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SYMPOSIUM: CLINICAL RISK AND JUDICIAL REASONING

The Expert Witness in Medical Malpractice Litigation

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Abstract Physicians may find serving as an expert witness to be interesting, intellectually stimulating, and financially beneficial. However, potential expert witnesses should be aware of the increased legal scrutiny being applied to expert witness testimony in medical malpractice litigation. In the past, expert witnesses received absolute immunity from civil litigation regarding their testimony. This is no longer the case. Expert witnesses may be subject to disciplinary sanctions from professional organizations and state medical boards. In addition, emerging case law is defining the legal duty owed by the expert witness to the litigating parties. Orthopaedic surgeons who serve as expert witnesses should be familiar with the relevant Standards of Professionalism issued by the American Academy of Orthopaedic Surgeons.

Introduction

In professional negligence cases, such as medical malpractice lawsuits filed against physicians, the specific duty owed by the physician to the patient is defined by the profession itself. A member of the profession is needed to tell the judge and jury what the defending physician should have done or not done under the particular circumstances, and whether such conduct constituted negligence by violating the standards of care of the profession. Therefore, in medical malpractice litigation, expert witness testimony is nearly always necessary. The perceived contribution of expert testimony in medical malpractice litigation was captured in a survey of the members of the American Association of Hip and Knee Surgeons; of the respondents, 75% believed expert witness testimony contributed to an increase in medical malpractice litigation and 58% had testified as experts in medical malpractice cases [43].

Expert testimony is based on implicit review of medical records after the fact; such review has inherent limitations since each expert potentially uses individual, nonstandardized criteria to assess the quality of care and physician' actions [8]. There is a tendency for some physicians to be consistently lenient in their judgments of medical care, whereas others are more consistently strict [32]. Several studies suggest only moderate to poor agreement among physicians trying to identify adverse events and negligent adverse events through chart review [38, 40]. The assessments of malpractice vary even during structured chart review, when practice guidelines are used [22].

Concerns that sworn expert testimony in medical malpractice litigation may not always be accurate, honest, or informed [13] have prompted state legislatures, state medical boards, medical professional organizations, and courts to scrutinize this conduct [28]. The concept of medicolegal malpractice liability has been recognized by courts; this means an expert hired to testify for a lawyer in medical litigation can become the target of litigation arising from this activity [29].

The purpose of this report is to examine potential liability risks that apply to physician-experts in medical malpractice litigation, and review emerging case law that applies to the conduct of such experts, with a discussion of

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the historical basis for expert testimony, the immunity of experts, the erosion of immunity, sanctions by state licensing boards and professional organizations, and other sources of potential liability, along with proper preparation for expert testimony.

The Historical Basis for Expert Testimony

The need for professionals to testify in medical litigation has its origins in English common law. In the 1767 English case of Slater v. Baker and Stapleton, the concept of professional standard was established; physicians and surgeons were to be judged by "the usage and law of surgeons…the rule of the profession as testified to by surgeons themselves" [12]. The Slater case involved the conduct of two physicians who were hired by a patient to remove bandages from his partially healed fracture. Instead, the physicians refractured the leg and placed it in an unorthodox device with the goal of achieving proper limb alignment. The patient sued, and in support of his case, produced expert testimony from other physician-witnesses who testified that the device used was inconsistent with standard medical practice.

The basic concept embodied in Slater, ie, that expert testimony can be admitted to support a claim against a professional, has been retained in the modern Federal Rules of Evidence Rule 702 (FRE 702) reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise" [42]. Many states have adopted evidence rules that parallel FRE 702 with the assumption that expert witnesses retained by feuding parties are independent, and that they will testify honestly as educators and not advocates for one side or another [33]. This is a very important assumption in the evidence rules that deal with this subject; and physicians contemplating serving as an expert witness should understand this point.

Under FRE 702, expert witness testimony is almost always required in medical malpractice cases to assist juries in reaching an informed decision. Typically, a plaintiff hires a medical expert to show both a breach of the standard of care and causation, and a defendant hires an opposing expert to show the physician's conduct met the standard of care and/or the breach did not directly or proximately cause injury to the plaintiff. The few medical malpractice cases that do not require expert testimony are those where negligence is obvious and within the common knowledge of a juror, such as operating on the wrong limb or leaving surgical instruments or sponges within the body [27].

Judicial Immunity of the Expert Witness

Courts historically have been deferential to expert witnesses and granted them absolute immunity from civil liability for what they said on the witness stand. In the 1985 case of Mitchell v. Forsyth, the U.S. Supreme Court said "the judicial process is an arena of open conflict, and in virtually every case, there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on…witnesses and will bring suit against them in an effort to relitigate the underlying conflict" [36]. The rationale for expert witness immunity was based on public policy concerns that court room testimony should be unrestrained; thus, short of a vigorous cross-examination under oath and the threat of a criminal prosecution for perjury, there was almost no accountability for the consequences of expert witness testimony [17, 20].

