

## Who is under obligation to determine the existence of malpractice?

*¿Quién está obligado a determinar la existencia de mala praxis?*

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### Key words:

Opinion, mal praxis, expert, schools.

### Palabras clave:

Dictamen, mala praxis, perito, colegios.

### ABSTRACT

The medical doctor that practices the profession must accomplish their duties of taking in time and place. However, his corrective actions will be qualified by different instances such as lousy practice. The differs in the different areas like criminal, civil, labor, administrative and in the alternative commission of justice. The Judge will apply the necessary resources to determine the medical act. Opinion elaborated by an expertise in the area. The same way these intervene towards expert to determine all the circumstances that can modify the act of the medical doctor and the results in the practical area. It comes from the laws from the school of professionals how they are indicated to present the official list of expertise in each area. That's the only way they are going to determine in each particular case if there is or not but medical practice.

### RESUMEN

*El médico en el ejercicio de la profesión debe cumplir con el deber de cuidado en modo, tiempo y lugar. Su acto médico será calificado por diferentes instancias hacia la mala praxis en las diferentes instancias como penal, civil, laboral, administrativa y en las comisiones alternas de justicia. El juzgador empleará el instrumento para determinar el acto médico, dictamen que es elaborado por el perito en la materia. De esta forma interviene el experto para determinar todas las circunstancias que modifican el actuar del médico y el resultado de la práctica médica. Se desprende que las leyes y los colegios de profesionistas son los indicados para presentar las listas oficiales de peritos en cada materia. Así se llegará a encontrar al perito idóneo que determinará en cada caso particular si hay o no mala praxis médica.*

## INTRODUCTION

Cases of professional liability in the practice of medicine consist in determining whether the healthcare professional's performance was correct or expected in each particular case, a matter of specialized appreciation requiring a document called "expert opinion" that is fundamental for the judge in cases of civil, criminal, administrative and labor responsibility, as well as cases requiring alternate means for conflict resolution, involving human rights or others pertaining to the medical act. The expert opinion<sup>1</sup> is the report issued by an expert in the art of his profession, in which he reports elements based on the results of examination, analysis and knowledge of the specific subject.

### Professional colleges

Groups of professionals are very valuable because they benefit in a comprehensive way

the professional organization, its affiliates, healthcare contractors, the population requiring solidary actions, new generations of students, society as a whole, and the country.<sup>2,3</sup> Article 21 of the Implementing Act of Article 5 of the Constitution, regarding the practice of professions in the Federal District,<sup>4</sup> provides for the creation within the Ministry of Education of an office named "Directorate General for Professions" (*Dirección General de Profesiones*), a body in charge of the surveillance of professional practice that will be the link between the State and professional colleges. These are non-profit civil associations formed by professionals in a specific branch, interested in creating a group for the benefit of their profession. Article 22 of the aforementioned Act states that the Directorate General for Professions will create technical commissions that will study and rule on matters of their competency. Each commission will include a representative

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from the Ministry of Public Education, another from the National Autonomous University of Mexico or the National Polytechnic Institute in their respective professional branches, and a third one from the relevant professional college. Should the same graduate studies be taught at both educational institutions, each one will appoint a representative. Colleges are instances of critical opinion striving to guarantee the quality and certainty of professional practice. Article 34 states that, should there be nonconformity on a customer's part regarding a service provided, the matter will be solved by the judgment of experts, either in the judicial system or in private, if agreed to by all parties. To issue an opinion, experts should take into consideration the circumstances; in view of their technical and scientific knowledge, they are the appropriate entity to issue opinions on certain situations, for both public and private agencies. They are responsible for promoting actions on behalf of the population, basically through the professional social service internship that, according to the law, all professionals must carry out, performing activities directly related to their profession with the goal of improving the community's quality of life. The most important aims of professional colleges are to collaborate in the surveillance and enrichment of professional practice and to protect society from poor professional practice by implementing several actions, such as including consultancy among their activities, promoting continuous professional education, and linking with the educational sector. Surveillance should be a comprehensive activity that guarantees commitment to the profession. A link with institutions of higher education is beneficial to both parties, since professional colleges, given their knowledge on the needs and the day-to-day life of professionals, may provide educational institutions the criteria for updating and adapting study plans and curricula, such as completion of the student's social service internship, and creating new careers consistent with current needs. Article 50 states that professional colleges, among other purposes, should create lists of professional experts by specialty that will be the only ones with official validity.

