

FOCUS ON

PROFESSIONAL LIABILITY

Aaron S. Kesselheim, MD, JD

Dr. Kesselheim is on the faculty of the Division of Pharmacoepidemiology and Pharmacoeconomics, Brigham and Women's Hospital, Boston, where he is also an Associate Physician. He is a Clinical Fellow in the Department of Medicine, Harvard School of Public Health, Boston, Mass.

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An idea takes root: Hold those expert witnesses accountable

Three cases show how regulation of physician-expert witnesses can be effective—or bite back

CASE #1 Suit filed after trauma during home delivery

The facts of the matter. Two parents, whose child was injured during a home delivery, sued the supervising nurse and their obstetrician. An expert witness for the plaintiffs testified that the defendant OB departed from the standard of care under the circumstances. The OB settled the case.

Later, the OB filed a complaint with ACOG's grievance committee, in which he detailed factual misrepresentations that he claimed were made by the physician-expert witness during that expert's testimony. (The defendant OB and the expert witness were both members of ACOG.)

The expert witness then sued the OB....

Physician-expert witnesses in medical malpractice litigation have come under increasing scrutiny in recent years. Specifically, many observers worry about "hired guns" who support the testimony of a plaintiff or a defendant in the face (and at the expense) of prevailing medical evidence. That concern is particularly salient in obstetrics, where the cause of a bad outcome that can lead to litigation—such as neurologic birth injury—is, in many cases, still unknown and where malpractice insurance coverage comes at high cost. Many lawsuits often attribute such injury to inappropriate

intrapartum management, especially in times of fetal distress, even though leading pediatric neuroepidemiologists have long argued that many of these injuries may be the result of unavoidable antepartum events.¹ On the other hand, improper testimony from expert witnesses for the defense may prevent legitimate cases from proceeding.

Medical societies build a place for complaints

Commentators have encouraged medical societies to create venues in which members can bring complaints about the appropriateness of expert witness testimony by other physicians.² ACOG has established guidelines in its Code of Professional Ethics for members who serve as an expert witness:

...before offering testimony, the obstetrician-gynecologist must thoroughly review the medical facts of the case and all available relevant information...

and, then, during trial:

...the obstetrician-gynecologist testifying as an expert witness must have knowledge and experience about the range of the standard of care and the available scientific evidence for the condition in question during the relevant time and must

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respond accurately to questions about the range of the standard of care and the available scientific evidence.³

If a member of ACOG considers a fellow member to have violated one of these, or any other, provision of the code, and any litigation has ended, a complaint can be initiated before its grievance committee.

A federal court of appeals recently supported the ability of a professional society to discipline members who violate the society's code of conduct,⁴ but such processes can still be subject to judicial review.

Here are three cases that describe professional societies' role in the oversight of physician-expert witnesses. The cases also reveal how physicians use those review systems and how expert witnesses attempt to rebuff complaints made against them.

CASE #1 continued Birth trauma

The controversy. As described, the physician-expert witness sued the defendant OB after he filed a complaint with ACOG against that expert witness. The suit alleged:

- **interference with business contracts**—he claimed that ACOG's grievance committee procedure impaired his ability to obtain more expert witness-related work
- **defamation**—the complaint damaged his reputation before his peers in ACOG.

The expert witness suggested that it would have been more proper for the defendant OB to forward the complaint to the trial court in which the malpractice action took place or to his employer.

What was the outcome? A federal district court ruled for the defendant OB. It found that the OB's statement to the ACOG grievance committee was not, for a number of reasons, defamatory:

- The complaint constituted a long statement of the obstetrician's opinions that was supported by a number of underlying facts
- The complaint was submitted to the

Who are the "expert" witnesses in OB malpractice cases?

A recent study revealed that a small cadre of physicians testified in nearly 90% of a national sample of neurologic birth injury cases. These witnesses tended to act consistently for one side. Frequent witnesses for the plaintiff had fewer markers of expertise than frequent witnesses for the defendant did.¹

Reference

1. Kesselheim AS, Studdert DM. Characteristics of physicians who frequently act as expert witnesses in neurological birth injury litigation. *Obstet Gynecol.* 2006;108:273-279.

grievance committee as part of ACOG's established procedure and was not communicated to other third parties; no apparent effort to intentionally harm the reputation of the expert witness could be inferred.

The court also dismissed the charge of interference with business contracts because, in its jurisdiction, such a claim required an intentionally malicious motive.

To the contrary, according to the court, the defendant OB "limited himself to advancing a confidential complaint to a peer group in which both parties were members, which might have remained confidential but for" the present litigation.⁵

CASE #2 Revision of a ventricular shunt

The facts of the matter. A lawsuit charged two neurosurgeons with malpractice in managing a ventricular shunt in a patient who had hydrocephalus. The plaintiff's expert witness, a neurosurgeon, testified in a deposition that:

- the standard of care for managing a patient after a surgical shunt revision wasn't met
- communication between the two neurosurgeons was faulty
- he "had difficulty believing" statements made by one of the defendants in the medical chart after the patient's health declined.

After the case, a complaint was brought by one defendant to the North Carolina

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A federal court recently upheld the right of a professional society to discipline members who violate a code of conduct. This could include physicians in expert-witness testimony.