The Erosion of Absolute Immunity

The absolute immunity of the expert witness in a medical malpractice trial was challenged in the 1977 case of Brousseau v. Jarrett, in which the court held that a patient could sue a doctor for statements made under oath concerning his recovery that affected his ability to collect benefits from an automobile insurance policy [7]. Three years later, the case of Hart v. Brown recognized the duty of an expert medical witness to render an unbiased and fair evaluation of another physician's care of a patient, when retained by a lawyer for this purpose [21]. As the number of experts for hire to help with litigation has proliferated over the last 30 years [26], the Fifth Circuit Court of Appeals summarized judicial concern about members of the academic community who did legal consulting work by testifying in court: "Experts whose opinions are available to the highest bidder have no place testifying in a court of law before a jury and with the imprimatur of the trial judge's decision that he is an expert" [24].

Today, the term "wrongful claim review" refers to the potential liability of an expert medical witness who is retained to advise whether the patient's treating doctor committed medical malpractice [29]. The legal duty of an expert witness in a medicolegal malpractice case can arise from the physician-expert's professional status and the underlying contractual relationship with the injured patient. The physician-expert has a medicolegal duty to conform to a professional standard of competence and objectivity to avoid prejudicing the patient's legal rights [29]. In reviewing a case the standard of care, which is on a case-by-case basis, is the degree of care ordinarily exercised by physicians in the same specialty under the same circumstances. Under this legal standard, the making of an honest

error will not shield the expert from liability unless it is founded on the exercise of intellect, knowledge, skill, and care; the expert will be liable for errors that are inconsistent with that degree of care every physician is required to bring to the treatment of a case [3]. Specific examples from case law that illustrate these concepts follow.

In Pollock v. Panjabi, scientific experts from a prestigious university were hired to testify about injuries sustained by a plaintiff in an altercation with police [37]. To model the injuries in question, the experts designed an experiment using a load cell; this load cell turned out to be defective and as a result, the expert testimony proved deficient and incomplete. After attempts to remedy the defective load cell were unsuccessful, the party that retained the experts sued them instead; in turn, the defendant experts asserted witness immunity as a legal defense. The court ruled against absolute witness immunity for the experts, holding instead that for immunity to apply there must be a nexus between immunity, the fact-finding function of the court, and the interest in having witnesses speak freely [37]. This case clarified that an expert witness is required to render services to the degree of care, skill, and proficiency commonly exercised by other members of the same profession.

Other state court decisions suggest a continued erosion of expert witness immunity [45] and the majority of courts view professional witness malpractice as an actionable claim. Most cases have involved "friendly" experts, where the party hiring the expert sues the expert for negligence, although a handful of lawsuits have been against "adverse experts", ie, those hired by opposing counsel. In Davis v. Wallace, a criminal defendant and her attorney filed a negligence suit against a doctor who served as the state's expert witness [10]; the court noted that "an emerging body of case law and scholarly work questions the granting of absolute immunity to expert witnesses." Similarly, a Louisiana court ruled that witness immunity does not bar a claim against a party's own expert for negligence: "With no sanction for incompetent preparation … an expert witness is free to prepare and testify without regard to the accuracy of his data or opinion. We do not see how the freedom to testify negligently will result in more truthful testimony" [34]. Other courts have also held that experts can be held liable for negligently prepared testimony [31].

Sanctions by State Licensing Boards

An unresolved legal question about expert testimony is whether or not it constitutes medical practice. Some authors have advocated that expert testimony should be considered part of the practice of medicine and subject to scrutiny on that basis [18, 19]. The American Medical Association passed a resolution in the late 1990s stating that the provision of expert testimony is the practice of medicine, thereby making expert testimony by physicians subject to peer review [44]. Existing case law in this area has been inconclusive, however.

In Fullerton v. Florida Medical Association, Inc., an expert witness testified in a medical malpractice suit in which the defendant doctors were exonerated from liability following the judicial proceeding [15]. The doctors complained to the Florida Medical Association (FMA) to review the expert's testimony, alleging that it was below reasonable professional standards, delivered solely to propagate a frivolous lawsuit for financial gain. The expert sued the FMA and the complaining doctors for defamation, tortuous interference with his business, and witness intimidation. A lower court found the FMA was immune to the lawsuit, but on appeal, the court held that a medical association is not immunized from liability in evaluating the testimony of a medical expert. While acknowledging the federal Health Care Quality Improvement Act immunizes hospitals from liability for disciplinary actions taken against staff physicians in good faith, the court refused to extend this immunity from liability to the FMA.

