



# Medical Society News

## Santa Barbara County

### A Point of View



Dante Pieramici, M.D.  
2012 SBCMS President

### Phase III Clinical Trial Results: Guidelines Not Gospel

One of my many elderly patients came to see me recently for her macular degeneration. She developed wet macular degeneration, as do about 10% to 20% of people with age-related macular degeneration. A number of very well conducted phase III clinical trials have demonstrated significant benefits with the use of anti-VEGF (Vascular Endothelial Growth Factor blockers) agents such as Avastin or Lucentis administered into the eye with an injection. Unfortunately, the treatment is ongoing and some patients will require monthly injections for the rest of their lives to maintain vision. Based on the outcomes reported in the trials it is likely that hundreds of thousands of patients have avoided central blindness with this treatment, a real "home-run" in medical care. Despite being informed of the excellent results of the treatment group and the poor outcomes without treatment this patient

decided against treatment. Was she committing ocular suicide?

There is little doubt that the scientific approach to medicine has moved the profession from anecdotal treatments to more rational evidence-based therapies. Science moved medicine from hucksterism and snake oil sales to a respected profession. Evidence-based medicine has continued to evolve over the last 50 years as an ever increasing number of clinical trials have attempted to determine whether treatment A is better than no treatment, or if therapy B is non-inferior or superior to therapy A. Evidence-based medicine strives to use the "best evidence" to guide treatment decisions. Typically, the best evidence has come from Randomized Clinical Trial (RCT) data or meta-analysis of multiple RCTs. Lower on the hierarchy are case-controlled trials and cohort studies, and even lower are single case and case series reports, expert opinion, and preclinical basic scientific data. Implementing phase III data into a prac-

tice can be extremely helpful in making clinical decisions but there are a number of shortcomings to using this data as gospel. First and most importantly, the results of such trials are based on averages. Patients in our practice are individuals and the range of outcomes from the mean are most often distributed in a bell-shaped curve. The variance at times can be enormous and not necessarily representative of any individual. Imagine a room with five people 5-feet-tall and five people 7-feet-tall. The mean height would be 6-feet, a result that poorly describes each person in the room.

A second major shortcoming of phase III clinical data is that the group of patients enrolled may be a poor representation of the real population of patients we see in our practices. Patients that enroll in clinical trials tend to be healthier, younger, and more motivated than the population at large. Pharmaceutical company sponsored studies, in particular, may manipulate the inclusion

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### Save the Dates

- June 10** Residents & Young Physicians BBQ
- June 13** CMA Workshop: "Know Your Rights: How to Identify and Stop Unfair Payment Practices" & "Medicare 2012 & Beyond," Santa Barbara
- August 5** Members Summer Social: A Fiesta Finale at The Tennis Club of Santa Barbara. Bring the family for tennis, ping pong, basketball, swimming & a Mexican Food Buffet
- October 12–15** CMA House of Delegates, Sacramento
- December 11** SBCMS Annual Meeting & Dinner Montecito Country Club

*For additional information on any of these programs, please contact our office.*

## Expert Fees for Treating Doctors (Part 2)

by Robert W. Olson, Jr., J.D.

*Part 1 (published in the March-April 2012 issue) concerned requests from the patient's attorney and setting expert fee amounts. Part 2 concerns collection of expert fees when testifying under subpoena.*

### Subpoenas

A request to discuss the patient's care becomes mandatory when in the form of a subpoena. This subpoena is a court order requiring the doctor to personally appear and testify about the patient, which can only be issued after a lawsuit is filed. The doctor is entitled to be paid for that testimony, with the amount determined by the type of testimony provided.

Anyone with personal knowledge of facts that don't require special knowledge to understand or report can be required to testify on those facts. If the doctor hasn't already been formally designated as an "expert witness" by either attorney and is only asked questions that could be answered by a nonexpert, the doctor is only entitled to mileage at standard IRS rates and a \$35 witness fee. Such questions would include "what day did the patient first visit you," and "what is this illegible word in the chart."

It is unlikely the attorney will limit the questioning this way, but will probably treat the doctor as an "expert witness," defined (in part) by California law as a "treating health care practitioner who is to be asked to express opinion testimony, including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for the particular treatment decision made ...."

