

Ethics in Conflict

Responsible medical expert testimony is keenly sought after by plaintiff and defendant lawyers alike. Lawyers on both sides of a medical malpractice suit seek to mount an effective case, whether to recover compensatory (and sometimes punitive) damages or to defend the physician defendant. Ethical norms and values clearly govern the behavior of the lawyers in such cases.

Serious ethical questions arise for the defendant's lawyer when aspects of the defendant's behavior or character merit concern. A lawyer acting on behalf of a physician known to have a problem with alcohol, drugs, and/or mental illness, for example, would be expected to do everything possible to defend that client. When that lawyer obtains a physician as an expert witness, what ethical imperatives, if any, require that the expert be informed of the defendant's problems? If the physician's behavior was a real or potential factor causing or contributing to the alleged act of negligence, should the defendant lawyer be expected to share those adverse facts with the expert witness? Would that lawyer not, rather, do everything to obfuscate the behavioral problems and not upset the expert witness, regardless of any ethical imperatives to the contrary?

Many medical expert witnesses, I believe, would be most distressed to discover the defendant's problems late in a case, or even after a trial was over. The obvious need for the expert to address only the "facts" of a case complicate a problem that physicians have been tardy in recognizing. The medical community's tendency to "protect" the "aberrant" physician is well ingrained, if only because, knowing how complex medical practice is,

physicians feel that "there, but for the grace of God, go I."

The expert witness who unwittingly testifies on behalf of an "aberrant" physician would find his or her ethical system in serious conflict with those of the defendant's lawyer. Is it



unreasonable or unrealistic to expect a defense lawyer to communicate these adverse aspects of the defendant's behavior to the medical expert witness? If so, would it not be judicious for every medical expert to ask the defense lawyer directly about any such problems, in order to avoid the personal ethical conflict that testifying for such a physician would create?

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Erratum

Due to a typographical error, a line was dropped from footnote 32 of the June 1985 Nursing Law & Ethics column by Jane Greenlaw, R.N., M.S., J.D., "Definition and Regulation of Nursing Practice: An Historical Survey." Footnote 32 should read: "AMERICAN NURSES' ASSOCIATION, THE NURSING PRACTICE ACT: SUGGESTED STATE LEGISLATION (American Nurses' Association, Kansas City, Mo.) (1981) at 3.