What should the parties to a suit expect of an expert witness?

Ideally, physician-expert witnesses should strive to follow the standards for testimony proposed by any state licensing board or professional society to which they are responsible or belong. Most such standards include being sure to review the entire case history before providing an opinion in court and basing opinions on peer-reviewed evidence when such evidence exists.

The goal of the physician-expert witness should be threefold: to put forth the best medical expertise in litigation, to help secure compensation for deserving plaintiffs in true cases of malpractice, and to reduce the impact of frivolous lawsuits on the medical profession.

Medical Board (the licensing authority in the state where the expert witness was licensed) that charged the expert witness with unprofessional conduct for misrepresenting the applicable standard of care and testifying, without corroborating evidence, that a physician had falsified a medical record.

The controversy. At a hearing, the medical board agreed that the expert witness engaged in unprofessional conduct on all counts. It revoked his medical license.

The expert witness appealed the decision to the local state court.

That court found no basis for disciplining the expert for his testimony about the applicable standard of care or the communication between the neurosurgeons. It did uphold the charge of testifying improperly that the defendant had falsified medical records.

The medical board altered its punishment, suspending the expert witness's medical license for 1 year. The expert witness then appealed this suspension to the North Carolina Court of Appeals.

What was the outcome? The appeals court concluded, after "careful review of the record," that "the substantial record of evidence does not permit an inference that [the expert witness] made an entirely unfounded statement" about the medical record.

The court held that the expert witness's opinions were based on a review of multiple aspects of the case, including imaging results and reports of the patient's behavior.

According to the court, "these observations provided a good faith evidentiary basis" for the expert's opinion. The court reversed the medical board's suspension of the expert witness's license.⁶

CASE #3 Poor care after CVA

The facts of the matter. In a medical malpractice action, a group of physicians were charged with negligence in their care of an elderly diabetic patient who suffered a cerebrovascular accident. During the trial, the plaintiff's expert witness testified that the defendant physicians' actions did not meet the standard of care. Ultimately, the case was decided in favor of the defendants.

Afterward, the defendant physicians forwarded a complaint to their state physicians' association (of which the expert witness was not a member), claiming that the expert witness's testimony was inappropriate and recommending disciplinary action to prevent the profession "from being terrorized by similar experts."

The controversy. The expert witness sued the defendants and the state physicians' association to stop the grievance process, claiming defamation, interference with contract, conspiracy, and other counts. The defendant physicians and the physicians' association countered that the lawsuit should be dismissed because state and federal laws grant immunity to members of medical peer review committees when there is no evidence of intentional fraud.

The trial court agreed with the defendant physicians. The expert witness appealed.

What was the outcome? The court of appeals overturned the trial court's opinion. It found that state and federal laws do not clearly provide immunity to the defendants.

The court held that the statutes protecting peer review committees were constructed to help evaluate and improve "the quality of health care rendered by providers of health services"—protection that does not necessarily extend to testimony in a malpractice case. The appeals court also found that the state medical association

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An expert should review the entire case history before providing an opinion in court—and base opinions on peer-reviewed evidence whenever possible

is not afforded immunity “in its role as an examiner of the quality of a non-member physician’s judicial testimony.”

Ultimately, the court determined that the case could go forward to assess whether there was any validity to the charges made by the expert witness.⁷

Tips on filing a complaint

Oversight of physician–expert witnesses is becoming more prevalent among professional specialty societies, state medical societies, and state medical licensing boards. Depending on the region, state, or locale, a physician who notes inappropriate testimony by an expert witness—on behalf of a plaintiff or defendant—may have a better opportunity now to file a complaint with a professional grievance committee established in a pertinent venue.

The cases here teach important lessons for physicians considering bringing a complaint to a grievance committee:

- A physician who files a complaint should be certain not to make unsupported claims or inflammatory statements, or breach any confidentiality provisions in the grievance process
- Complainants’ actions should be well documented because they may be subject to judicial review later
- Physicians should refrain from bringing a complaint against an expert witness to any organization with which that witness is not affiliated because a court might view the role of the organization in that situation differently

- An expert witness who believes that he (or she) has been improperly accused of wrongdoing might not be able to appeal the decision of a professional society to an external court, but he can seek judicial review of actions that affect his medical license and may be able to bring a personal lawsuit in extreme cases of illegal accusation.

For groups managing such a review process:

- The grievance process should be organized to avoid favoring either party; it should allow both sides to present their opinions and supporting evidence before a set of impartial observers
- An appropriate opportunity should be available for internal appeal
- Although a professional conduct committee can regulate expert witness-related work of its members, that authority may not extend to non-members. ■

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4. *Austin v. American Association of Neurological Surgeons*, 253 F3d 967 (7th Cir 2001).
5. *Bundren v. Parriott*, 2006 US Dist LEXIS 44591 (D Kansas 2006).
6. *In Re: Gary James Lustgarten*, 629 SE2d 886 (NC Ct App 2006).
7. *Fullerton v. Florida Medical Association*, 938 So2d 587 (Fla Ct App 2006).

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When filing a complaint, avoid making unsupported claims and inflammatory statements

We can't hear you...

...unless we hear from you.

Write to us at obg@dowdenhealth.com to comment for publication on an article you've read in these pages or to have your say about an an issue facing the specialty.