### Confirming Expert Status

If the doctor hasn't already been designated as an expert witness, the doctor may not know in advance whether expert testimony will be required. In either case, the doctor should inform the attorney issuing the subpoena, immediately by certified letter return receipt requested with a copy to the patient's attorney, as follows:

"You have subpoenaed me to

testify about my care of [patient]. Under California Code of Civil Procedure Section 2034 and following, if you request any opinion testimony, such as factual or opinion testimony regarding my past or present diagnoses or prognoses or the reasons for my particular treatment decisions, my entire appearance will be considered expert testimony. You are hereby notified that if you request expert testimony, your office will be responsible for my billings, as described below. I charge \$\_\_\_ per hour for expert testimony, with a four hour minimum per day. If I am required to be available for the full day, an eight hour minimum will apply. My fee is payable at least two business days in advance. If not paid in advance, no expert testimony will be given. If my testimony is canceled on less than two full business days notice, you will be billed for the full time scheduled, because you will have forced me to forego business I could have scheduled and conducted in that time."

### Amount/Payment of Fees

Unfortunately, the attorney issuing the subpoena can't be charged for the doctor's preparation, travel, or expenses unless that attorney has already designated you as an expert or agreed to pay those extra charges. Also, there is no authority under California law to demand payment for cancelled testimony or until the day of testimony (although you should ask anyway). Otherwise, this letter tracks California law that requires the attorney who subpoenas an expert witness must "pay the expert's reasonable and customary hourly or daily fee for any time spent ...."

The attorney who designates the doctor as an expert, usually the patient's attorney, is primarily responsible for the doctor's expert fees for testifying. If the doctor has an agreement on the rate and terms of payment, preferably under an Expert Retainer Agreement described in Part 1, that agreement will control

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# SBCMS Participates in CMA's 2012 Legislative Leadership Day in Sacramento

Drs. Edward Bentley, Jennifer Hone, and Ayesha Shaikh, who serve on the SBCMS Legislative Committee, participated in CMA's 2012 Legislative Leadership Day, April 17, in Sacramento.



Edward Bentley

Keynote speakers included Governor Jerry Brown and California Attorney General Kamala Harris.

Along with physicians from SLO, our delegation met with Assemblymem-

bers Das Williams and Katcho Achadjian, as well as Senator Tony Strickland. In addition, they testified before and attended the Assembly Health Committee hearing. The focus of the meetings was to discuss CMA sponsored bills including the following:

- **SB 1318** (Wolk)—Health facilities: Influenza Vaccinations. This bill would require all health care workers in health care facilities to either receive the influenza vaccination or wear a mask.

- **AB 1742** (Pan)—Assignment of Benefits. This bill would require health insurers to provide payment directly to the physician who provided the service when the patient has signed an Assignment of Benefits.



Ayesha Shaikh

- **AB 1746** (Williams)—Sale of Sports Drinks in Schools. This bill would ban the sale of sugary sports drinks during school

hours at middle and high school campuses throughout California.

- **AB 2109** (Pan)—Childhood Immunizations. This bill would require a parent or guardian seeking a personal belief exemption for their child to obtain a document signed by themselves and a licensed health care practitioner saying they have been informed of the risks and benefits of the immunizations, as well as the public health risks of the specified communicable diseases.

- **AB 2063** (V. Manuel Perez)—Reimbursement for Immunizations. Requires insurers to reimburse physicians for immunizations in an amount not less than the actual cost of acquiring and administering the vaccine.

For more information on these and other CMA sponsored bills go to [www.CMAnet.org](http://www.CMAnet.org)



Jennifer Hone

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## Expert Fees, cont.

how and when payment is made. If payment isn't made in full before testimony starts, the doctor shouldn't provide any "expert" testimony whatsoever. If testimony runs longer than anticipated, the attorney issuing the subpoena must pay the balance due either to the patient's attorney or directly to the doctor) within five days of receipt of the doctor's itemized statement.

## Day of Testimony

The doctor should bring four copies of the certified letter and proof of receipt, and upon starting testimony ask the attorney issuing the subpoena "on the record, do you accept the terms of this certified letter I sent you?" If the attorney denies receipt of the letter or doesn't accept its terms, the doctor should ask "do you promise to pay my expert witness fee of \$\_\_\_ per hour within five days of receiving my itemized statement for my testimony?" If the answer is no and the fee the doctor demands is reasonable (see Part 1), the doctor may legally refuse to answer any questions that ask for expert opinion.

© 2009-2012 by Robert W. Olson, Jr., JD. Robert W. Olson, Jr., is the former chairman of the Santa Barbara County Medical Legal Committee and a local attorney specializing in medical and dental practice transitions.



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