In 1997, the Washington State Supreme Court held that the state Board of Psychology could discipline a member who allegedly failed to meet professional ethical standards in rendering expert testimony in several child custody cases; the court said witness immunity did not extend to professional disciplinary hearings [11]. In 2002, the North Carolina Medical Board disciplined a surgeon by revoking his medical license for giving improper expert witness testimony in a medical malpractice suit. On appeal, the state supreme court reversed the medical board's decision, on the grounds that the expert had rendered his opinions in good faith [25]. These cases suggest case law recognizing the authority and scope of state medical associations to discipline medical expert witnesses remains inconclusive.

Discipline by Professional Associations

In 1983, the American Association of Neurological Surgeons (AANS) was one of the first professional associations to monitor the expert witness testimony of its members; by 2007, at least 18 other societies had followed the lead of the AANS [13, 28]. Courts have permitted the disciplining of expert witnesses by their professional associations, as long the associations act in good faith and do not violate public policy [41]. An example of a public policy concern was the 1956 case of Bernstein v. Alameda-Contra Costa Medical Association in which a California court refused to enforce a medical association by-law that barred criticism of other physicians; the court said that such

a rule would make physicians fearful of criticizing their colleagues and that it violated public policy [5]. Modern legal doctrine in this arena was established in 2001 when the 7th U.S. Circuit Court of Appeals held that the expert witness review program of the AANS promoted public policy by identifying and sanctioning improper witness testimony; the U.S. Supreme Court implicitly agreed when it denied appeal of this decision [2].

Professional society programs to monitor expert witness testimony have been challenged on the grounds that they are unnecessary. Under the Federal Rules of Evidence, judges can exclude experts and evidence if deemed incorrect or irresponsible. Two rules, called the "general acceptance" test and the "Daubert test" give trial judges authority to exclude expert testimony based on faulty reasoning or bad science [1]. The general acceptance test was established in Frye v. United States [14]; the case held that expert witness testimony is deemed reliable if it has gained "general acceptance" in the field. The case of Daubert v. Merrell Dow Pharmaceuticals, Inc. established that for scientific evidence to be admissible in court, it must be amenable to testing, should undergo peer review publication, should have known potential error rates, and should be generally accepted in the scientific community [9].

The Daubert standard is a legal precedent set in 1993 by the Supreme Court of the United States, and it applies to expert testimony in federal courts. Under this standard the court, ie, the trial judge, must evaluate expert testimony, whether medical or otherwise, to ensure it is both relevant and reliable. Under the relevancy prong, the testimony must fit the facts of the case and be relevant to the litigated matter. Under the reliability prong, the Supreme Court invoked the scientific method, specifying a general list of four factors that could be used to determine the validity of the testimony. One, the theory or technique offered in testimony must be falsifiable, ie, be capable of being refuted or shown false by observation or experiment if it truly were false. Two, the testimony offered should be subjected to peer review and publication, ie, it should be more than the subjective observation of the testifying expert. Three, the evidence offered should have a known or potential error rate, with some standards pertaining to its operation. Finally, the theory or technique offered in testimony should be generally accepted by the relevant scientific community.

Two later Supreme Court rulings refined the Daubert standard; together, the three cases are called the "Daubert trilogy." In the 1997 case of General Electric Co. v. Joiner, the Supreme Court held that appellate courts must defer to the lower trial court's decision regarding the admissibility of expert testimony, unless the lower court was strikingly wrong in admitting such testimony [16]. In essence, this ruling affirmed the role of trial court judges as gatekeepers of expert testimony. In 1999, the Supreme Court in Kumho Tire Co. v. Carmichael held that the trial judge's gatekeeping function applied to all expert testimony, including that which is nonscientific [30]. In the year 2000, the Supreme Court approved amendments to the Federal Rules of Evidence relating to opinion evidence and expert testimony to conform to the "Daubert trilogy." Thus, in theory at least, trial judges are supposed to act as gatekeepers, excluding expert testimony that is irrelevant and unreliable so that it is never presented to the jury. In practice however, these judicial tests are limited and have been criticized because judges and juries may not understand highly complex medical issues, and evidence shows judges are reluctant to exclude medical expert testimony under Daubert and Frye [4, 35].

