

# From my perspective

Of all the problems afflicting our health care system, perhaps none is as troubling to many surgeons as the professional liability crisis and some policymakers' unwillingness to effect the tort reforms needed to reverse this ever-worsening situation. As we strive to secure necessary changes, it is understandable and easy to lash out at other professionals, particularly the trial lawyers and biased legislators. By and large, however, such outpourings of frustration and emotion are fairly fruitless, albeit momentarily satisfying. Rather than engendering the ill will of other stakeholders, those of us who are committed to attaining reforms need to look critically at the situation and ask ourselves what we can do to improve the system.

## *Patient safety*

Of paramount concern to all of us at this time should be making certain that surgical care is delivered safely. The College's ongoing and growing contributions to the development of standards of care and the creation of evidence-based guidelines will advance this objective.

To further ensure patient safety, the profession must ensure that surgeons are appropriately credentialed and trained before doing new procedures. We also need to encourage the development of processes within hospitals that are centered on patient safety.

As surgeons adopt new, scientifically proven methods of care, as hospitals become more committed to developing supportive medical and surgical teams, and as we more stringently monitor the qualifications of members of our profession, the occurrence of medical "incidents" will decrease. And, I believe, as fewer of such incidents occur, the public will be less inclined to file malpractice claims.

## *Expert witnesses*

Another subject that demands our attention when examining the liability situation is the use of expert witnesses. On an annual basis at the College, we receive numerous complaints and allegations about Fellows providing expert testimony for the plaintiff and against other members of this organization. This activity inevitably incites the ire of the defendants, who, at first, are upset that anyone would question or testify against their



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course of treatment, and then by the fact that another member of the College is the one questioning their patient care decisions.

The College takes these complaints seriously and analyses the records used in the case. Our Central Judiciary Committee (CJC), which meets three times a year, selectively reviews the complaints and the testimony provided. The CJC reviews, on average, about two new cases of questionable expert witness testimony at each of its meetings. Over the course of the last several years, the CJC has considered 45 cases of questionable expert witness testimony. Eleven of those individuals have been referred to the CJC for review of their Fellowship status, and five have been charged with Bylaws violations.

## *Expert witness qualifications*

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College published a Statement on the Physician Acting As an Expert Witness. This position paper was further revised in 2004 and clearly outlines the qualifications of the physician who acts as an expert witness. (The revised statement was published in the March 2004 issue of the *Bulletin*, page 22, and can be found on the College's Web site at [http://www.facs.org/fellows\\_info/statements/st-8.html](http://www.facs.org/fellows_info/statements/st-8.html)).

This document indicates that a physician who serves as an expert witness must possess an unrestricted medical license, specialty board recognition, current privileges to perform procedures relevant to the case, and a familiarity with the standard of care under question. The expert witness must also carefully study all of the pertinent material, be impartial, and provide a balanced analysis. The physician expert should be able to differentiate between a negative occurrence and true malpractice and should avoid hindsight analysis of the case. Rather, his or her testimony should take into account the judgment of the defendant at the time care was rendered and the particulars of the environment in which the treatment was provided.

Closely linked to the qualifications of the physician giving expert testimony are ethical issues. Clearly, monetary compensation provided to the expert that is based on the outcome of a lawsuit is unethical.

Last year, the College also issued an Expert Witness Affirmation, which is intended for voluntary use by Fellows who want to make explicit their commitment to knowledgeable and ethical expert witness testimony. Fellows who testify in medical liability cases may sign this affirmation and give it to the attorney representing the party on whose behalf they intend to testify. We anticipate that if surgeons will review and sign this statement, reliable and appropriate expert testimony will be the end result. (See <http://www.facs.org/education/ethics/> for a copy of the Expert Witness Affirmation.)

Because few states have passed laws governing the qualifications of an expert witness, the College has also adopted model state legislation on this subject, which was distributed to the chapters of the College in February 2004 for introduction in their state legislatures. This prototype bill outlines the necessary qualifications for an expert witness.

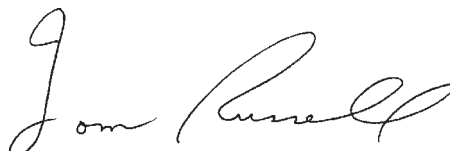
Additionally, at its recent interim meeting, the American Medical Association (AMA) adopted a resolution regarding expert witness qualifications, which the College and other surgical organizations sponsored. The AMA also adopted an affirmation statement and, by a clear majority, agreed that an expert witness must be board certified in the defendant's specialty—a clear departure from the organization's previous stance. The AMA's consideration and passage of these items further demonstrates the entire medical community's support of credible expert witness testimony that is offered only by qualified professionals.

### *Watching out for patients*

While court testimony by one surgeon against another is on occasion necessary and warranted, it is a very serious, contentious, and polarizing act. Surgeons should offer such testimony only in cases where the plaintiff clearly received substandard care and only when they are confident that they can offer an unbiased opinion that draws on their knowledge and credentials. The American College of Surgeons is fully aware of its members' strong feelings about the use of expert witnesses, and we believe we are making significant strides toward resolving this contributor to the medical liability crisis.

At the same time, we acknowledge that some actions endanger the safety and health of surgical patients. Hence, we are fully committed to uncovering new means of ensuring that our patients receive proven care from qualified surgeons.

The medical liability crisis is not about to be resolved overnight, especially when some members of Congress are opposed to passing tort reform legislation. However, as we move forward in delivering effective treatments and ensuring that expert witnesses offer sound and reasonable testimony, the impact of this situation is likely to diminish.



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If you have comments or suggestions about this or other issues, please send them to Dr. Russell at [fmp@facs.org](mailto:fmp@facs.org).