of causation, or apportionment of injuries as between multiple causes, in claims involving products liability, medical liability, worker's compensation, or other personal injury actions. This may also include issues such as "standard of

care," "informed consent," or other medico-legal issues involving propriety of conduct or responsibility, in medical negligence claims.

Sometime before trial, each party must disclose his or her "expert witnesses" to the other side and to the court. This is known as "endorsement of expert witnesses." Simply because an expert is "endorsed" by one party or another does not suggest that the expert's opinions are expected to be totally favorable to that party or that the expert should be anything other than fair and objective to all sides. "Endorsement" of expert witnesses by an attorney can be done informally by letter notification, can occur in response to discovery requests such as interrogatories, and usually must be included in a pretrial document called a "Trial Data Certificate" or "Pretrial Statement," which lists all witnesses and exhibits and must be filed a certain time before trial. A late endorsement of an expert witness may result in that expert not being allowed to testify.

The "expert witness endorsement" usually should briefly describe the physician's qualifications as an expert, the subject matter or issues that the expert may address, a summary of the opinions held by that expert, and the factual bases for those opinions. The endorsement can be written by the lawyer and can incorporate any expert witness reports, records or depositions given by that expert. Treating physicians are often endorsed as possible expert witnesses based solely on their role as a treating physician and the notes or records that they have generated, even though they have never been contacted by the lawyer. Opinions or other potential testimony of an expert witness that are not adequately disclosed to the other side and to the court can result in their not being allowed at trial.

After an expert witness is "endorsed," he or she may be asked to submit to a deposition so that the opposing attorney can gain further knowledge as to that expert's opinions and possible testimony. This also assists the opposing attorney in assessing the need for obtaining experts of his or her own choosing to address the same issue.

If the case proceeds to trial, those physicians who have been endorsed as expert witnesses may be called to testify. The party who calls the witness asks the first series of questions on "direct examination," the opposing attorney can then "cross-examine," and there may be further "redirect examination" by the attorney who called the witness. Adequate pretrial consultations should prepare the physician-expert concerning this trial testimony.

In jury trials, the judge determines the admissability of evidence and instructs the jury on the applicable law. The jury determines the facts based on the credibility of the witnesses and the weight of the evidence and determines the outcome based on the law as provided by the court. If legal errors were made by the court in ruling on motions, admitting evidence, or instructing the jury, a party may ask the trial court to correct that error or may appeal to an appellate court.

Most civil cases are settled. Settlement can occur at any time in-

cluding before the case is filed, during the pretrial phase or discovery phase, during trial or even jury deliberations, or after trial and during appeal.

1. General Principles

1.1 — *Where a patient suffers from a condition which is the subject of a legal dispute, a treating physician has a duty to provide medical information pertinent to the patient's claim in reports, depositions, conferences and trial testimony.*

It is recognized that the primary duty of a physician is to treat a patient's illness or injuries. However, an additional responsibility of a treating physician is to provide necessary medical information and opinions by virtue of his or her acceptance of that patient for treatment. Like any other citizen, a physician can be required to tell what he or she knows if such information will aid the judicial process.

The transmittal of this medical information may include a written report which either sets forth the diagnosis, treatment and prognosis, or which responds to specific questions posed by an attorney concerning important medico-legal issues in the case. Later, the physician's deposition may be taken to "discover" further information. Incidental to these contacts, one or more conferences between the physician and the attorney endorsing or retaining the physician may be requested. Finally, if the case does not settle, the physician may be called as a witness to testify in court.

The physician and attorney should cooperate in this information-gathering process to facilitate settlement, promote the administration of justice, and control the costs of litigation.

1.2 — *Physicians and attorneys should openly communicate with one another and, wherever possible, agree in advance concerning the terms of their relationship so as to avoid conflict and disputes between the professions.*

Open communication is the touchstone of dispute avoidance and dispute resolution. While physician's services are essential to the administration of justice, the physician and attorney should seek out and discuss ways of minimizing the burden of medico-legal services on physicians as well as minimizing the cost to patient-clients. Unless an attorney and physician have a history of prior business dealings, it is desirable to agree in advance concerning the nature, scope, and cost of the physician's medico-legal services. (These subjects are discussed in greater detail in other sections of this Code.) The physician may already have set policies, or an agreement may be worked out at the time of the initial contact. Preferably this agreement should be reduced to writing.

If an agreement cannot be reached, the matter should be discussed immediately. At all times, the patient-client's best interests should be the overriding concern. The professionals should agree on as much as possible and submit any residual dispute to the court or an interprofessional dispute resolution committee.

Toward this end, direct communication between the physician and attorney is preferable to communication between secretaries, receptionists or clerical staff.

1.3 — *The role of the physician is not that of an advocate or trier of fact and, at all times, the physician's opinions should remain fair, unbiased, and objective.*

The role of the physician in a lawsuit is that of a witness only. The physician should never become an advocate or a trier of fact. The physician should not seek to openly support or oppose the position of either party. No matter how much he or she inwardly favors or opposes the cause of one party to a lawsuit, it is the physician's clear duty to present information in a fair, unbiased, and objective fashion. When called to testify, the physician's duty is to answer the questions truthfully and to the best of his or her knowledge. Under no circumstances is a physician justified in suppressing medical evidence. The physician should never be influenced by extraneous matters such as the source of his or her compensation, friendships, personalities, or inappropriate pressures from patients, attorneys, insurers, or professional organizations.

1.4 — *Although an attorney is an advocate, an attorney is never justified in abusing or intimidating a medical witness in any manner, in an attempt to discourage the physician's further involvement in the litigation or to alter or suppress the physician's testimony.*

An attorney is an advocate and has a duty to zealously represent his client's best interests in litigation. However, that duty as advocate never justifies abuse, intimidation, badgering, or personal attacks on a medical witness. Improper attempts to discourage the physician's further involvement in the litigation or to alter or suppress the physician's testimony should be strongly denounced. Such attempts are never justified or necessary. Adequate means are available to test credibility by cross-examination, impeachment, and rebuttal. A physician need not tolerate abusive or improper conduct and should promptly bring it to the attention of the opposing counsel, the court or tribunal in which the action is pending, or an appropriate grievance committee.

1.5 — *Attorneys should refrain from giving advice on medical management or interfering in the physician-patient relationship. Similarly, physicians should refrain from giving advice on legal matters or interfering in the attorney-client relationship.*

Both physicians and attorneys must recognize that they hold a position of trust and confidence with their patient-client. Each professional must recognize the limitations of his or her role and expertise and defer to the other professional in matters uniquely within that individual's expertise.