Professional colleges do not limit their activity to the workplace; they are also recognized in the academic setting, since they carry out research activities and are registered in the CONACYT National Registry of Scientific and Technological Institutions.<sup>5</sup> They can submit candidates for the National Science and Arts Award. The participation of professional colleges in the technical councils that elaborate the CENEVAL general exams for graduates is mandatory. As for crimes and misdemeanors committed by professionals and the penalties resulting from non-compliance with this law, Article 61 states that offenses committed by professionals will be punished by the competent authorities in accordance with the criminal code.

### **Criminal law**

The preliminary investigation prior to presenting a case before the courts,<sup>6</sup> as established by the Mexican Federal Code on Penal Procedures that describes the means of proof, may be defined as "any element used to establish the truth on the matters of the cause". Article 220 states that whenever special knowledge is required for the examination of persons, facts or objects, experts will be called upon. Thus, establishing medical knowledge is predominantly abductive or retroductive, which means that historical knowledge is applied to the future when the case is urgent, as stated in article 221. Article 222 states that the court will inform experts on their appointment and will provide them with all the necessary information to issue an opinion. At this stage, all elements should be grouped according to medical science. Article 223 states that experts should have an official degree in the science or art related to the matter of interest, so as to determine whether the profession is legally regulated. Interpretation of this article makes reference to the Implementing Act of Article 5 of the Constitution, regarding the practice of professions in the Federal District. Article 229 states that if an injury is the result of a crime and the injured individual is in a public hospital, the physicians in charge shall be appointed as experts to classify the injuries; if the case is complex, other experts may also be called upon, if deemed convenient, in

order to issue an expert opinion and make the legal classification. Article 233 states that both the official in charge of the proceedings and the parties may ask the experts any questions considered relevant on the matter on which an expert opinion is being requested, either in oral or written form. The expert opinion will be applied in this stage of the legal process, and may be ratified in each of its parts. Pursuant to Article 234, the experts will carry out any operations and experiments that their science or art suggests, and will express the facts and circumstances upon which their opinion is based. Article 235 states that the experts will express their opinion in writing and will ratify it in a special proceeding. Official experts will not need to ratify their expert opinion, unless the official in charge of the proceedings deems it necessary. During such proceedings, the judge and parties will be able to ask questions to the experts. Article 236 states that whenever expert opinions disagree, the official in charge of the proceedings will summon the experts to a meeting in which the conflicting opinions will be discussed, and the result of the discussion will be recorded in the minutes. Should the experts not reach an agreement, a third expert will be appointed. Article 239 states that whenever the authenticity of a document is disputed, a comparison of handwriting or signatures may be requested, in accordance with the following rule: the judge may order that the comparison be repeated by other experts. Article 288 states that the courts will take expert opinions into account, even those from scientific experts, according to the circumstances of the case.<sup>7</sup>

### Civil law

Civil law is a unitary, orderly, and systematic set of private law rules, i.e., a body of law whose purpose is to regulate civil relations among natural and juridical persons, either private or public, the latter only when acting as individuals. In general terms, the physician's responsibility is nothing more than assuming the consequences of damage, normally translated into an economic estimate. Our civil code states that, dispensing for now of the requirement of guilt, he who, by action or omission, causes harm to another is obligated to repair the

damage caused. Thus, in any determination of responsibility, there are at least three common elements: action or omission, damage, and the causal relation between them.

Professional medical liability is the obligation to repair damages caused to the patient as a result of illicit conduct or the creation of a risk. When damage is caused by an action without the concrete intention of causing harm and it is not the patient's fault or the result of his inexcusable negligence, it is called objective responsibility, since the practice of medicine involves the use of mechanisms, instruments, devices or substances that are dangerous *per se*.

