



CSU  
College of Law Library

## Cleveland State Law Review

---

Volume 16  
Issue 3 *Police Tort Liability (Symposium)*

Article

---

1967

### The Physician as a Witness

Robert I. Zashin

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Evidence Commons](#), and the [Medical Jurisprudence Commons](#)

[How does access to this work benefit you? Let us know!](#)

---

#### Recommended Citation

Robert I. Zashin, The Physician as a Witness, 16 Clev.-Marshall L. Rev. 494 (1967)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

## *The Physician as a Witness*

*Robert I. Zashin\**

**A**S A PUBLIC SERVANT the physician, being licensed to practice medicine, has certain obligations both to the state and to his profession. His primary obligation is to give aid to his patients and offer himself as a person capable of diagnosis and treatment of human ills.<sup>1</sup> It is conceded by most observers that few professions require more careful preparation than that of medicine. However, a doctor's skill is not always to be found in his office. He is now often called upon to "battle" in the courts as an expert witness.<sup>2</sup>

In the growing interrelationship between law and medicine, the role, rights, and obligations of the physician as an expert witness are often both confusing and exacerbating.

Recognizing that these two professions must work together, how then shall they proceed to co-ordinate and correlate their objectives?

### **Obtaining a Medical Expert to Testify**

On September 6, 1958, the American Medical Association gave wholehearted support to "impartial medical testimony," and stated that between sixty to eighty percent of all our litigation today requires the use of medical evidence.<sup>3</sup>

Those in constant touch with our court system realize that it is continuously involved with negligence cases, involving personal injuries and workmen's compensation. Therefore, it becomes apparent that the necessity of expert medical testimony draws both the legal and medical profession into a close (if not hostile) alliance.<sup>4</sup> Today, the doctor plays a dual role in that he treats his patients and must testify on their behalf as a witness. Recent court decisions have gone so far as to say that this duty to testify includes the duty to refrain from giving affirmative assistance to the opposing party involved in the litigation.<sup>5</sup>

---

\* B.A., M.Ed., Rutgers Univ.; Teacher, Cleveland Board of Education, Cleveland, Ohio; Fourth-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

<sup>1</sup> *Kraus v. The City of Cleveland*, 66 Ohio L. Abs. 417, 459, 116 N.E.2d 779 (1953); 42 Ohio Jur. 2d, Physicians and Surgeons § 2 (1960).

<sup>2</sup> 5 *Curr. Med. for Attorneys* 6, Other Personal Injury News (No. 20, May, 1958); and see, *Oleck, A Cure For Doctor-Lawyer Frictions*, 7 *Clev-Mar. L. Rev.* 473 (1958).

<sup>3</sup> 50-51 *J.A.M.A.* (Sept. 6, 1953), as quoted in 5 *Curr. Med. for Attorneys* 4 (No. 22, Nov., 1958).

<sup>4</sup> *Beaton, Doctor and Lawyer*, 2 *Tort and Med. Yearbook* 600 (1962).

<sup>5</sup> See generally, *Hammonds v. Aetna Casualty and Surety Company*, 7 Ohio Misc. 25, 243 F.Supp. 793 (1965). Part of a doctor's duty of total care requires him to offer his medical testimony on behalf of the patient if the patient becomes involved in litigation over an injury or illness which the doctor treated; thus, during the course of that litigation, there arises a duty of undivided loyalty by the doctor in addition

(Continued on next page)

What then is a medical expert? Under Ohio law, for instance, an expert witness is one who is trained in a specific field which permits his testimony to be based on some superior knowledge that goes along with his training. His knowledge must be of such a nature that it will be beneficial to the jurors in assisting them to reach a just verdict.<sup>6</sup> The expert not only testifies by drawing from his own specific knowledge but may offer opinions as to certain hypothetical facts that may be presented to him.<sup>7</sup>

Therefore, in some instances, a physician is required to be more than a practitioner of the medical art. If he is a specialist, he can expect at some time to be called as a witness in a trial involving one of his patients. He will be subjected to the examination of both plaintiff's and defendant's attorneys, and is open to possible questions concerning the whole sphere of his treatment and expertise.<sup>8</sup>