Hence, a lawyer should not encourage "physician shopping," should not counsel a client concerning treatment options, and should not otherwise improperly influence the patient in medically related matters in an attempt to accentuate damages.

At the same time, the physician should refrain from counseling the patient concerning such legal matters as the value of the patient's claim, the nature or terms of the fee agreement with the attorney, or trial techniques and strategy decisions. These are exclusively the province of the lawyer.

2. Confidentiality of Medical Information

2.1 — *Medical information obtained by a physician for diagnosis or treatment of a patient is privileged by statute, and deemed confidential by medical ethics and common law. Great care must be exercised to prevent unauthorized or inappropriate disclosures of such medical information.*

To assure frank and complete disclosure of sensitive information concerning a person's health to a physician to assist in diagnosis and treatment, the law in Colorado recognizes that such information is privileged and confidential and should not generally be disclosed without the patient's consent. See Colorado Revised Statutes (C.R.S.) § 13-90-107(d) and (g).

The unauthorized disclosure of such medical confidences may expose the physician or health care provider to a common law claim for damages; it may constitute a violation of the physician-patient privilege; it may be a breach of the physician's ethics; and may also constitute a felony under Colorado's Theft of Medical Information Statute, C.R.S. § 18-4-412.

When a person makes a claim for damages for personal injury or otherwise places his or her mental or physical condition in dispute, any claim of privilege may be waived and the patient may be required to permit disclosure of relevant medical information. Similarly, a medical negligence claim asserted against a physician or health care provider constitutes an implied waiver as to information concerning medical care and treatment held by that health care provider or his or her consultants. However, in certain circumstances, if the disclosure of sensitive medical, psychiatric or psychological information would undermine the relationship with the patient or adversely affect his or her treatment, disclosure may be opposed until appropriately reviewed by a court.

If a question arises concerning the propriety of a requested disclosure of medical information, the physician should consult the patient or the patient's attorney, or seek advice from the physician's personal attorney.

3. Medical Records

3.1 — *Complete and accurate medical records should be maintained for each patient.*

Medical records are not only necessary for proper patient care but also assume important medico-legal implications. They are invaluable to the physician in defending medical liability claims. They are also of great assistance in evaluating and presenting a patient's personal injury

claim. If they are sufficiently complete and legible, they may avoid the necessity, time, expense, and effort of formal reports. Because of their medico-legal importance, accuracy is crucial and such records must not be altered, supplemented, or destroyed because of pending or anticipated litigation.

3.2 — *A treating physician should surrender legible and complete copies of any medical records requested to assist a patient in litigation and to advance the administration of justice.*

Under Colorado law, a patient has a right of access to his or her patient records. An exception applies to certain psychiatric or psychological records which have special restrictions before disclosure is allowed. C.R.S. § 25-1-801 *et seq.*

A physician therefore has a duty to provide pertinent information concerning a patient's health to assist the parties and the finder of fact in the evaluation and presentation of that patient's personal injury claim. (*See* § 1.1).

Oftentimes, all parties to a lawsuit will request such medical records. When this occurs, an attempt should be made to coordinate requests for medical records to avoid needless duplication of effort and unnecessary inconvenience to the health care provider.

Whenever possible, if a medical records deposition is taken and the only purpose is to obtain patient medical records, the subpoena should be addressed to the custodian of records or the physician's agent and not the physician.

Generally, the original medical records or x-rays should not be provided. These remain the personal property of the health care provider who generated them. However, all copies provided should be complete and legible. If records are not legible, a literal transcription of those records may be requested.

If original records from a health care provider are required for trial purposes, this should be fully explained to the custodian of the records. Promptly following the completion of the trial, copies should be substituted in the court file for the original records and the originals should be returned to the custodian.

3.3 — *A medical release authorization form, complying with all federal and state statutes and regulations, should be provided to the physician or health care provider before such medical records are released.*

By Colorado statute, patient medical records are available for inspection and copying upon ". . . submission of a written authorization-request for records, dated and signed by the patient. . . ." C.R.S. § 25-1-801.

Federal Privacy Acts concerning the release of drug and alcohol treatment program records also have very specific requirements concerning the contents of an authorization form (42 C.F.R. 2.31). Other

federal, state, and local statutes, laws, and regulations may also limit the disclosure and dissemination of certain medically related information.

A standard approved authorization form, complying with all existing applicable laws and privacy interests, has been developed in a joint effort by the Colorado Bar Association Interprofessional Committee and the Colorado Certified Medical Record Administrators, and is included here as an Appendix. If questions arise concerning the propriety of releasing certain information, the health care provider should contact his or her attorney. The requirement by some institutions and health care providers that a special internally developed form be used is disapproved. Such special forms add undue expense and are also a waste of time and effort to the institution or health care provider, as well as to the patient and attorney. The perceived advantages of internal forms are outweighed by the advantages of the standard approved authorization form.

Further, an internal requirement by a health care provider that the form be signed within a certain period of time prior to the request is disapproved, and the signed form should be deemed valid unless, by its expressed terms, it has expired.

There is no requirement that the signature be notarized. The release should identify the individual or entity to which the authorization is given, but one release may cover multiple health care providers. There should be a description of the information requested, and specific authorization should be stated if drug or alcohol treatment records or psychiatric or psychological records are requested.

3.4 — *A reasonable charge may be requested for copies of medical records. Unless records are subpoenaed, payment of such costs may be required before the records are surrendered.*

A health care provider is entitled to charge a reasonable fee for providing copies of medical records. It should be reasonably related to the actual cost of copying and mailing such records. A physician is not expected to assume a financial loss for reproducing such records. Similarly, a physician or health care provider should never charge an exorbitant fee for medical records simply because litigation is involved or he or she wishes to discourage litigation-related requests. (*See* § 9.3).

If an attorney requests that a physician's hand-written chart be transcribed, an additional reasonable charge may be requested for that service.

At present, the Colorado Department of Health and Hospital regulations governing patient access to medical records from licensed health institutions or facilities provide that such charges should not exceed $5.00 for the first ten pages and $0.25 per page thereafter.

Records should be released without regard to any outstanding unpaid balance due on the patient's bill for medical treatment. (*See* § 9.7).

4. Medico-Legal Opinions, Reports and Endorsements

In many instances, expert medical reports may be legally required by procedural rules or court order. Even when not required, reports from treating or examining physicians may foster settlement or avoid more formal, expensive, and time-consuming depositions.

Physicians should be mindful that all expert opinions must be disclosed to the opposing side by way of either a report or an endorsement of the expert witness in discovery or pre-trial documents. If an opinion is not disclosed, it may be precluded. Therefore, clear communication of the expert's opinion is of utmost importance.

