

Empiric and Descriptive Analysis of ACEP Charges of Ethical Violations and Other Misconduct An Information Paper

Introduction

The American College of Emergency Physicians (ACEP) has a formal procedure for addressing charges of ethical violations and other violations of ACEP’s Code of Ethics for Emergency Physicians. Ethics charges relate directly to our specialty’s professional moorings and scope of practice; therefore, they are important to address in a fair and unbiased manner.

The ACEP Ethics Committee accepts complaints related to two policies. One is the “Expert Witness Guidelines for the Specialty of Emergency Medicine,” first published in 1990, and revised and approved in 1995, 2000, 2010, and 2015.¹ These guidelines describe the role of individuals who are asked to render expert opinion regarding the practice of emergency medicine. The policy’s guiding principle is that because medical expert witness testimony has demonstrated the potential to establish medical standards of care, and because physician expert witnesses purport to be qualified to render an opinion, the expert witness “should review the medical facts in a thorough, fair, and objective manner” and “should not provide expert medical testimony that is false, misleading, or without medical foundation.”

The second policy is the “ACEP Code of Ethics for Emergency Physicians,” first approved in June 1997, replacing the “*ACEP Ethics Manual*,” which had been in place since January 1991. The Code was reaffirmed in October 2001, revised and approved in June 2008 and 2016, and most recently reapproved in January 2017.²

The mechanism by which ACEP addresses ethical complaints is detailed in the executive document, “Procedures for Addressing Charges of Ethical Violations and Other Misconduct,” first adopted in 1998, later revised and approved in October 2000, and revised with adoption in October 2001. Subsequently, the document underwent two rounds of revision and approval (June 2004, October 2007) by the ACEP Board of Directors (BOD), and its final iteration was approved in September 2010 and finally again in 2013.³

History of ACEP Ethics Charges of Ethical Violations and Other Misconduct

Between 2001–2017, fourteen ethics charges have been processed. All charges involved alleged unethical expert witness testimony. In addition, there were eight complaints brought to ACEP that were not completed, due to inadequate information from the complainant. Table 1 summarizes the content and outcomes of these charges.

Table 1. Ethics charges between 2001 to 2017

Year	Type of Ethics Violation	ACEP Ethics Comm. Recommendation	ACEP Board of Directors Action
2001	Unethical expert witness testimony	Dismissal	Dismissal
2003	Unethical expert witness testimony	Dismissal	Dismissal
2004	Unethical expert witness testimony	Private letter of censure	Private letter of censure
2005	Unethical expert witness testimony	Private letter of censure	Private letter of censure
2006	Unethical expert witness testimony	Dismissal	Dismissal

2007	Unethical expert witness testimony	Dismissal	Dismissal
2007	Unethical expert witness testimony	Public censure	Dismissal
2008	Unethical expert witness testimony	Dismissal	Public censure
2009	Unethical expert witness testimony	Private letter of censure	Public letter of censure
2011	Unethical expert witness testimony	Expulsion for 5 years	Expulsion - permanent
2011	Unethical expert witness testimony	Public letter of censure	Public letter of censure
2015	Unethical expert witness testimony	Private letter of censure	Private letter of censure
2015	Unethical expert witness testimony	Public letter of censure	Public letter of censure
2016	Unethical expert witness testimony	Private letter of censure	Private letter of censure

Discussion

The review and recommendation from the ACEP Ethics Committee are an integral part of the process of addressing ethics charges of ethical violations and other misconduct. The deliberation and recommendation inform the Board of Directors that ultimately makes the decision about action on the Charge.

To date, all Charges have been due to expert witness testimony. Although we do not fully understand the reasons for the lack of complaints for other issues, it may be due to several factors. The risk of public exposure, potential for widespread ramifications, and strong emotions invoked by the complaint review process may act as a deterrent to filing an ethics complaint. Additionally, other ethical misconduct and professionalism issues, in general, may be reviewed on an institutional or state level. Expert witness testimony is not typically assessed at a local level, and complainants may then thus turn to ACEP for review.

Of the fourteen ethics complaints from 2001 to present, four of them, or 29 percent, resulted in a different decision by the Board of Directors compared to the Ethics Committee recommendation. This section will attempt to understand and explain the reasons for this discordance of opinion by discussing each discrepancy in isolation and what led to the recommendation implemented by the Board.