Most physicians feel that if they are called to testify as a witness concerning some medical area within their particular expertise, it is unjust that doubt be cast upon the method used in examination and treatment of the patient. If he is a voluntary witness who is coming in to assist in either the plaintiff's or defendant's case, he regards the attack on his decisions made by opposing counsel as a direct reflection on his competency.<sup>9</sup> He is rightfully concerned with his public image, and realizes that when his decisions concerning examination and treatment are open to public scrutiny, his reputation is oftentimes at stake.<sup>10</sup> This feeling on the part of the physician is not altogether unjustified. However, in defense of the legal profession, it should be noted that not all physicians recognize or understand the intrinsic principles of the legal profession. The attorney realizes that he is in a legal contest and that his opposing colleague is there to challenge each and every point that is brought up. It is a duel between two advocates who are trying to plead a cause for their respective clients; and, depending upon which side you are on, the physician's testimony is very often crucial to a case. Natural-

---

(Continued from preceding page)

to the duty of secrecy with regard to confidential information gained through physician-patient relationship. *Alexander v. Knight*, 197 Pa. Super. 79, 177 A.2d 142 (1962). A physician owes the patient a duty of total care that includes a duty to aid the patient in litigation, to render reports when necessary, and to attend court when needed, and the duty of aiding in litigation includes a duty to refuse affirmative assistance to the patient's antagonist in litigation.

<sup>6</sup> *Kittredge v. Armstrong*, 11 Ohio Dec. Reprint 661 (1892); 21 Ohio Jur. 2d, Evidence § 421 (1956).

<sup>7</sup> Stetler and Moritz, *Doctor and Patient and the Law*, 209 (4th ed. 1962).

<sup>8</sup> Lilly, *Medical Testimony*, 2 *Tort and Med. Yearbook* 620 (1962).

<sup>9</sup> Gerber, *Expert Medical Testimony and the Medical Expert*, 1 *Medical Facts for Legal Truth: Law-Medicine Series* 198 (1961).

<sup>10</sup> 6 *Curr. Med. for Attorneys* 3, *Doctor-Lawyer Relations* (No. 23, Feb., 1959); see also 9 *Curr. Med. for Attorneys* 9, 14, *When Do Doctors and Lawyers Distrust Each Other* (No. 37, Sept., 1962).

ly, a doctor will resent cross-examination on the part of opposing counsel. If he is faced with a skilled attorney, he may be made to appear confused and uncertain in his diagnosis and method of treatment. Often he will be questioned until this uncertainty is established, at least in the minds of the triers of the facts. This method of questioning may be deliberately employed to undermine the value of his testimony.<sup>11</sup>

How often is a doctor asked a question that requires more than a yes or no answer? If he tries to explain his position, he may hear the familiar sound, "thank you, doctor, that is all for now." The physician gives testimony, but is he being allowed to proceed with the whole truth?<sup>12</sup>

Since there is conflict existing in settling legal disputes, it has been suggested by some that court appointed experts be substituted in place of plaintiff's and defendant's physicians. One of the arguments given to support this measure is that it would heal the friction that is being caused by the often inequitable medico-legal battles that take place within a courtroom. Though this situation of impartial court-appointed medical experts has been recommended by both the American Medical Association and the American Bar Association, it still hasn't come to pass with any degree of regularity.<sup>13</sup> It still remains for the plaintiff's attorney to seek independent medical evidence which will help draw the jury to his side. In most situations, a physician will recognize the fact that he has both a moral and ethical obligation to testify on behalf of his patient, and therefore, it is rarely necessary to subpoena him as a witness.<sup>14</sup> Nevertheless, a subpoena may be the only recourse when your client has had an argument with his physician concerning fees, non-payment of bills, or the possibility of malpractice litigation.<sup>15</sup> However, most attorneys agree that if it becomes necessary to subpoena the client's physician, then it is best to refrain from doing so, since the risk of damage to your cause is too great. Keep in mind the fact that whether or not it is your client's physician or your adversary's, you generally have the right under statute to call an adverse witness and compel him to testify, as to facts, but there is a difference of legal opinion as to whether you can also compel him to testify as to his opinions.<sup>16</sup>

---

<sup>11</sup> Liebensohn, *The Doctor in Personal Injuries Cases* 104, 105 (1956).

<sup>12</sup> Curran, *The Doctor as a Witness* 2 (2d ed. 1965).

<sup>13</sup> 5 *Curr. Med. for Attorneys*, *op. cit. supra* n. 3; see generally, 6 *Curr. Med. for Attorneys* 9-12 (No. 25, Sept., 1959).