4.1 — *A request for a formal medico-legal opinion should be in writing. It should fully inform the physician concerning the purpose for which the report is sought. It should identify the parties to the claim and the party requesting the report. It should specify the information and documentation provided to the physician on which the expert opinion should be based. The request should preferably provide a brief summary of the case. Finally, the request should specify the medico-legal issues to be addressed and the legal terminology, if any, required.*

The request for a formal medico-legal opinion is intended to alleviate any future misunderstandings concerning the nature, scope, and purpose of the physician's review and further involvement. In more complex cases, and in those instances involving non-treating physicians, this request may be preceded by a conference where the expert's qualifications will be reviewed, the medico-legal issues discussed, the information needed by the physician to complete the review will be discussed, and financial arrangements will be agreed upon.

4.2 — *The attorney has the duty to determine the physician's legal competency to render opinions on a given issue. The physician should recognize the difference between a legal expert and an expert among his or her peers in a given specialty.*

The attorney should be familiar with the legal rules of evidence governing competency of expert witnesses. It is the attorney's duty to make adequate inquiry into the physician's education, background, training and experience to determine if the physician is legally qualified to address a given medico-legal issue. An attorney should accept the limitations of the physician's expertise and avoid attempts to obtain opinions from a physician that are clearly beyond that physician's expertise. At the same time, the physician should be aware that under the Colorado and Federal Rules of Evidence, an expert witness is one who by knowledge, skill, experience, training or education, has sufficient knowledge and expertise to assist the trier of fact to understand the evidence or determine a fact in issue. However, to qualify as an expert for the purpose of testifying at trial, such an individual need not be a super-specialist or a university professor, nor must that person be recognized as an expert in a given subspecialty by the physician's peer group.

4.3 — *A copy of all medical records and other documentation pertinent to the*

medico-legal issues to be addressed should be furnished to a reviewing physician before a formal opinion is rendered.

Treating and examining physicians may legitimately rely upon the history, examination findings, radiological studies, and other test results which they acquire in their treatment or examination of a claimant.

However, non-treating physicians who are requested to evaluate a medico-legal issue should be provided with all relevant documentation and medical records such that the opinions rendered are fully informed opinions. The practice of providing only partial medical records which are favorable to a client's position is firmly condemned. If a physician requests further information which is reasonably available to the attorney, it should be provided. However, the expert should not be burdened with unnecessary, extraneous materials. Fair and unbiased summaries of depositions, records, or other facts may be provided to assist the physician in economically reviewing the issue involved.

The physician and retaining attorney should discuss the advantages and disadvantages of providing other experts' reports to the reviewing physician before he or she arrives at an opinion. Such disclosure of other experts' opinions may appear to affect the expert's independence and objectivity in his or her initial review.

Both physician and attorney should bear in mind that all documentation and information provided to the medical expert, as well as all research, notes, reports and other papers generated by the medical expert in his or her review of the claim, may be discoverable by the opposing side.

4.4 — *If the treating physician has an opinion, he or she is obligated to state it. It is unclear to what extent a treating physician may be required to form an opinion.*

The extent to which treating physicians may be required to formulate expert opinions is unclear. However, a physician can be compelled to state his or her observations concerning a patient and may be required to testify as to medical information acquired in the course of treating a patient. If the physician has an opinion concerning a medico-legal issue, he or she may be compelled to express it.

A treating physician may also be required to answer hypothetical questions. If the physician can answer the questions as posed, he or she must do so. If further facts or study are necessary to answer the questions, the physician may so state.

4.5 — *Expert witnesses should be advised of factual disputes concerning the underlying facts on which the expert opinion is to be based. Even though the expert is asked to assume a "hypothetical" set of facts, the expert witness should still be provided with all relevant facts and records.*

Physicians asked to review medico-legal issues should understand that they are not the ultimate finders of facts. Therefore, there may be factual issues which are beyond the competence of an expert witness to

resolve, as where there are discrepancies in various medical records or disagreements over certain conversations, etc. The physician may therefore be requested to assume the truthfulness of a "hypothetical" set of facts when formulating his or her opinion.

"Hypothetical" facts do involve real cases. The reviewing physician should still be provided with all relevant medical records and facts and is entitled to know the nature of the underlying dispute.

In responding to hypothetical questions, the expert witness should set forth the significant factual assumptions underlying his or her opinions, and may qualify an opinion by stating that it could change if different factual assumptions were made.

4.6 — *It is preferable that the physician's opinions be set forth in writing in the physician's own language. If an attorney makes an expert witness endorsement in addition to, or in lieu of, an expert report issued by the physician, such an endorsement should only be done after its contents have been carefully reviewed and approved by the physician.*

Physicians often prefer that their medico-legal opinions be set forth in writing to avoid future misunderstanding concerning the nature, extent and scope of the expert's review and opinions. The expert report also assures that the opinions are accurately communicated in the physician's own language.

However, in some instances, typically involving non-treating physicians, an attorney may desire that no expert report be issued. This is because reports may limit the scope of that expert's future testimony; the physician's language may not adequately set forth necessary legal terminology; reports may provide potential grounds for cross-examination; and early reports may hamper future modifications or supplementation of the expert's opinions as new or different information becomes available. To provide for such flexibility, the attorney may prefer that an expert witness endorsement in court documents be in the attorney's own language.

To avoid miscommunication, expert witness reports should be encouraged. However, when an affidavit or a discovery or pre-trial endorsement of expert testimony is drafted by the attorney in the attorney's own language, legal terminology should be fully explained, and it should not be tendered to the court or opposing counsel until its contents are fully approved by the physician to whom the opinions are attributed.

4.7 — *Medico-legal reports should be promptly provided.*

Physicians should recognize that there are often legal time restrictions and court-imposed deadlines concerning the submission of expert reports or the endorsement of expert opinions. Therefore, attorneys should retain the expert and request reports sufficiently in advance of such deadlines so as to avoid inconvenience and hardship to the review-

ing physician. At the same time, undue delay in providing expert reports may hamper settlement negotiations, cause otherwise unnecessary continuances of trial dates, create burdensome scheduling difficulties for later depositions, or otherwise prejudice the party's ability to use the expert witness at trial.

4.8 — *A medico-legal report should be accurate, objective, and fully and fairly address the issues presented. The author should be mindful of the legal terminology necessary to satisfy evidentiary rules concerning competency and burden of proof.*

The physician should be aware of the significance and use of his or her reports. They play a vital role in the settlement process and in the necessary pretrial disclosure of expert witness opinions. The physician should therefore carefully review the attorney's request for the report and fully and objectively answer any special questions posed. Where legal terminology is required, the physician should attempt to set forth his or her opinions consistent with that necessary legal terminology.

