

Risk Management Hotline



Services Provided as an Independent Medical Examiner or Expert Witness

By Anne M. Menke, RN, PhD
OMIC Risk Manager

Forensic consulting can provide physicians with welcome revenue, but it raises many questions for our policyholders when they are asked to serve as an expert witness or to perform an independent medical examination.

Q Is it true that the American Academy of Ophthalmology has issued an opinion about expert witness testimony?

A Yes. The AAO added Rule 16 to its Code of Ethics in order to address concerns raised by its members about the truthfulness and accuracy of expert witness testimony. The Rule clarifies that testimony should be objective, based upon medical knowledge, and free from the influence of nonmedical factors such as solicitation of business, competition, and personal bias. Compensation should reflect the actual time and effort involved, and not be contingent upon the outcome. Physicians are often asked to disclose compensation during their deposition or testimony.¹

Q Do I establish a physician-patient relationship by providing expert witness testimony or by performing an independent medical exam?

A As an EW, if you do not examine or treat the patient, there is no physician-patient relationship and thus no duty owed to the patient. The situation of an IME is less clear. While some courts have ruled that you do not create a relationship, the American Medical Association recognizes what it terms a "limited" physician-patient relationship.² Acknowledging that the

patient has not necessarily asked for the evaluation and does not pay for it, and that the examiner will not treat the patient, the AMA nonetheless asserts that professional and ethical standards continue to govern the physician's role in the encounter.

Q What liability risks do I face in an IME?

A Malpractice lawsuits related to independent medical examinations are rare; allegations covered by OMIC's policy include failure to diagnose eye conditions, failure to diagnose and disclose incidental findings, and harm caused by the examination itself (see **Policy Issues**). For a discussion of other theories of liability pertaining to EW and IME, see "Forensic Consulting: From Immunity to Liability," *OMIC Digest*, Summer 2003, Vol. 13, No. 3, at www.omic.com.

Q What duties do I owe the person I examine?

A The AMA explains the duties in its Code of Ethics and opinions. At the start of the visit, address what may be perceived as a conflict of interest by informing the patient who has hired you and will pay your fee. Clarify that your role is limited to conducting an examination and producing a report. State clearly that you will not treat or follow the person and will not discuss the pros and cons of treatment options. Stress that the usual privacy and confidentiality rights are restricted in that your findings will be shared with the company or attorney who hired you. Finally, inform the examinee of what the AMA terms "important health information or abnormalities" that you discover during your examination (for your own protection, document these disclosures and incidental findings). To the extent possible, ensure that the person understands the problem or diagnosis.

Q The person I evaluated during an IME signed a form acknowledging that he would not receive a copy of the report. He now, however, wants a copy of his "medical record." Should I create and provide one?

A The party that requests the IME usually instructs the ophthalmologist to have the patient acknowledge in writing that both the party paying for the examination, and often the opposing party, will receive a copy of the IME report. Interestingly, in some circumstances and jurisdictions, while the patient still controls which other third parties may have access to the report, he or she may not see or receive a copy of it. In response to Hotline calls, OMIC researched whether the patient is nonetheless entitled to a copy of the medical record. While it seems logical that the examinee would need a copy in order to seek care for any incidental findings, we could not find a clear answer to this question. For that reason, be sure to clarify before agreeing to do an IME whether or not the examinee is entitled to receive a written copy of your findings. Ask if you may provide the patient with a document containing only the "important health information or abnormalities" that the AMA feels you have a duty to disclose. Inform the patient of what you may provide before beginning the exam. Please contact the OMIC Risk Management Hotline if you need further assistance on this issue by calling (800) 562-6642, option 4.

1. See the AAO web site at http://www.aao.org/about/ethics/code_ethics.cfm for more information about the entire Code and Rule 16; accessed on 6/11/08.

2. American Medical Association, Opinion E-10.03. *Physician-Patient Relationship in the Context of Work-Related and Independent Medical Examinations* at http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/E-10.03.HTM; accessed on 6/11/08.