<sup>14</sup> Curran, *op. cit. supra* n. 12 at 177.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> *Vincenzo v. Newhart*, 7 OhioApp.2d 97 (1966). Even though a plaintiff does not waive the physician-patient privilege afforded by Sec. 2317.02, Ohio Rev. Code, his attending physician may be called as a witness by the defendant; and as such witness the physician may testify to all competent matters other than communications made to him in his professional capacity by his patient, or his advice to his patient given in that capacity.

In an interview with a young ophthalmologist, he stated that there was one severe drawback which acted as a deterrent to his becoming an expert witness. He related how it was entirely possible for two physicians working in the same hospital to use completely different techniques in treating a patient. The physician often felt the need to inform his colleague of a better method, but refrained both out of respect for this man's experience and because he would probably come up with the same answer as the younger doctor.

In conclusion, he stated that he would not be happy in becoming a witness who might be forced into casting an aspersion on a fellow physician just because this doctor's methods and techniques were different from his. Of course, this paper shall not engage in a polemic discussion of the so-called "conspiracy of silence" among physicians in medical malpractice cases.

It is easy to understand why successful physicians who have well established practices are reluctant to handle cases of injury or disease which may lead to litigation in the courts. A doctor shuns the responsibility when he is confronted with a loss of time from his practice, the thought of being a manipulated party in a legal proceeding, and the expectation that an attorney will ask him to stretch all professional ethics by manufacturing a version of the patient's medical problem to induce a favorable verdict.<sup>17</sup>

Yet, it is important that the medical and legal professions work together with greater understanding to insure the fulfillment of public service.<sup>18</sup>

### **The Treating and Non-Treating Physician**

When a physician is notified that it will be necessary for him to be a witness in a case involving one of his patients, it is incumbent upon him to adequately prepare himself as to all possible questions that may be asked of him. To accomplish this, he must gather together all the pertinent facts of the case and consider the possible scope of his testimony.<sup>19</sup> According to the National Interprofessional Code for Physicians and Attorneys, a pre-trial conference between physician and attorney is highly recommended. This discussion has the functional purpose of making the physician aware of what is involved in the controversy and how his medical testimony will be used.<sup>20</sup>

---

<sup>17</sup> Broderick, *The Physician as an Expert Witness—Some Psychological Aspects*, 34 *Notre Dame Law*. 181 (1959).

<sup>18</sup> Rhyne, *Medicine and the Legal Profession*, 75 *J.A.M.A.* 1374 (1958), as quoted in 2 Averbach, *Handling Accident Cases*, 98 (1958).

<sup>19</sup> Long, *The Physician and the Law* 273, 274 (2d ed. 1959).

<sup>20</sup> 6 *Curr. Med. for Attorneys* 6-7, *National Interprofessional Code for Physicians and Attorneys* (No. 23, Feb., 1959).

The treating physician is under a burden in that a certain amount of time must be devoted to gathering and studying his patient's medical records, hospital reports, and consultant reports (if it was necessary to seek additional advice). At a casual glance, this would not seem to be too much to ask of a physician. However, consider the fact that it sometimes takes years for a case to reach the trial stage,<sup>21</sup> and finally, two or three years later, we are asking the physician to refresh his memory. If he is a general practitioner who is inexperienced as a medical witness, inadequate preparation on his part may lead to a very bad experience when he takes the stand. Therefore, it is evident that within the ambit of his professional service, it is incumbent upon him to record all important observable facts concerning his patient in order to draw logical conclusions regarding the results of his examination.<sup>22</sup>

A doctor can expect questioning concerning the nature and extent of his patient's injuries, the exact treatment that was prescribed, the present physical condition of the patient, the medical bills that were charged, and whether future medical treatment will be needed. In most instances the doctor will be asked if there was a causal connection between the injury received and the event which led to that injury.<sup>23</sup>

There are three important points to be noted in this discussion. The first concerns a lengthy delay that might result between the trial and the physician's last examination. It is a good idea on the part of the treating physician to examine his patient prior to the trial so that he can bring his facts up to date. Secondly, a good set of records will go a long way in helping the doctor to adequately prepare for legal testimony.<sup>24</sup> Thirdly, a physician may be called on to testify about a patient he has treated over a lengthy period of time. It is hard for a family doctor to avoid bias. He, like anyone else, may become involved with human emotions. He must therefore remember that he is not an advocate and that his sole duty is to enlighten the court concerning his medical findings. To this end his objectivity is an important factor and he must keep this in mind at all times.<sup>25</sup>

It is apparent from what has been discussed that the ideal medical witness is one who keeps an up-to-date set of medical records showing his patient's past and present medical history, has inquired into the feasi-

---

<sup>21</sup> Meyers, *The Battle of the Experts: A New Approach to an Old Problem in Medical Testimony*, 44 Neb. L. Rev. 559 (1965); Ass'n. of the Bar of the City of New York, Special Committee on Medical Expert Testimony Project, *Impartial Medical Testimony* 8 (1956) (hereinafter cited as Special Committee).