4.9 — *Unless otherwise requested, a report from a treating or examining physician should generally include the following information:*

(a) History of present illness
(b) Examination findings
(c) Pertinent radiological and other diagnostic test results
(d) Diagnosis
(e) Etiology and/or causation
(f) Treatment rendered
(g) Course and prognosis, including anticipated permanency and residual disability
(h) Future treatment options and needs
(i) Past and future medically related expenses

4.10 — *A reasonable charge may be made for the time spent in preparing a medico-legal report and payment may be requested in advance of the doctor's release of the report.*

Physicians have the right to be reasonably compensated for preparation of medico-legal reports. The amount, terms and conditions of such payment should be handled at the outset, preferably in a written retainer agreement or a letter setting forth the physician's policies. (*See* § 9.2).

4.11 — *The furnishing of a medico-legal report should never be conditioned upon payment of a patient's bill for the underlying treatment.*

(*See* § 9.7).

4.12 — *A physician who may be the subject of a medical liability claim should not provide a written report to the patient's attorney without first contacting his or her professional liability insurer or attorney.*

When a physician is contacted by a patient's attorney and advised

that he or she is being investigated as a possible defendant in a medical liability claim, the physician should not provide that attorney with new summary reports concerning the care and treatment of that patient. If information is requested, the patient's medical records should be provided and the physician should contact his or her professional liability carrier or attorney for further advice and instructions.

Similarly, attorneys investigating a potential medical liability claim against a physician or health care provider should clearly state their purpose when requesting medically-related information.

5. Choice of Language and the Communication of Medical Opinions and Testimony

5.1 — *Physicians and attorneys should attempt to understand the differences between medical causation and legal causation to avoid confusion in medico-legal opinions.*

Physicians and attorneys differ in their defining of causation. This often leads to misunderstanding when the physician is asked an expert opinion on the issue of legal causation.

Medical etiology is the science of determining the causes of disease requiring medical treatment. As such, it is concerned with all possible causes. Through differential diagnosis, these causes can be narrowed such that treatment is rendered based on a final diagnosis. Therefore, the physician focuses primarily on those causes which are still operative and can be controlled, altered, or removed by treatment such that the outcome is affected. Legal causation focuses on these earlier precipitating or aggravating causes brought about by allegedly tortious conduct. Legal causation is a political and social decision as to where society feels a loss should fall. It is a factual determination, based on legal standards, as to whether a sufficient causal relationship exists between the alleged wrongdoing and the injury complained of.

Legal causation therefore has little to do with medical etiology and focuses on the role of a single past traumatic event rather than all possible causes and conditions contributing to a medical condition.

A legal cause is often defined as a cause without which the claimed injury would not have occurred. A legal cause is also sometimes defined as conduct which is a "substantial factor" in bringing about the claimed injuries. It need not be the sole cause nor the last or nearest cause.

So long as it is a cause, it does not matter that it joined with other causes to bring about the claimed injury.

In cases where an underlying medical condition was allegedly aggravated or worsened by a defendant's conduct, the defendant should only be responsible for that portion of the total harm caused by his or her conduct. This often requires a physician's opinion attempting to apportion the plaintiff's total harm as between multiple causes, *i.e.*, the underlying condition and the aggravation of that condition by defend-

ant's conduct. If apportionment is impossible, the law will hold the defendant legally responsible for all of the harm.

5.2 — *A physician should understand the legal standards of proof and evidentiary rules concerning expert opinions, and attempt to express medico-legal opinions by using necessary legal terminology.*

Each profession has a highly technical language largely unknown to the other. This technical terminology is needed in each profession to attain accuracy and certainty of meaning. However, while this terminology facilitates understanding within a profession, it often blocks understanding between professions. Physicians reporting or testifying on medico-legal issues should attempt to understand some of the legal standards of proof and technical terminology. The physician should understand that law is largely a profession based on words and language. Therefore, while many legal terms are foreign to the physician, they are of critical importance in stating a relevant and competent legal opinion.

Foremost among these necessary legal terms is "reasonable medical probability." To be competent, a physician's medical opinion should generally be based upon "reasonable medical probability." This term simply means that which is more probable than not, more likely than not, or over 50 percent probable.

This is consistent with the legal standard of proof that findings must be based upon probabilities and not possibilities. Opinions based upon surmise, speculation, or conjecture are irrelevant and inadmissible in law. However, an opinion need not be based upon scientific or medical certainty, which is a far more stringent standard than the law requires.

Therefore, physicians should attempt to express their opinions using such terms as "reasonable medical probability," or "probably" or "likely." Terms such as "possibly," "might," "may," "could," "guess," "maybe," and the like may, under some circumstances, render the opinion inadmissible.

Similarly, before testifying regarding a medical liability claim, the physician should be thoroughly versed on such terms and issues as "standards of care," "negligence," "respectable minority," "judgment calls," etc.

It is the responsibility of the attorney requesting a medico-legal opinion to educate the physician concerning the legal standards of proof and the significance of technical legal terminology. This can and should be done in the various meetings with the physician and any letters requesting a formal medico-legal opinion.

5.3 — *Physicians should use clear, plain and understandable language when testifying and should attempt to avoid overuse of complex medical terminology.*

A physician may have an excellent command of the facts and medicine and may be adequately versed in the legal terminology. However, the physician must communicate his or her facts and opinions con-

sistent with the level of sophistication of the fact-finding body hearing the case. Medical testimony may be so technically worded that its meaning is entirely lost to the jury or is so completely misunderstood that the jury arrives at a verdict that would have been different had it known the true import of the testimony.

The medical witness should remember that his or her role is essentially that of a teacher. The testimony is not intended to impress or edify, but to explain. If the testimony does not help explain and does not clarify the issues of a particular case, it has failed in the sense that it was not useful to the determination of the case.

To make expert medical testimony clear, a medical witness should preferably express his or her findings and opinion in medical terms first. Those terms should then be translated as accurately as possible into language intelligible to the court, attorneys and jury.

The attorney should assist the medical witness in choosing appropriate terminology and then monitor the testimony. If undue use of complex medical terminology is used by the physician, it is appropriate and even recommended that the attorney interrupt the testimony and obtain necessary clarification.

In complex medical cases, it may be appropriate to compile a glossary of terms and definitions which, with permission of opposing counsel and the court, may be provided to the jury.

