



## C. Scott Litch

Chief Operating Officer and General Counsel

### Litch's Law Log

# So You Want to be an Expert Witness?

From time to time a pediatric dentist may be asked by an attorney to provide expert testimony in a pending legal proceeding. Usually the expertise will be that of a clinical pediatric dentist, in the attorney's effort to demonstrate whether or not the standard of care was followed.

Is it ethical to do so, and what are considerations before accepting such an offer?

The ADA Code of Ethics<sup>1</sup> advises the following:

#### “4.D. EXPERT TESTIMONY.

Dentists may provide expert testimony when that testimony is essential to a just and fair disposition of a judicial or administrative action.

#### ADVISORY OPINION

##### 4.D.1. CONTINGENT FEES.

It is unethical for a dentist to agree to a fee contingent upon the favorable outcome of the litigation in exchange for testifying as a dental expert.”

But I suspect you might be interested in more guidance beyond than these two sentences.

The American Association of Endodontists ran a column<sup>2</sup> about this topic a couple of years ago which has some very useful and relevant points for a pediatric dentist which I'll summarize and paraphrase below:

- You should talk to another pediatric dentist who has served as an expert witness, to learn from their experiences.
- The legal process is a lengthy process, so keep full and careful track of the time you spend reviewing records and literature review for a case. This will ensure you are properly paid for your effort.
- If your opinion or position is formalized by the attorney, then the next step is a deposition with opposing attorneys. Depositions take time—it could be all day. You must have the ability to stay calm and confident.
- Cases may be complicated by the fact that often on the plaintiff's side there is a family member who is a lawyer.
- The key question you are addressing is the standard of care in pediatric dentistry.
- “As an expert witness, you play an integral role in the development of a case.” This especially relates to whether a case

is worth pursuing to trial versus accepting a settlement.

- You can select the cases you feel comfortable serving as an expert witness, and reject others if you feel they have no merit.
- “I have found that serving as an expert witness is like solving a puzzle; you have pieces and perspectives from multiple sources, and putting everything back together again is an interesting challenge.”
- You must have knowledge of current and classic pediatric dentistry literature.
- You should be aware of procedures and treatments and philosophies taught at your local pediatric dentistry residency program (s).
- You should be familiar with AAPD clinical recommendations (best practices and guidelines).
- You should be familiar with state dental board regulations and recent rulings.

Finally, being a pediatric dentist expert witness or consultant can be very important for pediatric dentistry in regards to Medicaid dental audits or False Claims Act (FCA) cases. The key issue will usually be medical/dental necessity and appropriateness of services. The AAPD strongly encourages the relevant auditor or government agency to utilize pediatric dentist experts to review pediatric dentist cases, in order to ensure appropriate peer-to-peer review. According to a recent American Health Lawyers Association (AHLA) article, an effective expert demonstrates “independence and objectivity, proper demeanor, and relevant experience.”<sup>3</sup> Further:

“Perhaps the most important characteristic of an effective expert is having relevant clinical experience. The medical [dental] expert should be able to explain highly technical facts and interpret complex medical [dental] issues in a manner that can be understood by others who do not have extensive provider or medical [dental] experience.”

Also, in terms of reviewing documentation of treatment, it is important to have the ability to “discern the difference between technical documentation deficiencies and the standard of care/medical necessity deficiencies.”

For further information contact Chief Operating Officer and General Counsel C. Scott Litch at (312) 337-2169 ext. 29 or [slitch@aapd.org](mailto:slitch@aapd.org).

*This column presents a general informational overview of legal issues. It is intended as general guidance rather than legal advice. It is not a substitute for consultation with your own attorney concerning specific circumstances in your dental practice. Mr. Litch does not provide legal representation to individual AAPD members.*

<sup>1</sup>ADA Principles of Ethics and Code of Professional Conduct (ADA Code), pp. 9-10.

<sup>2</sup>Marc P. Gimbel, DMD, *The Making of an Endodontic Expert Witness*, *AAE Communique*, March 2016. <https://www.aae.org/specialty/2016/03/18/the-making-of-an-endodontic-expert-witness/>. Accessed January 6, 2019.

<sup>3</sup>Seikaly, Hibbert, Zapolska and Stearns, *The Use of Medical Experts in Medical Necessity Cases*, *AHLA Connections*, December 2018, pp. 12 – 20.