

Addiction Medicine and the Law: How to Become an Expert Witness

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Disclosure Information

☀ Michael Weaver MD, DFASAM

☀ No Disclosures

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☀ Eli Lilly, Advisory Board, 2024

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Learning Objectives

- 1.) Discuss legal issues in Addiction Medicine practice, including impact on professionals, patients, families, and the court system.
- 2.) Identify the qualifications of an Addiction Medicine expert witness and contributions to the U.S. legal system.
- 3.) Recognize different settings where a practicing Addiction Medicine professional can participate in legal case work as a form of professional development.

Overview of Session

- ☀ Basics of expert work
 - ☀ Overview: Qualifications and Terminology
 - ☀ Types of cases
 - ☀ Setting up a practice
- ☀ Individual Areas of expert work
 - ☀ Addiction Medicine and Administrative
 - ☀ Medical Toxicology
 - ☀ Pain and Addiction
- ☀ Pitfalls and Pearls Panel Discussion
- ☀ Q&A

Overview: Qualifications and Terminology

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Expert Witness Responsibilities

- ✱ Ethical responsibility to the truth of the findings
- ✱ Protect the truth from the influences of both sets of attorneys
 - ✱ You are not trying to help the side who hired you to win the case
 - ✱ Testify to the truth and let the lawyers spin it for their own sides
- ✱ The fact-finder (judge/jury) makes the final decision
- ✱ Medical consultants assist lawyers for the plaintiff/defense
 - ✱ Comment on testimony of witnesses and other experts
 - ✱ Assist with preparation for trial (deposition, cross-examination)

Qualifications to be an expert witness

- ☀ Must be qualified to render an opinion
 - ☀ Knowledge, skill, experience, training, or education
- ☀ Testimony
 - ☀ Must be comprised of scientific, technical, or other specialized (medical) knowledge
 - ☀ Help the fact finder understand the evidence or resolve a factual dispute
- ☀ Admissibility of scientific (medical) knowledge
 - ☀ Whether a theory or technique can be or has been tested
 - ☀ Subjected to peer review and publication
 - ☀ Degree of acceptance within the relevant medical scientific community
 - ☀ Known or potential rate of error

Medical Expert Testimony

- ✱ Not an ordinary (fact) witness
 - ✱ Offer opinions on ultimate questions of fact
 - ✱ May not be based on first-hand knowledge or observation
 - ✱ Explain the bases of their opinions
- ✱ Malpractice case
 - ✱ Establish one or more of the essential elements of a claim or defense
- ✱ Criminal case
 - ✱ Support claims of diminished capacity or insanity
 - ✱ Resolve issues about a defendant's potential for future dangerous behavior
- ✱ Explain complex scientific concepts
- ✱ Aid the fact finders (jury or judge) to understand the evidence

Limits of Expert Testimony

- ☀ Expert witnesses are not permitted to offer legal conclusions
- ☀ Cannot express opinions about the credibility of other witnesses
- ☀ Testimony can be excluded if probative value is substantially outweighed by other specific considerations
 - ☀ Unfair prejudice, mislead the jury, waste time
- ☀ Expert opinion must be based on sufficient factual data
- ☀ Cannot rely on hearsay deemed unreliable by other experts in the field
- ☀ Conclusions must be useful given the applicable burden of proof

Malpractice Litigation

☀ Professional liability

- ☀ Allegation of failure to assess and diagnose a problem (addiction, overdose risk)
- ☀ Inappropriate prescribing
 - ☀ Opioids and benzodiazepines are most commonly questioned
- ☀ Inadequate monitoring
- ☀ Failure to obtain informed consent

☀ Bad outcome

- ☀ Addiction
- ☀ Disability
- ☀ Death

☀ Expert witness evaluates whether the standard of care has been met

The 4 D's of Malpractice

- ☀ Duty
- ☀ Dereliction
- ☀ Direct Cause
- ☀ Damages

Types of Cases an Expert Witness Might See

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Three Broad Categories of Cases