<sup>22</sup> Curran, *op. cit. supra* n. 12 at 16 (for a discussion of the duties of a treating physician).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Id.* at 16-17.

<sup>25</sup> 6 Curr. Med. for Attorneys 13, *Demonstration of Bias in a Medical Witness* (No. 25, Sept., 1959).

bility of having a pre-trial conference with his patient's attorney, and remains objective when he is questioned by opposing counsel. Since these are the ultimate goals, it would be advantageous to the lawyer to have a physician who not only understands the intricacies of the legal profession, but who also can adapt himself to meet these requirements.<sup>26</sup>

Certainly, the obligations required of the treating physician are also required of the non-treating physicians. These latter are the expert witnesses, specialists in their fields. They usually are men who have a high standing within the profession and are regarded as having a superior knowledge within a specialized area. An attorney might use both the treating and non-treating physician to help bolster his cause, but the outside expert is usually called in for the sole purpose of giving his opinion as to certain medical issues that arise within the case itself.<sup>27</sup> Definite distinctions exist between the treating and non-treating physician. The most obvious is that the treating physician can testify as to the history of the accident, where a history is necessary in order to embark upon a proper course of treatment.<sup>28</sup>

The benefit of this type of testimony is that it corroborates your client's version of the occurrence, and is absolutely essential in fatal cases. It is a well known exception to the hearsay rule.<sup>29</sup>

Additionally, an expert witness is not necessarily required to examine the injured party. He, therefore, will testify from secondary sources, or from hypothetical questions posed in the courtroom. However, if the medical expert wishes to conduct an examination, most jurisdictions would allow it even though the injured party may object.<sup>30</sup>

Finally, both the treating and the non-treating physicians, in preparing for their testimony, would be wise to study the medical and scientific literature within the scope of the problem. This would refresh their memory on particular points and would bring them up to date with any current developments. Also, if they have visual exhibits, they should have them available when the trial starts and be prepared to discuss them in terms that will be easily understood by the members of the jury.<sup>31</sup>

<sup>26</sup> Kelly, *Handling the Medical Witness*, 27 Marq. L. Rev. 192 (1942-1943).

<sup>27</sup> Curran, *op. cit. supra* n. 12 at 17.

<sup>28</sup> *Meaney v. United States*, 112 F.2d 538 (2d Cir. 1940), 130 A.L.R. 937 (1940); *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720, 724 (1944). "It is settled that a physician may take into consideration a patient's declarations as to his condition, including a history, if they are necessary to enable him in connection with his own observation to form an opinion as to the patient's past or present physical or mental condition."

<sup>29</sup> McCormick, *Evidence* § 266 (1954). "The argument of special reliability of the patient's statements made in consultation for treatment is a strong one and has induced some courts to extend the scope of the hearsay exception to include statements of the patient as to past symptoms, when made to a doctor for treatment."

<sup>30</sup> Curran, *op. cit. supra* n. 12 at 18.

<sup>31</sup> *Id.* at 16-18.

Before leaving the area of the treating and non-treating physician, it is essential to mention the remarks made by doctors concerning their fellow physicians who make a living by testifying as expert witnesses. The criticism ranges from "lack of ethics" to how financially hard pressed they must be.<sup>32</sup> In this respect, the courts have recognized that expert witnesses may not be objective. In fact, in one Pennsylvania case, the court specifically alluded to the evils of testimony padded by the use of hired expert witnesses.<sup>33</sup> There are, of course, doctors who see injured parties in a lawsuit for the sole purpose of qualifying as a witness, and this by implication tends to show bias. However, it is recognized that physicians, besides having a responsibility to their patients, have a responsibility to abide by the ethics of their profession, and this demands both honesty and integrity.<sup>34</sup>

If the treating and non-treating physicians play their roles with dignity and respect, then biased, "shopped for" testimony will be the exception rather than the rule.