6. Conferences and Consultations Between the Physician and Attorney

Communication with the treating physician or medico-legal expert is all-important to assure that necessary, competent and persuasive expert opinions are developed. This in turn facilitates settlement and the orderly presentation of evidence at trial. Therefore, conferences and open communication between the attorney and physician are encouraged so as to minimize misunderstandings over scheduling and fees, diminish the frequency and impact of surprises to both physician and lawyer, and overcome the often present divisiveness between the professions. (*See* § 1.2).

6.1 — *It is often advisable to meet with a treating physician or potential expert at the outset before the expert has reviewed the medical issue or rendered a report.*

An attorney and physician should often confer at the very outset before opinions are formally rendered. The attorney should explore the physician's background, training and experience to determine that physician's competence to render opinions on the medical issues involved. The background facts and medico-legal issues should be explored. The nature, scope and availability of medical records and other documentation on which the expert opinion will be based should be discussed. Any special legal concepts or language needs which should be included in a report should be addressed. Finally, financial arrangements, deadlines,

scheduling and availability should be fully reviewed at the initial consultation. Such conferences can often be held over the telephone, which saves the time, expense, and inconvenience of a more formal office consultation. Fees may be charged for such telephone conferences.

6.2 — *An attorney who expects to call a physician to testify as an expert witness in a deposition or at trial should confer in advance with that physician.*

An attorney should always meet with a physician before a trial, hearing or deposition to place the physician at ease. Most physicians have a fear of looking "foolish" in a testimonial setting and, by proper preparation of the physician, any such fears should be alleviated while, at the same time, a more effective presentation of evidence should be fostered. It is the responsibility of the attorney to schedule that conference at a mutually convenient time sufficiently in advance of the time for testimony.

Some or all of the following topics should be discussed at a pre-deposition or pre-trial consultation:

(a) The purpose for which that physician is being called as an expert witness, if that purpose has not previously been disclosed;
(b) The significant medical issues which may arise during testimony;
(c) Any potentially problematic evidentiary rules or issues;
(d) The strengths and weaknesses of the medical evidence concerning these medical issues;
(e) The medical theories and evidence which will probably be advanced by the opposing side and its experts;
(f) Important legal terminology as it relates to the medical issues;
(g) Supporting and contrary medical literature;
(h) Any reports, records or literature generated by the physician or others which should be studied to prepare for testimony;
(i) Updating and reviewing the physician's qualifications and *curriculum vita* and assuring his or her competency to address certain medico-legal issues;
(j) The substance of the questions the attorney will probably ask of the physician, including key specific questions and hypotheticals;
(k) The scope and content of the anticipated cross-examination by the opposing side, including prior depositions, publications, reports, conflicting medical histories, fee arrangements, etc.;
(l) Scheduling and trial or deposition procedures; and
(m) Financial arrangements.

6.3 — *A treating physician should not discuss the case privately with a patient's adversaries without a clear and expressed authorization to do so or without knowledge by the patient's attorney of the time and place with an opportunity to object or*

be present at that meeting. Similarly, a non-treating expert medical witness should not engage in private consultations with a representative of the opposing party without permission of the party or attorney who originally retained him or her.

Physicians should attempt to understand the adversarial system of justice and recognize the principle of adverse interest as between the patient and his or her adversary. It is axiomatic that a physician's integrity, honesty, objectivity, and judgment are among his or her most precious assets and can never be "purchased" by a litigant. However, that physician also has a duty of confidentiality concerning the patient's medical information. (*See* § 2.1). A non-treating physician expert may also owe a duty of loyalty toward the party who initially retained that expert's services.

A treating physician should therefore generally resist private communications with an opposing party's representative unless a clear and expressed authorization for such contact is provided. This will assure that the relationship of trust and confidence between a physician and patient is not undermined and will assure the propriety of any disclosures made.

If contacted by an opposing party or counsel, the physician should be provided with a prior express authorization for that contact. If such authorization is not provided, the physician should advise his or her patient's counsel or the attorney initially retaining him or her concerning the contact so as to enable that attorney to object to any such private contact or attend, observe and participate in any such consultation with the opposing party.

7. Scheduling and Subpoenas

7.1 — *The attorney should schedule a physician's testimony in depositions or at trial far enough in advance and in such a manner so as to minimize inconvenience to the physician and disruption of the physician's practice.*

Scheduling of a doctor's deposition or in-court testimony should be done as far in advance as possible. It is often a good practice to advise all potential medical witnesses of a trial date at the time the trial is first set. Vacation schedules and other potentially conflicting obligations can then be determined and resolved in advance. Specific arrangements concerning the date, time and place of trial testimony preferably should be made more than six (6) weeks prior to the scheduled appearance.

Similarly, depositions should be scheduled at a mutually convenient time and place. Attorneys should readily agree to depositions "after hours" at the physician's office if that is the least disruptive to the physician's practice. However, if the physician's office is not large enough to accommodate the attorneys in a multiple party case, the physician should readily agree to the deposition being held at an attorney's office, hospital or other convenient location.

To avoid delays and unnecessary waiting at trial, the attorney should try to schedule a medical witness as the first witness in the morn-

ing or afternoon sessions. Lay witnesses may also be used as buffers to medical witnesses. It is sometimes possible to call a physician "out of order" to accommodate his or her schedule.

However, being called "out of order" may disrupt a trial, inconvenience other witnesses and interrupt the logical flow of evidence. Therefore, while the physician is entitled to some estimate of the amount of time needed for testimony, he or she should be mindful that the attorney has little control over the court's docket, the needs of other witnesses, or the opposing attorney's conduct or questioning. These may necessarily result in some delay in testimony or other inconvenience to the physician.

7.2 — *Physicians should understand the significance of the subpoena and honor its enforcement. Likewise, an attorney should never abuse the power of the subpoena.*

A *subpoena* is an order of court, that may be issued by an attorney, compelling a witness to appear at the time and place stated in the subpoena. A *subpoena duces tecum* ("subpoena to produce") requires a witness to appear and produce certain things or documents. Subpoenas may be issued for deposition or trial testimony. The failure to comply with a subpoena may constitute contempt of court and subject the noncomplying witness to fine or imprisonment unless there exists "good cause" for the failure to comply—such as a true medical emergency. A physician who does not comply with a subpoena takes the risk of later having to convince the court that the emergency was of sufficient gravity to constitute "good cause."

Not only professional courtesy, but the reputation of the physician and the safety of his or her patients, demands that an attorney not abuse the subpoena power. A patient's life or health must not be jeopardized so that a physician can make a timely appearance in court. On the other hand, every reasonable effort should be made by the medical witness to appear as scheduled, whether or not a subpoena has been issued.