☀ Criminal Lawsuits

- ☀ Asserts a criminal law was broken
- ☀ The government is prosecutor
- ☀ Defendant is arrested then → incarceration → court and possible jail/prison time and/or monetary penalties

☀ Civil Lawsuits

- ☀ A non-criminal “dispute”
- ☀ Anyone with legal standing, including the government, can be a plaintiff filing a ‘claim’
- ☀ No arrests or jail/prison time will be involved for the defendant
- ☀ “Other” = not (yet) actual lawsuits

Criminal Cases

- ❖ Prescribing controlled substances outside legitimate medical practice
 - ❖ By Type (Pain/opioids; Buprenorphine/methadone; Stimulants; Sedative hypnotics; Polypharmacy)
 - ❖ By practice issues (sex for rx, selling Rx)
- ❖ Murder cases, sex trafficking (pregnant women, 'dealers')
- ❖ Fraudulent billing / Conspiracy to commit health care fraud (RICO)
- ❖ Abuse of patients by provider / treatment programs
- ❖ Driving Under the Influence
- ❖ Drug Court

Civil Cases

- ☀ Malpractice / Wrongful death

- ☀ There are similar cases against owners/managers/provider organizations
- ☀ Involve acts of commission and/or omission
- ☀ Deviating from minimal standards of care/ P&P / regs
- ☀ Which lead to harm against the plaintiff who was owed duty of care

- ☀ Waste/abuse (Payers) versus failure to pay (Providers)

- ☀ Competency

- ☀ Involuntary Commitment

Other – ‘not yet’ lawsuits

- ☀ Health care related issues:

- ☀ Medical necessity

- ☀ Work, disability, or other non-health care insurance related:

- ☀ Fitness for duty

- ☀ Medical boards

- ☀ Disability, Worker's compensation, Life insurance

- ☀ Causality, pre-existing conditions

Issues You May be Asked to Opine On

- ☀ Impairment
- ☀ Competency
- ☀ Toxicology interpretation
- ☀ Child custody
- ☀ Care Delivered v. Standards of Care

Or you may be asked to provide information with no clear opinion on a given case

- ✱ Educating fact-finders (jury/judge) on nature of addiction as relevant to the case at hand
- ✱ Etiology, Prevention, Diagnosis, Treatment, Prognosis of Addiction
- ✱ Nature of intoxication/withdrawal with specific substances
- ✱ Time-line of changes in diagnoses / standards of care

Who hires you?

- ☀ Attorneys in lawsuits (prosecutors, plaintiffs, defense)
 - ☀ For individuals (patients or their estates, treatment providers, criminal defendants,
 - ☀ For Groups
 - ☀ Insurance companies (health, worker's comp, disability, life, malpractice)
 - ☀ The government (state or federal, civil or criminal);
 - ☀ Treatment providers, employers (FAA, medical boards)
- ☀ The Court itself (independent expert; competency, etc)
- ☀ VERY RARELY an individual themselves

Setting Up an Expert Witness Practice

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Setting up an Expert Witness Practice

- ☀ Mentorship (very little training on how to be an expert in medical education -sure the science but not 'how to')
- ☀ Positioning yourself as an expert & the 'ideal' expert
- ☀ Referrals –first case often from a senior colleague that does expert work & is just too busy...
- ☀ Talking to an attorney (and who hires you?)