### Compensation of the Medical Report

A great deal has been written about the question as to whether or not a physician is entitled to reasonable compensation for time spent in preparing to be a medical witness. Both the legal and medical professions, in their "National Interprofessional Code," have provided a short paragraph as to the necessity of paying the physician for his time spent in preparation for his court appearance. It is specifically stated that a doctor's fee should never depend upon the outcome of a case.<sup>35</sup> Conflicts between the two professions exist even in this area. Lawyers dislike paying high fees for a few minutes of a doctor's time, and physicians, on the other hand, regard with contempt the idea of having their fees set by non-physicians.<sup>36</sup>

However, the fact is that even though lawyers and doctors generally recognize that a physician is entitled to additional compensation, legally he is entitled only to the statutory fee set for ordinary witnesses.<sup>37</sup> The courts have further held that contracts made between physicians and attorneys dealing with compensation for testimony is void as against

<sup>32</sup> Gerber, *op. cit. supra* n. 9 at 202.

<sup>33</sup> Murphy v. Pennsylvania R. Co., 292 Pa. 213, 216, 140 A. 867, 869 (1927).

<sup>34</sup> Kelly, *op. cit. supra* n. 26, at 193; see also, Meyers *op. cit. supra* n. 21, at 551 (for a discussion on the problem of bias testimony among physicians).

<sup>35</sup> 6 Curr. Med. for Attorneys, *op. cit. supra* n. 20 at 7.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> Hefti v. Hefti, 166 Neb. 181, 88 N.W.2d 231 (1958); State ex rel. Berge v. Superior Ct., 154 Wash. 144, 281 P. 335 (1929); Ulaski v. Morris and Co., 106 Neb. 782, 184 N.W. 946, 947 (1921), where the court said, "There is, however, no provision in the law for the payment of expert witness fees." The expert witnesses are therefore allowed the usual and lawful witness fee, and no more.



public policy.<sup>38</sup> This policy of not enforcing contracts applies both to contingent-fee and implied contracts.<sup>39</sup>

Some states have come to an opposite conclusion concerning the rule of compensation to the physician, and have decided that it creates an unsound policy. They now recognize that a physician has a right to the additional compensation. Likewise, some courts go so far as to hold that a physician's testimony and opinion is a type of property right and that a doctor can never be forced into testifying without extra compensation.<sup>40</sup>

Going one step further, some courts distinguish between physicians testifying as to known facts, and those that require additional examination and study. In the latter case, he may be entitled to extra compensation if he has to make the additional scientific study and evaluation.<sup>41</sup>

Disregarding for the moment what is stipulated by law, the fact remains that most attorneys will come to an agreement with the physician and pay him for his knowledge and loss of time. Today, win or lose, most lawyers have the moral obligation of being responsible to a physician for his services rendered as a witness.<sup>42</sup>

From those who feel that a physician is not entitled to extra compensation come loud outcries of the injustice to the poor litigant who cannot easily bear the burden of pursuing his lawsuit. They further allege that the idea of extra compensation breeds a form of "doctor hunting" and casts doubt upon the validity of that type of testimony.<sup>43</sup> The practical effect, however, is that the plaintiff presents his "biased" witness, and the defendant does likewise. The result is usually offsetting, and operates to neutralize the effect of this type of testimony upon the jurors. The actual ill exists more in theory than in effect.<sup>44</sup>

<sup>38</sup> *Thomas v. Ruhl*, 30 Del. 438, 108 A. 78 (1914); *Burnett v. Freeman*, 125 Mo.App. 683, 103 S.W. 121 (1907). "An agreement to pay a medical expert extra compensation for evidence which it was his duty to testify under a subpoena was invalid as against public policy. . . ."

<sup>39</sup> *Miller v. Anderson*, 183 Wis. 163, 196 N.W. 869 (1924); *Annot.*, 2 A.L.R. 1576 (1924) dealing with the power of the court to compel an expert to testify.

<sup>40</sup> *People ex rel. Kraushaar Bros. and Co., Inc. v. Thorpe*, 296 N.Y. 223, 72 N.E.2d 165 (1947); *Agnew v. Parks*, 172 Cal. App.2d 756, 343 P.2d 118 (1959). "A doctor who has no relationship with a person growing out of a contract to treat or examine has no duty to enter into an agreement to render services as a medical expert merely upon request."

