MARICOPA COUNTY MEDICAL SOCIETY
&
MARICOPA COUNTY BAR ASSOCIATION

GUIDELINES FOR COOPERATION BETWEEN THE PHYSICIANS AND ATTORNEYS IN MARICOPA COUNTY, ARIZONA

Prepared jointly by
the
Medical-Legal Liaison Committees
of
MARICOPA COUNTY BAR ASSOCIATION
and
MARICOPA COUNTY MEDICAL SOCIETY

1978

INTRODUCTION

This statement has been prepared to assist physicians and attorneys in their inter-professional contacts in the hope that misunderstandings may be minimized and meaningful inter-professional relationships, based on mutual respect may be engendered. The governing bodies of both associations have approved the provisions of these Guidelines.

MEDICAL LIAISON COMMITTEE
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I. MEDICAL EXAMINATIONS

(Requested by the Attorney or Representative of the Opposing Party.)

1. The law specifically provides for a medical examination if either party to a lawsuit requests it. Many times such an examination is performed by an agreement and even before litigation.

2. The attorney or representative requesting examination will arrange the time with the physician and notify the patient of the appointment.

3. The attorney or representative motivating this examination should, in writing, request the physician to answer certain pertinent medical questions.

4. The physician should perform those examinations necessary to formulate an informed opinion as to the nature and extent of the party's medical condition, and answer pertinent medical questions.

5. The physician may request plain x-rays and routine laboratory tests. Should more sophisticated x-rays or tests be necessary, such as barium x-rays, myelograms or electromyograms, the physician should make appropriate arrangements with the requesting attorney.

6. Should the party refuse to submit to examination or x-rays or routine laboratory tests, the physician should not persist but notify the attorney or representative requesting the examination.

7. Should the physician desire additional previous medical information, this request should be conveyed to the attorney or representative motivating the examination.

II. WRITTEN REPORTS

A. The Attorney.

1. The request for the report should be made in writing and must be accompanied by a written authorization signed by the patient or his or her legal guardian.

2. If an examination is pursuant to a stipulation, a court order or notice, under Rule 35, Arizona Rules of Civil Procedure, a written authorization to perform the examination or send the report is not necessary.

B. The Physician.

1. Medical records. The physician must keep records adequate to supply a patient's attorney with pertinent information regarding the patient-client's medical history. The physician should remember that the legal aspect of the case may not appear for several years.

2. X-rays, ECG's, EEG's, etc. The physician must retain control of his x-rays, ECG's, EEG's, etc. This does not preclude their delivery to another physician provided the permission of the patient is obtained and arrangements are made for their return.

3. Requests for medical information should be honored promptly. If there is a court order specifying more than the name of the examining physician and the time of the examination, the attorney should specify the details of the court order.

4. If a physician is unable to make a complete medical evaulation within the time required, he should notify the attorney. In this event, a preliminary report clearly designated as such may serve the attorney's needs until an evaluation can be completed.

5. Content of report. The following, where applicable, should be included in the report:

a. Date, time and place of first visit.

b. An accurate history of the medical condition,

including pre-existing disease. The history of the accident or trauma should be confined to those elements necessary to elicit the medical situation. Facts relating to liability are within the province of the attorney.

c. Nature of examination and findings.

d. Results of any laboratory work, x-rays and consultations, including copies of said reports.

e. Where possible, the physician's opinion including diagnosis and prognosis. This opinion should discuss the relationship, if any, of the accident or injury to the patient's symptoms. The opinion should include further disability, necessity for future treatment or surgery, the effect of any pre-existing disease or prior injury, the length of convalescence, and should answer any specific medical questions presented to the physician by the attorney or representative requesting the examination.

In addition, where the report is made by a treating or consulting physician with respect to a patient's condition, it should include:

(i) A statement about whether the patient's condition is stationary or whether the patient was or will be discharged.

(ii) A description of subsequent examinations, including history, findings and impressions, nature of treatment, need for confinement to hospital or home, referrals to other physicians and patient's progress, pertinent laboratory data, and a final diagnosis and prognosis.

(iii) Statement for current physician's charges and medical expenses should be itemized excluding charges for medical reports to attorneys which cannot be used as evidence.

(iv) The cost and extent of future medical care should be estimated when possible.

f. All references to liability insurance or medical insurance should be omitted.

III. DEPOSITION
(Testimony Under Oath Outside of Court)

A. Deposition Defined.

A deposition is an official proceeding authorized by law whereby a person, such as a physician, may be required to give testimony and be cross-examined under oath outside of court before an official court reporter and in the presence of attorneys representing the parties. Sometimes production of original records will be required. Often, however, copies of the doctor's medical records may suffice for the legal purposes.