Consultant Work

- ☀ Who gets paid? (you or your institution)
- ☀ Setting up a PLLC (1099 income)
- ☀ Tax strategies (talk to an accountant)

Contact with an Attorney

- ☀ Responding to an email (or phone call) inquiring about your availability to consult on a case or review material.
- ☀ How much information is too much? Don't sell your expertise for too little (or give it away for free).
- ☀ Brief summary from the attorney → general comments either it seems reasonable to review and provide an opinion or it is outside your expertise or you simply don't want to serve as an expert related to this subject/case etc.
- ☀ "In general that seems like... but I would need to review XYZ"

CV, Rate Sheet, and EIN (or SS –for W9)

- ☀ CV should be readily available
- ☀ Rate sheet and retainer (hourly rate)
- ☀ Some organizations (e.g., the government) have fixed rates that they offer.
- ☀ Some courts or work for Public Defender is limited in what they can offer/hour.
- ☀ Consider some volunteer work for non-profits, causes that resonate with your values (*Legal Aid Society, New York Legal Services Coalition, Empire Justice Center*)

What is included in a Rate Sheet

- ★ Billing information –contact/address/phone/website etc.
- ★ Rates (hourly vs daily or half day) (what is a typical hourly rate?)
- ★ Hourly rate –does it differ for review vs deposition/trial work (more stressful).
- ★ Billing by the half-day or day
- ★ Billing when traveling, expenses (hotel/flights) ? prepay
- ★ Cancellations (when fees waived if trial cancelled)
- ★ Retainer (how many hours for initial review)
- ★ How often do you bill?

Contract (your vs attorney or other entity)

- ✱ Conflicts of interest
- ✱ Position yourself very visibly for topics you want to be an expert consultant/witness in.
 - ✱ Publications/book chapters/review articles
 - ✱ Lecturers/symposiums/Professional Society Board positions
 - ✱ Articulate/can present complicated material at appropriate levels
 - ✱ Scientific vs lay (to a jury).

Paperwork

- ☀ Invoice tracking
- ☀ Contracts
- ☀ Secure files
- ☀ Thumb drives/discs
- ☀ Reports
- ☀ Case log
- ☀ List of cases you've testified in (number of times at trial, depositions, etc.)

- ☀ Obtain a few different rate sheets from mentors, ask for copies of report (of a 'closed' case) you can review (and keep confidential).

Anatomy of a case

- ☀ First contact (email or phone or colleague referral)
- ☀ First discussion
- ☀ Rate sheet/CV/contract
- ☀ Material sent
- ☀ Initial review
- ☀ Report yes/no*
- ☀ Discussion → report yes/no
- ☀ Report → submission, review of opposing expert, deposition, trial*
(% of cases that go to trial extremely low < 5%)

What is in a report -example

- ☀ Format
- ☀ Background/qualifications (refer to CV for additional info)
 - ☀ Process of review
- ☀ Materials reviewed
- ☀ Summary of materials reviewed
- ☀ Timeline* (if appropriate)
- ☀ Toxicology (if appropriate) levels and interpretation
- ☀ Discussion
- ☀ Conclusion
- ☀ References*

How to Become an Expert Witness

- Recognize that you are not an expert at everything.
- Identify and work within your specific areas of expertise.
- We present 3 examples as models:
 - General Addiction Medicine and Administration
 - Medical Toxicology
 - Pain and Addiction

General Addiction Medicine Practice and Administration Expert Witness Work

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Possible Parties Involved

- ☀ Patients
- ☀ Doctors, other prescribers, other addiction/ mental health clinicians
- ☀ Owners/ Operators of treatment programs /clinics / practices
- ☀ Clinical supervisors / Medical Directors
- ☀ Parents
- ☀ Employers
- ☀ Child and Family Services
- ☀ Insurance Companies
- ☀ Criminal Prosecutors
- ☀ Medical Boards / State Bar Associations / FAA / etc

My Background

- ✱ Psychiatrist and Addiction Medicine
- ✱ Psychiatric practice involves forensic work
- ✱ MBA with additional certificate in Health Sector Management
- ✱ Medical Director for 2 payers (CDPHP, CVS Caremark)
 - ✱ Experience on Special Investigations Units (SIU) for both payers
- ✱ Past ASAM President, involved with developing multiple guidelines and policies
- ✱ Broad psychiatry and ADM clinical background in many states