Article 1913 states that when a person makes use of mechanisms, instruments, devices or substances that are dangerous *per se* due to the speed they achieve, their explosive or flammable nature, the electric current they conduct or other analogous causes, he is obligated to answer for the harm caused, in spite of not acting illicitly, unless it can be proven that the injury resulted from the victim's fault or inexcusable negligence. It must be noted that if the conduct also implies civil liability, repair of damage resulting from a crime shall be proved within the criminal process in an incidental manner. Another possibility for an aggrieved patient, in case the prosecutor decides not to file charges or the judge renders a verdict of not guilty, is to resort to civil proceedings, pursuant to the relevant legislation. Article 1915 states that repair of the damages must consist, at the option of the plaintiff, in the restoration of the previous state, if possible, or in compensation for loss or injury. When injury is caused to individuals and it leads to death, permanent complete disability, permanent partial disability, temporary complete disability or temporary partial disability, the level of repair will be determined pursuant to the provisions in the Federal Labor Law. Compensation will be calculated using a baseline of four times the minimum wage in the Federal District at the time, and will extend for the number of days stated for each disability mentioned in the General Labor Law. In case of death, compensation will be paid to the victim's heirs. If the victim was a salaried employee, compensation credits are non-transferable and will be preferably paid in a single payment,

unless otherwise agreed to by the parties. These provisions will be applicable regarding Article 2647 of this code.<sup>8</sup>

### Administrative law

Administrative liability in health care arises from the infraction of judicial norms of an administrative character, i.e., the infringement of judicial standards grouped in laws or regulations ruling the health system. In these cases, the typical sanction is a fine imposed on the individual that committed the administrative infraction. Such individual may be a natural person or a professional that infringes one of the standards established in the General Health Act, its rulings and other provisions laid out in the law, regardless of whether harm was caused to a patient or not.

As an example, we can mention that, when conducting their professional activity, health institutions and physicians must abide by each and every obligation established in the Regulations of the General Health Act on the Provision of Healthcare Services, that set out the manner and conditions in which such services must be provided. Sanctions for administrative liability are imposed by health authorities and, pursuant to Article 417 of the General Health Act, they may consist of: 1) an admonishment with a disciplinary measure, 2) a fine, 3) temporary or definitive closing, and 4) detention for up to 36 hours. On the other hand, professionals who are considered public servants due to the position they occupy in the healthcare system may be sanctioned in terms of the provisions established in the Federal Act on the Responsibilities of Public Servants. Sanctions may consist of dismissal and/or disqualification from public office.<sup>9</sup>

### Labor law

Labor laws intend to create balance between production factors and social justice, as well as to promote dignified or decent work in all labor relations. Dignified or decent work is that in which the worker's human dignity is fully respected; there is no discrimination on the basis of ethnic or national origin, gender, age, disability, social or health status, religion,

migratory status, opinions, sexual preference or marital status; individuals have access to social security and a remunerative salary; continuous training is available to increase productivity with shared benefits; and safety and hygiene conditions are optimal to prevent work-related risks. Dignified or decent work also includes unrestricted respect to the workers' collective rights, such as freedom of association, autonomy, the right to strike and collective hiring. Workers' substantive or de facto equality before the employer is guarded by the law.

Article 821 of the Federal Labor Law states that expert opinion will deal with issues pertaining to a science, technique or art. For that effect, there is a list of medical experts in the Joint Federal Conciliation and Arbitration Board, pursuant to articles 899 F and 899 G, clause 3, of the Federal Labor Law, that contains the provisions for the registration of medical experts (body and list) specialized in occupational medicine. Article 822 states that experts must be knowledgeable in the science, technique or art upon which their opinion must be issued; should the profession or art be legally ruled, the experts must prove they are authorized in accordance with the law.<sup>10</sup>

### CONCLUSION

Professional colleges have the obligation to implement mechanisms for the surveillance of professional practice, so that it is carried out according to the highest legal and moral standards, and to promote the training of professional experts by specialties in the criminal, civil, labor and administrative areas, as well as in commissions for alternate means of justice, in order to correctly apply "medical expert opinion" as an instrument of medical practice.

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