1. The Ethics Committee recommended that an expert witness should receive public censure. The Board of Directors initially agreed; however, a hearing determination resulted in dismissal of the ethics charge because a 2/3 majority was not achieved.
2. The Ethics Committee recommended that an ethics charge against an expert witness be dismissed; however, the Board of Directors decided to publicly censure based on their assessment that the testimony delivered was “false, misleading, or without medical foundation.”
3. The Ethics Committee recommended a private letter of censure for an expert witness’ testimony; however, the Board of Directors recommended a public letter of censure.
4. The Ethics Committee recommended an expulsion for five years, while the Board of Directors decided to expel the member indefinitely.

The discrepancies between the Ethics Committee and Board of Directors cannot be fully explained by the information provided to the subcommittee; however, it can be said that the Ethics Committee deliberations support advisory level recommendations and the Board of Directors clearly considers their input before making the final decision in all cases. The Ethics Committee focuses on the level of concern about violation of the Code of Ethics, while the Board of Directors focuses on the effects on membership of ACEP. There will certainly be times when the Ethics Committee thinks the matter should be handled privately, but the Board of Directors would like to make an example of the behavior to send a message to ACEP members. There will also be times when a hearing uncovers additional perspectives that change a decision. Currently,

there is not sufficient evidence to support any concrete recommendations to addressing discrepancies in decisions regarding ethics charges between the Ethics Committee and Board of Directors.

Future Directions

Ethics violations, and even the charge of an ethics violation, have a considerable potential impact on College members, including those not involved with the case. The reprimand, censure, or other public or private discipline of a well-known or influential College member can be scandalous to the College and specialty, causing discussion or rumors among members. These consequences can tarnish the reputation of members. Conversely, the College can be strengthened by showing members that maintaining professional and personal integrity are foundational to ACEP's organizational well-being. This dual reality makes it paramount that there be transparent and timely communication and education for members interested in providing expert witness testimony, as well as for those motivated to file ethics complaints through the College.

Communication should ideally be focused on keeping ACEP members up to date on the process and outcomes of ethics charges, while maintaining the integrity of due process and protecting the rights and the privacy of the members involved in an ethics complaint. Additionally, the communication process should aim not to tarnish the reputation of the parties involved, including the member(s) bringing the ethics complaint, those adjudicating the charge, and the individual against whom the complaint has been lodged. This communication should be timely and as complete as possible, while advancing the aforementioned goals. An annual report from the College to members is one formal way that information regarding ethics complaints might be communicated to members.

There are multiple ways to educate ACEP members on what behaviors, actions, or activities warrant a formal ethics complaint. For example, public forums such as *ACEPNow*, daily, weekly, or monthly membership email communications, and open discussion forums such as ACEP Council meetings are all appropriate venues for conversations about what constitutes a violation according to College policy. The key to these educational efforts is providing members with the relevant ACEP ethics policies.^{1,2,3} In addition to providing examples of ethics violations, members should be aware of the process by which ethics complaints are reviewed and adjudicated and the potential outcomes that might result from the process (eg, censure).

Finally, it is critical that members be engaged in efforts to provide education on the gravity of the ethics complaint process. Ethics complaints are not intended to advance personal or professional vendettas and should only be considered in the most serious instances, and when the incident or concern threatens the professional integrity and standards expected of an ACEP member.

Created by the ACEP Ethics Committee
Reviewed by the Board of Directors - February 2018

Appendix A

Expert Witness Guidelines for the Specialty of Emergency Medicine

Expert witnesses are asked to render opinions as to assess the requisite standard of care pertaining to emergency physicians in cases of alleged medical malpractice and peer review. Because medical expert witness testimony has demonstrated the potential to establish standards of medical care, and because physician expert witnesses hold themselves out as qualified to render an opinion by virtue of a medical degree, such testimony is considered by the American College of Emergency Physicians (ACEP) to constitute the practice of medicine.

To qualify as an expert witness in the specialty of emergency medicine, a physician shall:

Be currently licensed in a state, territory, or area constituting legal jurisdiction of the United States as a doctor of medicine or osteopathic medicine;

Be certified by a recognized certifying body in emergency medicine;¹

Be in the active clinical practice of emergency medicine for at least three years (exclusive of training) immediately preceding the date of the occurrence giving rise to the case.² A physician serving as an expert witness who is not currently engaged in the clinical practice of emergency medicine shall be considered to have met this requirement if he or she was so engaged during the three years immediately preceding the date of the occurrence giving rise to the case:

Abide by the following guidelines:

The expert witness should possess current experience and ongoing knowledge in the area in which he or she is asked to testify.

The expert witness should not provide expert medical testimony that is false, misleading, or without medical foundation.² The key to this process is a thorough review of available and appropriate medical records and contemporaneous literature concerning the case being examined.

A medical expert's opinion should reflect the state of medical knowledge at the time of the event giving rise to the case.