Typical Cases I Don't Take

- ☀ Child custody
- ☀ DUI
- ☀ Fitness for Duty
- ☀ IMEs (Independent Medical Exams)
- ☀ Behavioral Addiction

My Typical Cases

☀ Criminal:

- ☀ Health Care Fraud
- ☀ Prescribing outside legitimate practice

☀ Civil:

- ☀ Malpractice/ Wrongful death (clinicians and programs)
- ☀ Civil billing disputes
- ☀ Disability, worker's comp, health insurance reviews
 - ☀ Medical necessity, relatedness, pre-existing conditions

Treatment Program Issues

- ✱ Owners / Operators not following their Policies and Procedures
(which were typically sent to the state to get program licensure)
- ✱ Medical Directors / Supervisors not following requirements
- ✱ Not delivering services as required or as billed
 - ✱ Staff unqualified to perform services
 - ✱ Inadequate number / types of services
 - ✱ inadequate psychotherapy notes
- ✱ Billing for medically unnecessary care *
- ✱ Engaging in illegal activities (especially patient inducements)

Example 1 Drug Test

- ★ A 'general residential program' drug tests every patient 3x per week
 - ★ On standing orders for all patients, no patient specific orders
 - ★ Bills \$2000 per test as an Out of Network provider
 - ★ Runs the same 50+ analytes on every patient, including multiple TCAs/SSRIs
 - ★ MD/APC rarely signs off on results
 - ★ Failed test results are not documented as being reviewed with patient or used for patient care/ tx plan changes
- These are not medically necessary tests, and the expert could be called on for a criminal fraud case, a civil billing dispute case, or evidence of malpractice in a specific case.

Example 2 –Wrongful Death

- ☀ Patient is inpatient for medically monitored withdrawal management from EtOH
 - ☀ Staff do not adequately perform CIWAs or provide medications as ordered for 2 days
 - ☀ Physician / APC does not document seeing patient or reviewing patient's records after brief initial admission exam
 - ☀ Patient develops DTs, noticeable on facility's video camera, but which is not identified by staff until patient is found on unit non-responsive
- Expert can be called upon for malpractice suit against APC, supervising physician medical director, DON, treatment center itself

Addiction/Toxicology Expert Witness & other medicolegal work

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Types of Cases I take

- ☀ Cause of death (e.g., “Mixed drug overdose” need to differentiate if there was a primary agent or if it was “but for the XXX Mr Q would be alive.”)
- ☀ Driving Impairment (alcohol*, cannabis, other drugs)
 - ☀ Other impairment –clearance from hospital/ED/treatment program complications.
- ☀ Drug Recognition Expert Exam challenges
- ☀ Standard of care for addiction specialist work (withdrawal management, medication use/initiation complications, monitoring)
- ☀ Dram shop cases (against typically or provide context/consult)

Types of Cases I take continued...topics

- ☀ Interpretation of drug levels and concentrations in biologic matrix'
- ☀ Drug testing use and interpretation.
- ☀ Pharmacology –Pharmacokinetic/pharmacodynamic issues and explanation.
- ☀ Pain, sedation and withdrawal management and complications from drugs (interactions, adverse effects, tolerance/dependence and withdrawal factors).

Pain & Addiction Expert Witness Work

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Types of cases I take

- ☀️ Defend physicians related to pain management issues
 - ☀️ Being sued for malpractice
 - ☀️ Prescribing opioid analgesics leading to addiction or other bad outcomes (overdose)
 - ☀️ Investigated for inappropriate opioid analgesic prescribing
 - ☀️ Being sued for failing to prescribe opioids
- ☀️ Lawsuits involving vehicle collisions where a driver used opioids (and possibly other substances)
 - ☀️ Plaintiff or defendant
 - ☀️ Often involve a trucking company or driver employed by a commercial company