While every attempt should be made to accommodate the physician, it must be understood by the physician that he or she does not always have the right to choose the time and place to give medical testimony. Like any other witness, a physician summoned to court by subpoena must appear at the time and place so designated. However, it must constantly be stressed that a lawyer should never abuse the use of a subpoena and should always recognize the potentially disruptive effect it could have on a physician's practice and his or her patients.

If a physician feels that a subpoena has been improperly used, or a *subpoena duces tecum's* request to produce documents is overly burdensome, oppressive, or invasive of his or her privacy, the physician should contact his or her lawyer to determine what protective measures, if any, might be available.

Even though testimony is scheduled in advance, sound reasons still exist for subpoenaing a physician. The doctor should understand that the issuance of a subpoena does not signify a lack of trust in the physi-

cian's agreement to appear nor is it intended as a heavy-handed tactic to compel a recalcitrant or hostile witness. Rather, a subpoena is often necessary to protect the interests of the client seeking the testimony of the physician and to allow the attorneys and the court to better accommodate the physician's scheduling needs. Courts are often reluctant to grant continuances in the event of a medical emergency, take witnesses out of order, or otherwise accommodate busy physicians unless they have been previously subpoenaed.

Frequently, a judge will permit the physician who has been subpoenaed to remain "on call," which means that the doctor need not be personally present at all times, so long as he or she can be reached by telephone and respond promptly when needed.

When the testimony of the medical witness has been completed, counsel should immediately move the court to excuse the physician from further appearances under the subpoena.

7.3 — *The use of a subpoena to compel a physician's presence does not in any way affect the physician's entitlement to an expert witness fee.*

If the subject of testimony arises out of an individual's role or status as a physician, he or she is entitled to an expert witness fee. (*See* § 9.6). The use of subpoena to compel a physician's presence at a deposition, hearing, or trial does not in any way affect the physician's entitlement to such an expert witness fee.

Before a subpoena is issued and served on the physician, the better practice is for the attorney to contact the physician and attempt to agree upon a reasonable expert witness fee for complying with the subpoena. At the very least, a short note by the attorney should be served with the subpoena explaining that the check for the statutory mileage and witness fee accompanying the subpoena should not be considered the physician's sole remuneration for appearing under subpoena and a further expert witness fee is justified.

If no prior agreement is reached, the physician may bill the attorney for a reasonable expert witness fee for attending pursuant to the subpoena. (*See* § 9). If a disagreement arises over the entitlement to such a fee, or the amount requested, that dispute may be submitted to the court or to an interprofessional dispute resolution committee. (*See* § 10).

7.4 — *Service of a subpoena should be handled in the least disruptive manner. A physician should never seek to evade service of a subpoena so as to avoid having to give testimony.*

At the time the physician's testimony is scheduled, the attorney should discuss with the physician the need for service of a subpoena and the manner in which the subpoena should be served. Personal service on the physician can be disruptive to the physician's office and embar-

rassing to the physician. A private process server should be instructed by the attorney concerning tactful and discrete service of a subpoena.

Many physicians prefer that the subpoena be sent through the mail with a "Waiver and Acceptance of Service." This can also save the client service of process costs. If this is not returned a reasonable time before trial, personal service can still be accomplished.

A physician should never seek to evade service of a subpoena so as to avoid having to testify. This is beneath the dignity of the physician, substantially increases litigation costs, obstructs the administration of justice, and can result in eventual embarrassment to the physician when service is finally accomplished.

8. DEPOSITIONS

8.1 — *Depositions are an inherent part of the pretrial discovery process. Usually, the taking of a deposition is not in lieu of court appearance and testimony.*

Depositions of witnesses, including expert witnesses, are usually taken for "discovery" purposes. In other words, they are usually taken by the attorney opposing the party retaining or endorsing the expert in order to discover the physician's opinions. As such, different rules of examination, foundation, and qualifications apply to discovery depositions than to trial testimony. Therefore, a physician's pre-trial deposition is often not admissible at trial. This is especially so if the physician is otherwise available in the jurisdiction and amenable to compulsory attendance by the service of a subpoena. The attorney retaining or endorsing the medical expert naturally does not want to rely upon his opponent's questioning to present his or her evidence. The lawyer also wants to assure an orderly presentation of evidence in compliance with all rules of evidence to assure admissibility of the testimony. Further, the attorney must be allowed the flexibility of addressing new medicolegal issues that first arise during trial and could not have been reasonably foreseen prior to trial. Finally, for the trier of fact to understand and evaluate medical testimony, especially complex or conflicting testimony, it is essential that they see that testimony live and that the medical expert appear in court.

8.2 — *The party taking the deposition is responsible for timely payment of all reasonable charges for time spent traveling to and from the deposition and for attending, reviewing, correcting, and signing the deposition, unless there is an agreement or order to the contrary. The party retaining or endorsing the medical expert is responsible for the cost of the physician's time in preparing for the deposition.*

The party taking the deposition must pay reasonable compensation for the deposition he or she has requested. This includes reasonable costs and fees associated with any travel to or from the deposition as well as an expert witness fee for attending, reviewing, correcting and signing the deposition. Preparation for the deposition, on the other hand, inures primarily to the benefit of the party retaining or endorsing

the expert, and that party should be responsible for that preparation time. Presumably, such preparation furthers the cause of the endorsing party. Also, it would be unworkable and inappropriate for the opposing party to exercise control over the amount of time the other party's expert is to spend in preparation for a deposition. Rather, the party retaining or endorsing the medical expert can and should discuss and agree with the physician concerning the amount of time to be spent in preparation for a deposition.

8.3 — *Deposition costs and fees should be reasonable and should be agreed upon in advance of the deposition. Disputes should be noted at the outset and attempts should be made to amicably resolve such disputes or timely submit them to the court for resolution.*

Deposition costs and expert witness fees should be reasonably based on the factors set forth in Section 9.2 of this code. Every effort should be made prior to the deposition to agree on the manner, timing, and amount of compensation. In the alternative, the party endorsing the expert may legitimately condition the deposition upon prior financial arrangements being agreed to or determined by the court as set forth in Rule 26(b)(4) of the Colorado and Federal Rules of Civil Procedure.

An attorney taking the deposition of an opponent's expert witness should never withhold or delay payment of that expert's fees or engage in unnecessary conflict so as to discourage that expert witness from further involvement in the case, or as a means of "punishing" that expert for his or her testimony. When an agreement has not been reached and a dispute does arise, it should be promptly submitted to a judge or interprofessional committee for resolution. Any undisputed amounts should be remitted without delay.