B. Time and Place.

The time and place of the deposition should be set, by agreement with the physician and, if possible, in the physician's office. Both the physicians and the attorneys should be punctual. Any attorney or physician who is delayed should promptly notify all parties of the delay.

C. Physician-Patient Privilege.

If the testimony of the physician regarding his patient's physical or mental condition is being elicited through a deposition, the physician need not be concerned with the question of privilege unless the attorney for the patient invokes the same.

D. Subpoenas.

If the deposition of a physician cannot be set by agreement, his attendance can be required by subpoena. Even if the deposition is set by agreement, the attorney causing the deposition may nevertheless subpoena the physician. The physician should not be concerned if subpoenaed, for many times a subpoena is necessary to permit inspection or copying of the physician's records, and in many instances a subpoena will avoid any privilege problems.

E. Preparation and Deportment.

Since the testimony given at deposition hearings may be read at the trial, it is important that the physician, prior to deposition, prepare himself as for trial, and that his attitude and deportment at the deposition hearing be similar to that at trial. The attorney should make every effort to assist the physician in this preparation. (See parts IV and V of this Plan.)

IV. RELATIONSHIP BETWEEN PHYSICIANS AND ATTORNEYS

A. A Physician May Only Act for One Side.

The physician may be engaged only by one side of a lawsuit except by agreement between the attorneys or by order of the court. However, the physician's testimony should always remain objective and must not be colored by the opinions of the employing attorney.

B. Informal Conferences Between Physicians and Attorneys.

1. When the physician is treating or has treated a patient and that patient's attorney desires a conference with the physician to discuss the patient's condition, or desires a medical report or copies of the physician's office records, the physician must comply with the request at the earliest convenient time. The attorney should present the physician with a release of medical information authorization, signed by the patient or his legal representative.

2. If the lawyer representing the defendant desires to discuss the case with the physician, or obtain a medical report or copies of the physician's records, he should either:

a. Present the physician with a signed release of medical information authorization, or

b. Subpoena the physician for deposition.

3. The physician and the attorney calling the physician on behalf of the patient should confer prior to trial or deposition at which time the medical-legal issues should be discussed.

4. Medical and legal causation are not always the same. For example, an injury may become infected. As a result of the infection, the patient may need to be hospitalized. While medically speaking, the infection is the cause for the hospitalization, legally, the trauma necessitated the hospitalization and, therefore, caused it.

Consequently, no physician should be offended by an attorney's conscientious, thorough and diligent inquiry into the physician's reasoning and analysis concerning the treatment, diagnosis

or prognosis of the medical problem. Such terms as "possible", "probable" or "reasonable medical probability" have special legal significance to an attorney who may request that the doctor phrase his opinions using these terms.

5. Attorneys should meet with physicians before depositions or court appearances. Attorneys should determine, before these proceedings take place, the nature and extent of the physician's opinions and conclusions.

V. THE PHYSICIAN AND THE TRIAL

A. Subpoenas for Trial.

Some attorneys will not subpoena a physician they expect to call as a witness, preferring to make personal arrangements with the physician, and relying upon his promise to appear. Other attorneys subpoena medical witnesses because:

1. It may be desirable in a particular case for the physician to be able to testify, if asked, that he appears in court pursuant to a subpoena; or

2. It may be essential in order to secure a continuance if for any reason the physician fails to appear as required.

B. Recommended Policy Regarding Subpoenas and Physician's Appearance.

1. A physician should not take offense at being served with a subpoena. Whenever possible, the lawyer should give the physician advance notice of the service of the subpoena. The physician should make himself available for such service.

2. To the best of his ability, the attorney should make arrangements with the physician regarding the time the physician will be called to testify.

3. Recognizing the time problems of the medical profession, judges and attorneys should make every effort to avoid unnecessary inconvenience for the physician. Notwithstanding these efforts, the physician's testimony may not occur on schedule. The process of law and the time of other individuals must also be respected by the physician.

4. Many times a trial does not start on schedule. This is the unavoidable result of oversetting trial calendars to keep the judge busy, when, as usually happens, many of the cases are settled shortly before trial. However, because no judge can accurately predict the number of settlements, there may be delays.

5. Once the trial has started, the most competent at-

torney may fail to accurately predict the time of the physician's testimony because of such things as unforeseen trial developments, justifiable inability to predict the number of witnesses called by the opposing attorney or the time consumed by the opposing attorney's examination or cross-examination. During the trial, the attorney should daily, or more often, inform the physician of the expected testimony time.

6. The attorney should, in writing, notify each physician whose testimony he intends to present at trial of the trial date within thirty days prior to trial, or if trial notification is less than thirty days, immediately thereafter. Within a week prior to the scheduled trial date, the attorney should, orally and in writing, notify each physician of a tentative testimony date and time. The attorney should promptly notify the physician of any delay.