Other cases I take

- ✱ Not just pain management
- ✱ Alcohol withdrawal
 - ✱ Bad outcome in a hospital or jail
 - ✱ Plaintiff or defendant
- ✱ Inappropriate disclosure of medical records of impaired physician
- ✱ Lawsuits involving overdose
 - ✱ Prescribed controlled substances or illicit substances
 - ✱ Defendant or plaintiff

Cases I don't take

- ☀ Workers Compensation
- ☀ Department of Transportation
- ☀ Anything “controversial”
 - ☀ Cases must be approved by my employer (medical school)
 - ☀ Dean has not approved of my involvement in specific cases
 - ☀ Defend opioid analgesic manufacturer against state and county lawsuits
 - ☀ Major league baseball player who died of an overdose

Billing through my academic Department

- ☀ Department does advertising of my expert witness services
- ☀ Refers cases to me as appropriate
- ☀ Department Accountant handles billing
 - ☀ Sends out invoices, receives payments, follows up with law firms
- ☀ My payments go into my regular paycheck and taxes are taken out
- ☀ Department gets a portion of my expert witness fee for this
 - ☀ Many other academic Departments take a higher cut
 - ☀ I can get some of this back for travel to conferences, etc.

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Pearls & Pitfalls

Panel Discussion

- ✦ Developing a pipeline for referral - How do you get cases?
- ✦ Communication with lawyers
 - ✦ Understanding what you are being asked to do by a lawyer
 - ✦ How do you decide to not take a case?
 - ✦ Expectations for time and deliverables
 - ✦ Retainer vs. no retainer
 - ✦ Anything you write and send to lawyers is discoverable; assume ANYTHING you write down is discoverable
 - ✦ Scope of practice issues (can you offer an opinion about another practitioner; for example, can a Psychiatrist opine about a primary care physician doing OBOT?)

Pearls & Pitfalls

Panel Discussion (2)

★ Giving testimony

- ★ Listen Hard, Think Carefully, and Only Then speak
- ★ When a lawyer asks, “Wouldn’t you agree...”
- ★ “Yes”, “No”, “It depends”, “I don’t understand your question/can’t answer as worded”
- ★ Impeachment

★ Malpractice insurance

- ★ Limited immunity and liability
- ★ Get separate policy or not

Appendix Materials

Writing an Expert Report

☀ Decisions

- ☀ Write on own or draft together with lawyers
- ☀ Send (via e-mail) written drafts to lawyers or only discuss verbally until final
 - ☀ Early drafts may be discoverable (varies by jurisdiction)
- ☀ Include medical literature reference citations or not
- ☀ Cite Bates number pages in medical records and other documents or not

☀ Always include

- ☀ My background – why I’m an appropriate expert for this case
- ☀ List of all records and documents reviewed for case
- ☀ All my opinions about the case
- ☀ I may update my opinions based on new information

Medical literature as evidence

- ☀ All state and federal courts allow medical literature to be used for some purposes at trial
- ☀ Courts permit an article to be used for impeachment if the witness relied specifically on that article in forming their opinions
 - ☀ Thoroughly know any references you cite
 - ☀ They can be used against you
- ☀ An article can be used for impeachment in the absence of the witness' reliance if the witness acknowledges that the source is a recognized authority in the field
 - ☀ Don't just agree with an opposing lawyer that an article or textbook is "authoritative"

Medical Necessity is defined in the contract / plan documents for a specific health plan, but generally comports with the following:

Health care goods and services provided to a patient for the purpose of preventing, evaluating, diagnosing or treating an illness, injury, disease or its symptoms and that are:

- necessary for and appropriate to the diagnosis, treatment, cure, or relief of a health condition, illness, injury, disease or its symptoms
- within the generally accepted standards of medical care in the community
- not solely for the convenience of the insured, the insured's family or the provider.
- not more costly than an alternative service or sequence of services at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of that patient's illness, injury or disease.