The expert witness should review the medical facts in a thorough, fair, and objective manner and should not exclude any relevant information to create a view favoring either the plaintiff or the defendant.

Expert witnesses should be chosen on the basis of their experience in the area in which they are providing testimony, and not on the basis of offices or positions held in medical specialty societies, unless such positions are material to the expertise of the witness.

An emergency physician should not engage in advertising or solicit employment as an expert witness where such advertising or solicitation contains false or deceptive representations about the physician's qualifications, experience, titles or background.

The expert witness should be willing to submit the transcripts of depositions and testimony to peer review.

An expert witness should never accept any compensation arrangement that is contingent on the outcome of litigation.

Misconduct as an expert, including the provision of false, fraudulent, or misleading testimony, may expose the physician to disciplinary action.^{2,3}

An expert witness should be not only familiar with the local state law, regulations, and practice of emergency medicine, but strictly adhere to the state specific definitions of negligence.

References

1. American College of Emergency Physicians. ACEP Recognized Certifying Bodies in Emergency Medicine policy statement. *Ann Emerg Med.* 2014 Nov;64(5):560-1.
2. American College of Emergency Physicians. Code of Ethics for Emergency Physicians policy statement. *Ann Emerg Med.* 2017 Jul;70(1):e17-25.
3. American College of Emergency Physicians. Procedures for addressing charges of ethical violations and other misconduct. Available at <https://www.acep.org/Clinical---Practice-Management/Procedures-for-Addressing-Charges-of-Ethical-Violations-and-Other-Misconduct/>. Accessed December 19, 2017.

Appendix B

ACEP's Code of Ethics for Emergency Physicians: Contents

Contents

- I. Principles of Ethics for Emergency Physicians
- II. Ethics in Emergency Medicine: An Overview
 - A. Ethical Foundations of Emergency Medicine
 1. Moral pluralism
 2. Moral challenges of emergency physicians
 3. Virtues in emergency medicine
 - B. The Emergency Physician-Patient Relationship
 1. Beneficence
 2. Nonmaleficence
 3. Respect for patient autonomy
 4. Justice
 - C. The Emergency Physician's Relationships with Other Professionals
 1. Relationships with other physicians
 2. Relationships with nurses and paramedical personnel
 3. Impaired or incompetent physicians
 4. Crimes of moral turpitude
 5. Relationships with business and administration
 6. Relationships with students, trainees, and other learners
 7. Relationships with the legal system as an expert witness
 8. Relationships with the research community
 - D. The Emergency Physician's Relationships with Society
 1. The emergency physician and society
 2. Resource allocation and health care access: problems of justice
 3. Central tenets of the emergency physician's relationship with society:
 - a. Access to emergency medical care is a fundamental right
 - b. Adequate in-hospital and outpatient resources must be available to protect emergency patient interests
 - c. Emergency physicians should promote prudent resource stewardship without compromising quality
 - d. The duty to respond to out-of-hospital emergencies and disasters
 - e. The duty to oppose violence
 - f. The duty to promote the public health Code of Ethics for Emergency Physicians
- III. A Compendium of ACEP Policy Statements on Ethical Issues

Appendix C

Procedures for Addressing Charges of Ethical Violations and Other Misconduct: Summary

Guiding Principle: Ethics charges and other disciplinary charges are important and will be addressed in accordance with College policy.

- A. Complaint Received
- B. Executive Director
- C. Bylaws Committee
- D. Ethics Committee
- E. Board of Directors
- F. Ad Hoc Committee
- G. Right of Respondent to Request a Hearing
- H. Hearing Procedures
- I. Disciplinary Action: Censure, Suspension, or Expulsion
 - 1. Censure
 - a. Private Censure
 - b. Public Censure
 - 2. Suspension from ACEP membership
 - 3. Expulsion from ACEP membership
- J. Disclosure
- K. Ground Rules

References

- ¹ Expert Witness Guidelines for the Specialty of Emergency Medicine. Available at: <https://www.acep.org/Clinical---Practice-Management/Expert-Witness-Guidelines-for-the-Specialty-of-Emergency-Medicine/#sm.0001gfjxtma1edawyij1icrjldsef>. Accessed December 19, 2017.
- ² ACEP's Code of Ethics for Emergency Physicians. Available at: <https://www.acep.org/Clinical---Practice-Management/Code-of-Ethics-for-Emergency-Physicians/>. Accessed December 19, 2017.
- ³ Procedures for Addressing Charges of Ethical Violations and Other Misconduct. Available at: <https://www.acep.org/Clinical---Practice-Management/Procedures-for-Addressing-Charges-of-Ethical-Violations-and-Other-Misconduct/>. Accessed December 19, 2017.