7. If the case is settled, the physician should be immediately notified.

C. Duty to Testify.

Our system of justice depends upon being able to require any citizen's attendance at a judicial proceeding and to give testimony regarding the case. There is no question as to the obligation of a physician to respond to a subpoena except where grave emergency prevents his doing so. This emergency must be of sufficient magnitude to justify his inability to obey the order of the court.

D. The Physician as a Witness.

The physician should testify in a dignified, objective manner. He may express his opinion and yet should understand that he is not in the courtroom as an advocate, and should not be argumentative or contentious.

E. Choice of Language by Medical Witness.

The physician should use simple language wherever possible. Technical expressions should be followed with simplified explanations or illustrations for the benefit of the jurors who are laymen.

F. The Physician on the Witness Stand.

It is proper for opposing counsel to cross-examine the phy-

sician with respect to his qualifications, his fees, the accuracy of his memory, his records, the soundness of his diagnosis, prognosis, and other opinions, as well as any other facts bearing on the weight and credibility of his testimony.

The physician should never be discourteous or antagonistic. The physician may be assured that if an attorney examining him exceeds the bounds of propriety, the court or the attorney offering the physician's testimony will ordinarily intervene for his protection.

G. The Province of the Objection.

Trials are goverened by the rules of evidence. When an attorney makes an objection to a question, he is merely requesting the court to decide the legality of the question. If, after the court makes its ruling, the physician is in doubt whether to answer the question, he should ask the judge.

H. Do Not Refer to Insurance.

Witnesses should avoid mentioning liability insurance or medical insurance. The mention of these subjects in a personal injury action may result in a mistrial.

I. Categorical Answers.

When a physician feels that "yes" or "no" will not accurately answer a question, he should so state. Permission will usually be given to qualify or explain the answer.

J. Opinions May Differ.

A physician should express a medical opinion if he feels he has sufficient knowledge, experience and observation to do so. He should not be reluctant to express such a medical opinion because he is not a specialist in the particular field involved, or because others with more experience have expressed a different conclusion.

A physician is not an advocate. Should he change his mind because of new facts or other evidence, he should not hesitate to express himself accordingly.

K. Hypothetical Questions.

It is frequently necessary to use hypothetical questions in

eliciting testimony from expert witnesses, but these questions can be very troublesome and confusing unless proper care is taken to be sure that all of the elements of the question are clearly expressed and are not ambiguous. They further must properly reflect the testimony which has been submitted or which the party expects to submit in support of his contentions. It is therefore recommended that wherever feasible the question should be submitted by the attorney to the physician in advance in written form to eliminate, so far as possible, any misunderstanding that might otherwise arise. If the hypothetical question is lengthy or complicated, it is preferable practice, wherever possible, for the attorney to submit it to the opposing counsel and, if need be, to discuss it with the court in chambers in advance of reading it to the physician on the stand.

The expert witness, in answering the question, must of course, make sure that he understands all of its medical elements, and that it is complete enough so that he can properly predicate an opinion thereon.

The answer to the hypothetical question must be based exclusively on the facts stated in the hypothetical question. No other facts can form the basis for the answer.

VI. COMPENSATION FOR MEDICAL REPORTS, DEPOSITION AND COURT APPEARANCES

It is difficult to establish precise rules governing physicians' fees for medical reports, depositions and court appearances. However, it is important that fees be reasonable. If fees are discussed and agreed upon in advance by the physician and the attorney, a major cause of possible misunderstanding and dissatisfaction will be eliminated.

A. Compensation Must not be Contingent Upon Outcome of the Suit.

Under no circumstances may a physician charge a fee for an examination or for testimony which is contingent upon the outcome of the lawsuit.

B. Responsibility of Payment of Physician's Charges.

An attorney is ethically forbidden to pay debts, medical or otherwise, incurred by a client. However, where the attorney contracts for services on behalf of his client, which expenses are necessary to the proper preparation and presentation of the client's case, he should expect to make payment for the services. Therefore, while the attorney should not (and ethically cannot) pay for or guarantee payment of medical services rendered to the client, he should make payment directly to the physician for medical reports, conferences with the physician, time spent in depositions or in court and then look to his client for repayment of these costs advanced on behalf of the client.

A lawyer must have the permission of his client in order to deduct and pay the doctor's bill from the proceeds of the litigation or settlement. Attached as "Exhibit A" is a recommended form of authorization and agreement to pay a physician's fees. If a doctor desires that a lawyer deduct and pay his fees from the proceeds of the litigation or settlement, he should request that the attorney obtain the client's signature on such an authorization. If such request is made of the attorney and the client refuses to sign the authorization, the attorney should immediately in writing, notify the doctor so that the doctor can take appropriate action. Any dispute as to the charges should be settled between the physician and his patient, and the patient should be aware of the fact that he is liable for payment of the physician's fees regardless of the outcome of the litigation.