<sup>41</sup> *People v. Barnes*, 111 Cal.App. 605, 295 P. 1045 (1931).

<sup>42</sup> 6 *Curr. Med. for Attorneys*, *op. cit. supra* n. 20 at 7.

<sup>43</sup> *Ford and Holmes, The Professional Medical Advocate*, 17 SW. L. J. 551 (1933); *Special Committee*, *op. cit. supra* n. 21 at 7.

<sup>44</sup> *Peck, Impartial Medical Testimony*, 22 F.R.D. 21, 22 (1959). "Under present procedure, where the medical testimony comes from no objective or necessarily qualified source, and only through the hirelings of the parties, partisan experts, medical mouthpieces, the jury is more apt to be confused than enlightened by what it hears. It hears black from one expert, white from the other, a maximizing or minimizing of injuries in accordance with the interest of the source of payment for the testimony."

The whole issue becomes even more confused when contingent-fee contracts enter into the picture. These contracts provide that the amount to be paid to the physician will depend upon the outcome of the litigation. Such a contract does nothing but depreciate the value of an expert's testimony, since it can cause biased medical testimony.<sup>45</sup>

Both attorneys and physicians denounce this type of contract and suggest that the answer to the dilemma of appropriate professional fees is the payment of a reasonable guaranteed fee to the testifying doctor, with the attorney doing everything possible to see that this compensation is paid. This seems to be the only sound way of having an expert witness fulfill his proper duties while at the same time protecting the working relationship between the legal and medical professions.<sup>46</sup>

### The Medical Report

The most important function that the physician has is the duty to adequately prepare a medical report. This information is used by attorneys and insurance companies to appraise themselves of the nature and extent of injuries sustained, and it is helpful in deciding whether or not to proceed with the case in the courts. These reports are used by both sides in evaluating the extent of injury which is necessary to establish a basis for determining monetary damages.<sup>47</sup> Therefore, it is incumbent upon the physician to be as thorough as possible in preparing such information. The report must be well written so as to cover all the facts of the injury, while at the same time it must provide a justifiable diagnosis.

Often a physician's reputation is at stake when he makes up such a report. It will be read by both sides of the controversy, and certainly, a thoughtless, biased statement, or one that is out of proportion as to diagnosis and prognosis, will often lead many of those who read the report to conclude that the physician is incompetent, or "too competent."<sup>48</sup>

Therefore, a physician should attempt to diagnose only that which is within his sphere of knowledge. If an outside consultant is necessary, he should include the specialist's report within the body of his own report.<sup>49</sup>

Liebenson in *The Doctor in Personal Injury Cases*, has set forth the goals of a good medical report. The doctor should: (1) understand what

---

<sup>45</sup> Weinberg v. Magio, 285 Mass. 237, 189 N.E. 110 (1934); Sullivan v. Goulette, 334 Mass. 307, 182 N.E.2d 519 (1962); Clifford v. Hughes, 139 App. Div. 730, 124 N.Y.S. 478 (1910); Thomas v. Caulkett, 57 Mich. 392, 24 N.W. 154 (1885); Long, *op. cit. supra* n. 19 at 270. "Agreements for compensation contingent on recovery or proportionate to recovery are uniformly condemned by the courts and are contrary to public policy because such agreements hold out an inducement to commit fraud or procure persons to commit perjury."

<sup>46</sup> 6 Curr. Med. for Attorneys, *op. cit. supra* n. 20 at 7.

<sup>47</sup> Liebenson, *op. cit. supra* n. 11 at 11. (See generally ch. III for examples of the medical report.)

<sup>48</sup> *Id.* at 11-13.

<sup>49</sup> *Id.* at 15.

is to be included within the scope of such a report, (2) it should state all findings as to the extent of injury as based upon scientific tests, (3) it should be thorough, well written and free from verbosity, and (4) the diagnosis and prognosis must be as medically sound and accurate as possible.<sup>50</sup>

Timeliness is important, in that physicians should promptly furnish their findings to counsel, since a delay may injure the party's chances for an adequate settlement and may lead to additional expense upon his part.

It is recognized that both the treating and non-treating physicians have a right to a reasonable fee for preparing such a report. Aside from the aspect of compensation, the doctor's professional image may well rest upon a thorough, well written, and carefully prepared medical report.

---

<sup>50</sup> *Id.* at 11, 15-17.