9. Physician Compensation and Expert Witness Fees

9.1 — *Physicians and attorneys should strive to agree in advance concerning the nature and scope of the services to be performed, the terms and amounts of compensation to be paid for those services, and the responsibility for payment of that compensation. Absent an agreement, disputes may arise which will require resolution by the court or an interprofessional committee.*

The physician is entitled to reasonable compensation for providing services in connection with litigation. The issues of fees, costs and scope of employment for medico-legal services are frequent areas of disagreement. This is usually due to lack of open communication and the absence of a prior agreement between the physician and the attorney.

Therefore, whenever possible, these issues should be clarified before services are rendered and whenever possible, confirmed by written agreement. The agreement should be tailored to fit the specific circumstances, but it is suggested that the following be included:

(1) The scope of services to be performed by the physician;

(2) The rate of compensation to be paid for the physician's services, including whether the fee will vary depending upon the services rendered, *e.g.*, research, review of documents, examination, dictating of report, travel or testimony;
(3) Whether advance payments or retainers are required and, if so, under what circumstances;
(4) The handling of costs and expenses;
(5) Cancellation terms and amounts; and
(6) The person or persons responsible for payment of those costs and fees.

Physicians are encouraged to develop office policies concerning medico-legal involvement, which can then be reduced to writing and provided to the attorney at the time of the initial request.

An attorney provided with such a written policy should immediately assent or object to the terms provided. It is improper for the attorney who does not object to continue to request the physician's services after being advised of the physician's policies for medico-legal involvement, and then later deny that he or she agreed to the terms of those policies. However, the physician should recognize that providing the attorney with the physician's policies merely constitutes an offer and does not bind the attorney or client until they expressly or impliedly agreed to those terms.

If no agreement can be reached between a treating physician and an attorney, the physician must recognize that he or she can still be compelled to provide necessary medico-legal information and a court or interprofessional committee may be called upon to determine the amount and terms of compensation. A non-treating or consulting physician can simply refuse to participate absent an agreement with the attorney or his or her client.

9.2 — *A physician is entitled to fair and reasonable compensation for providing expert testimony.*

In determining what constitutes a fair and reasonable expert witness fee, some or all of the following factors should be considered:

(1) The amount of time spent, including review, preparation, drafting reports, travel, or testimony;
(2) The degree of knowledge, learning, or skill required;
(3) The amount of effort expended;
(4) The uniqueness of the expert's qualifications;
(5) The amounts charged by similarly situated physicians;
(6) The amount of other professional fees lost; and
(7) The impact, if any, on the physician's practice because of scheduling difficulties, other commitments, or other problems.

See also C.R.S. § 13-33-102(4).

A physician should also be aware that some statutes, such as those governing workers compensation claims, set reasonable medical fee schedules and provide that it is unlawful, void and unenforceable as a

debt for any health care provider to charge a claimant in excess of the scheduled fee. *See* C.R.S. § 8-49-101.

The use of itemized billing by the physician to the attorney should be encouraged and will often expedite payment.

9.3 — *A physician is never justified in charging exorbitant fees so as to capitalize on the patient's legal problem, or so as to discourage requests for information. At the same time, a physician cannot be expected to lose money or suffer financially as a result of participation in the litigation process. The physician should recognize that it is the patient or client who is ultimately responsible for payment of such litigation costs, regardless of the outcome of the case. Hence, charges for medico-legal involvement should generally be no higher than the physician's charges for other medical services.*

A physician should neither gain nor lose financially as a result of his or her participation in the litigation process. An attorney should never expect the physician to sacrifice income merely because his or her patient is involved in litigation. The attorney should never abuse the power of the subpoena in the hopes of obtaining free or discounted expert testimony.

On the other hand, expert witness fees should not be as high as to have the effect of preventing the patient from obtaining the doctor's medico-legal services, or as to create the appearance that the physician is attempting to capitalize on the patient's legal problem. Physicians should not seek to punish or deter attorneys or patients seeking the physician's medical information. This merely further victimizes the patient who is compelled to seek compensation for injuries through litigation.

Even though the attorney may become obligated initially to pay the physician's expert witness fees, the physician should always be mindful that the patient is ultimately responsible for such litigation costs, regardless of the outcome of the case. Even in cases handled on a contingency fee basis, only the fee is contingent. While an attorney may advance these costs on behalf of the client, the lawyer's professional ethics require that the client remain ultimately responsible.

Therefore, fees charged for litigation-related services should be roughly equivalent to fees charged in the physician's practice for medically related services.

9.4 — *In contracting for medico-legal services, the attorney is acting as an agent for the client. It is the client who remains ultimately responsible for such fees and costs. However, an attorney may ethically obligate himself or herself to pay the physician's fees and costs and, customarily, the attorney contacting or retaining a physician on behalf of a client is personally obligated to see that the physician is paid for litigation-related services.*

An attorney is only an agent for his or her client, and litigation costs and expert witness fees are contracted for by the attorney on behalf of

the client. Under agency law, an agent is usually not responsible for debts contracted for or on behalf of a disclosed principal.

However, different rules apply to expert witnesses in the litigation setting. An attorney is ethically obligated to compensate the physician directly for medico-legal services he or she has requested. The attorney may also ethically advance or guarantee such litigation costs and expert witness fees, so long as the client remains ultimately responsible for payment.

Customarily, the attorney pays those expert witnesses or physicians he or she contacts on behalf of the client, even if the attorney is not obligated to do so. This is because the attorney is in a better position to assess the client's ability to pay and to collect such advanced costs from the client.

9.5 — *Compensation of an expert witness may never be contingent upon the outcome or the content of the physician's testimony, or the court's acceptance of the witness as an expert witness.*

A physician's compensation should never be conditioned upon, or measured by, the amount of the patient's recovery in damages in the litigation. Any contingent witness fee naturally compromises the integrity of the testimony of that witness. The physician is entitled to reasonable compensation regardless of the outcome of the case.

It goes without saying that the attorney cannot condition compensation upon the content of the physician's testimony and thereby seek to purchase favorable testimony. This is clearly unethical conduct on the part of the attorney and should be reported to the court in which the action is pending, or the Supreme Court Grievance Committee.

Because the attorney should be familiar with court rules governing competency of expert testimony and has a duty to inquire concerning the qualifications of his or her tendered expert, it is also inappropriate to condition the physician's compensation upon the court's acceptance of that physician as an expert witness.