The physician should bill the patient and not the attorney for medical services rendered to the patient. The physician should bill the attorney for medical-legal services such as examinations, reports, depositions, etc. The attorney should pay these amounts promptly and as they are billed, and should not await the outcome of litigation or settlement before paying the same.

C. Guideline for Physician Charges to Lawyer

An attorney should not request or subpoena a physician to testify as an expert witness without making arrangements for compensation. It is important that these charges be fair and reasonable.

While it is recognized that any suggested fee schedule be modified from time to time in order to reflect current medical charges and economic trends, the following is a suggested guideline:

1.	Preparation of Medical Reports	– Same basis as per hour or unit of time charge to patient for consultation.
2.	Reproduction or copying of any records or reports	– The normal Xerox or copying charge.
3.	Conferences with laywer, including preparation for trial or deposition testimony	– Same basis as per hour or unit of time charge to patient for consultation.
4.	Preparation for deposition or trial testimony	– Same basis as per hour or unit of time charge to patient for consultation.
5.	Deposition testimony	– On basis of one to one and one-half times the per hour or unit of time charge to patient for consultation depending upon the complexity of issues.
6.	Court testimony	

Factors to be considered in determining charges are:

a. Time away from office necessitated by trial testimony.

b. The physician's experience in treating the patient's medical problem at issue.

c. The physician's education and training concerning the medical field or fields affected by the medical problem at issue.

– On basis of one to one and one-half times the per hour or unit charge to patient for consultation depending on the complexity of the issues.

7. Cancellation of deposition or trial appearance – No charge if no financial loss from cancellation; otherwise reasonable charge on the same basis as the per hour or time charge to the patient for consultation.

8. Delay in trial testimony – No charge if lawyer follows procedure in Section V; otherwise same as 7 above.

COMMITTEE NOTE: The committee recognizes that the basis for hourly charges or units of time may vary with the physician and the specialty. However, the fee charged must be reasonable and fair keeping in mind the fact that the patient must ultimately pay the charges.

VII. ARBITRATION COMMITTEE

1. A medical-legal Arbitration Committee shall be formed. It shall consist of four (4) members of the Maricopa County Bar Association and four (4) members of the Maricopa County Medical Society, which members shall include the Chairman or Co-Chairman of each Medical-Legal Liaison Committee. The remaining members shall be appointed by the respective association and society and shall serve at their pleasure.

2. The purpose of the Committee shall be to arbitrate non-malpractice forensic medicine disputes between members of the two professions, and to educate and advise the participants to the dispute.

3. Such unsolved disputes between members of the medical and legal professions may be harmful to harmonious relationships between the two professions. Therefore, members of each profession are requested to submit such grievances to the Arbitration Committee.

4. A grievance may be presented in writing to the Executive Director of either Association, who shall submit the same to the Arbitration Committee. The Arbitration Committee shall afford the party complained against an opportunity to respond in writing. If the Arbitration Committee deems it appropriate, it may also, but need not, make further inquiry into the subject matter of the dispute, and may request the participants to present themselves at an informal hearing. Failure of either participant to attend the hearing shall not preclude the Committee from proceeding.

5. One member of the Committee shall be appointed Chairman of each inquiry and/or hearing. At the discretion of the Chairman, a Committee meeting may proceed with no more than five (5) Committee members.

6. The determination of a majority present at such meeting or hearing of the Committee shall constitute a decision of the Committee.

7. The decision of the Committee shall be in writing and addressed to each participant of the dispute. A written copy of the decision shall also be provided to the appropriate grievance committee of each profession.

8. A decision of the Committee shall not preclude either party from resorting to the courts.

AUTHORIZATION AND AGREEMENT TO PAY PHYSICIAN FEES

I, _____, hereby authorize and direct my attorney, _____, to pay promptly to _____, M.D., from my portion of the proceeds of any recovery which may be paid to me through my attorney as a result of the injuries sustained by me (and_____), on _____, 19__, the unpaid balance of any reasonable charges for professional services rendered by said physician and his associates on my behalf, said professional services to include those for treatment heretofore or hereafter rendered to the time of the settlement or recovery. I understand that this does not relieve me of my personal responsibility for all such charges in the event of an insufficient or no recovery.

I further authorize said physician to furnish said attorney with any reports he may request in reference to said injuries.

DATED: _____

_____
Patient

_____
Attorney

APPROVED AND ACCEPTED:

_____

DATED: _____

EXHIBIT "A"