9.6 — *An expert witness fee is owed to the physician if the subject of the testimony arises out of the individual's role or status as a physician and cannot be conditioned upon the eliciting of expert "opinions."*

The premise that an expert witness fee is due only if an expert opinion is elicited from the witness is not a valid assumption. A physician who comes into possession of facts or information solely because of his or her position as a physician is entitled to receive compensation as an expert when subpoenaed to testify to those facts in court. The physician's position and status at the time he or she comes into possession of relevant information determines whether the physician should be entitled to an expert witness fee.

9.7 — *A physician has a duty to provide medical information and participate in his patient's litigation regardless of the status of the patient's bill for medical care and*

treatment. However, where possible, the attorney may assist the physician in the collection of outstanding fees for medical treatment.

Fees for medical care and treatment are exclusively the responsibility of the patient. It is unethical for the attorney to advance these costs on behalf of the client.

A physician may not condition his involvement in litigation, (*i.e.*, providing records, reports, or deposition or trial testimony) upon payment of the patient's bill. A physician should never feel that he or she has some financial interest in the outcome of the case, due to an unpaid patient bill, which might appear to taint the objectivity of medical testimony. The physician should recognize that some patients are dependent upon a legal recovery to pay for past and future medical services. Further, public policy mandates that the physician provide necessary medical information and testimony to evaluate such claims. However, as a professional courtesy, the attorney may make reasonable and ethical efforts to assist the physician in obtaining payment for his or her services. The attorney should urge the client to pay the physician for the medical care received as soon as possible regardless of the status of the lawsuit. It is never proper for the attorney to advise the client that payment for medical care and treatment may justifiably be withheld until the lawsuit is completed.

The attorney may also request permission from the client to pay the physician for such services directly out of any recovery received in the litigation. This authorization for direct disbursements to the physician can often be set forth in the attorney-client fee agreement.

9.8 — *Terms concerning cancellation of testimony should be discussed and agreed upon in advance. A physician is entitled to prompt notification of cancellation of testimony. Cancellation fees should be reasonably related to the actual loss to the physician.*

Cancellation of testimony is often a source of interprofessional disputes. This usually can be alleviated by prior agreement between the physician and the attorney endorsing or retaining the physician. If the physician has a cancellation policy, the opposing attorney should be advised of that policy at the time a deposition is scheduled. The opposing attorney is then subject to the terms of the cancellation policy should he or she later be responsible for the cancellation of the deposition.

If a case is settled or continued, or the physician's testimony is otherwise cancelled, the attorney who scheduled that physician's testimony should immediately notify the physician of that cancellation. This should preferably be initially done by telephone and followed by a confirming letter.

In the event of settlement, the cancellation notification should also include an inquiry concerning any outstanding fees and costs which should be withheld from the recovery. As a professional courtesy, it is

often a good practice to advise the physician of the outcome of the case and the role, if any, the physician played in that resolution or recovery.

Cancellation policies should be reasonable under the circumstances. There should be agreement concerning what constitutes "reasonable notice" of cancellation such that a cancellation fee will not be charged.

Cancellation fees that are charged should be reasonably related to the actual loss to the physician in terms of lost medical fees and the impact on his or her practice. If the physician can use the cancelled time productively, *e.g.*, for necessary administrative functions, billing, dictation of reports or hospital or medical reports, updating medical literature, or seeing emergency patients, this factor should be heavily considered in determining the need and amount of a cancellation fee.

10. Dispute Resolution

10.1 — *Interprofessional disputes should be promptly submitted to an interprofessional dispute committee. Disputants should cooperate in the submission, investigation and resolution of such disputes.*

Regardless of the best efforts of both professions to avoid disagreements, disputes do arise. The Colorado/Denver Bar Association Interprofessional Committee is available to assist with the resolution of such disputes between physicians and attorneys. Other local professional societies may have similar committees. If a dispute arises the disputants are encouraged to submit the controversy to the appropriate dispute resolution committee for review. The disputants are requested to submit written summaries of relevant facts along with pertinent documentation concerning the matter in controversy. Submission of the dispute should be done with fairness and candor, without rancor, and without unprofessional remarks or other conduct which would be further divisive to interprofessional relations.

Members of the committee are then assigned to investigate the disputes and make recommendations for their resolution. The disputants should remember that these investigators are unpaid volunteers, and every effort should be made to cooperate in their investigation. When a final recommendation is made, the disputants will be advised in writing from the interprofessional committee involved. The recommendation of the interprofessional committee is not binding unless agreed to by the disputants. However, in most cases, the recommendations of the committee are followed.

Such disputes may be submitted to the following committee:
Colorado Bar Association/Denver Bar Association
Interprofessional Committee
1900 Grant Street, Suite 950
Denver, Colorado 80203-4309

APPENDIX

AUTHORIZATION TO RELEASE MEDICAL INFORMATION

(The execution of this form does not authorize the release of information other than that specifically described below)

TO:	PATIENT:	RELEASE TO:
	Name:	
(Print/type name & address of doctor or health care facility)	S.S.No:	(Name & address of organization, agency, individual to whom information is to be released)
	Birth Date:	

I request and authorize the above-named doctor or health care provider to release the information specified below to the organization, agency, or individual named on this request. I understand that the information to be released includes information regarding the following condition(s):

☐ Drug Abuse, if any
☐ Sickle Cell Anemia, if any
☐ Alcoholism or alcohol abuse, if any
☐ Psychological or psychiatric conditions, if any

Information Requested:	Dates Covered:
☐ Copy of history & physical, discharge summary & operative reports ☐ Copy of outpatient & E.R. admissions ☐ Copy of complete hospital chart ☐ Other (specify)_____	☐ All admissions or care at this facility or by this doctor ☐ Limited to treatment dates & for conditions described below:

Purpose(s) or need for which information is to be used:
☐ Damage or claim evaluation and presentation
☐ Other _____

AUTHORIZATION — I certify that this request has been made voluntarily and that the information given above is accurate to the best of my knowledge. I understand that I may revoke this authorization at any time, except to the extent that action has already been taken to comply with it. Redisclosure of my medical records by those receiving the above authorized information may not be accomplished without my further written consent. Without my express revocation, this consent will automatically expire upon satisfaction of the need for disclosure, but in any event:
☐ on _____ (date supplied by patient); or ☐ if revoked in writing by patient; or ☐ 180 days from the date hereof; or ☐ under the following condition(s):

_____

☐ Copies of records to be supplied to opposing counsel
☐ Other

OTHER CONDITIONS — A copy of this authorization or my signature thereon: ☐ may, ☐ may not be utilized with the same effectiveness as an original.

DATE	SIGNATURE OF PATIENT	PERSON AUTHORIZED TO SIGN FOR PATIENT
		_____ Print or type name State how authorized: _____