In theory, another judicial safeguard, namely cross-examination of the expert in court should expose bias, partisanship, or financial interest of the testifying expert. However, the adversarial nature of civil trials in the United States does not necessarily expose all improper expert testimony; lawyers and judges may not understand medical issues sufficiently to ask the appropriate questions. In acknowledging the limitations of cross-examination, Louisiana courts have stated that cross-examination "seldom is of adequate value when thrust against the broadside of the litigation expert who can so gracefully stiff-arm his unprepared cross-examiner" [39]. A thorough cross-examination may yield nothing more than to provide another opportunity for the expert witness to repeat damaging testimony [26].

As an example of disciplinary guidelines adopted by professional societies to address fraudulent or inappropriate expert testimony, the American Academy of Orthopaedic Surgeons (AAOS) launched the Professional Compliance Program at its 2004 Annual Meeting, with overwhelming support of the AAOS membership. The program has developed procedures to review, hear, and adjudicate professional compliance grievances arising from a reported violation of the AAOS Standards of Professionalism relating to orthopaedic expert witness testimony (Appendix 1). The AAOS standards hold orthopaedic surgeons responsible for providing expert testimony that is truthful, scientifically correct, and in accordance with the merits of the case. Specifically, the standards mandate that orthopaedic expert testimony shall be impartial, based on knowledge of the subject matter, and provided by a surgeon appropriately qualified to render such testimony, in exchange for reasonable compensation [23].

The AAOS reviews allegations of inappropriate expert testimony through its Committee on Professionalism and the Judiciary Committee; members of these committees are appointed from the AAOS membership. The findings of these committees can lead to a professional compliance

action by the AAOS Board of Directors; the range of sanctions can include censure, suspension, or expulsion of an AAOS Fellow or Member. Actions relating to expert testimony are published in one or more AAOS publications, identifying the orthopaedic surgeon by name and the state of practice. These data are also reported to the relevant state licensing board, state orthopaedic society, state medical society, the American Board of Orthopaedic Surgery, and other medical boards or associations as appropriate. Since adoption of the relevant Standards of Professionalism related to expert testimony, the AAOS has regularly publicized the identity of its members who have been sanctioned under this professional compliance program.

Other Sources of Liability

With increased awareness of patient privacy concerns, expert witnesses should be aware of liability arising from a breach of patient confidentiality. In Brandt v. Medical Defense Associates, a patient sued his physician for complications arising out of treatment for Crohn's disease [6]. Two specialists who had later treated the patient for these complications were called to testify by the defendant physician. Separately, the two specialists also participated in ex parte discussions with an attorney for the defendant's medical malpractice insurer, discussing the plaintiff's condition and related medical issues.

At the conclusion of the trial against his physician, the patient sued the specialists for breach of fiduciary duty from participating in unauthorized ex parte discussions with the patient's adversary in litigation. The Supreme Court of Missouri held that while initiating litigation acts as a waiver of the physician-patient fiduciary privilege, such a waiver does not authorize a physician to enter into ex parte contacts with opposing counsel; by so doing, the physician risks being liable for the tort of breach of fiduciary duty. The court remarked that expert witnesses hired in medical malpractice may be well-advised to avoid all ex parte discussions with the patient's adversaries absent express authorization allowing such contacts.

The Scope of Liability

The law, as it relates to the professional negligence of a doctor who testifies in a medical malpractice trial, is still too new to offer guidelines in terms of the financial risks associated with this activity. Financial settlements between litigants are usually confidential; therefore the scope of the risk may not be known until a legal opinion that is on point is published by a court. However, some guidance is available from a related field, namely that of legal malpractice. Legal malpractice refers to a client suing a retained attorney who negligently handled a legal claim, thereby depriving the client of the possible benefits of that claim. Such lawsuits are to lawyers what medical malpractice is to doctors, and examining the elements of these legal malpractice claims may be useful in thinking about the financial risk undertaken by a testifying doctor.

Legal malpractice claims are thought of as a lawsuit within a lawsuit. The client who sues a hired attorney for legal malpractice must prove two things. One, that the attorney acted negligently as a professional; the elements of such are similar to proving professional negligence against a doctor. Two, the client must also prove the likelihood of success in the underlying lawsuit, namely the claim that was mishandled by the attorney. Essentially, the aggrieved client must show that, but for the negligence of the attorney (for example, late filing of a suit and missing the statute of limitations), the client would have prevailed in the claim that the attorney was hired to handle. If these elements can be proven to the applicable standard, then the defendant attorney is liable to the client, for damages that the client would have received in the underlying lawsuit.

It is reasonable that the financial liability associated with a negligent expert witness testifying for a plaintiff alleging medical malpractice will be measured similarly, ie, by the damages that the plaintiff could not collect, if the plaintiff can show that negligent testimony was the cause of an adverse judgment. In terms of a negligent expert who testifies for a defendant doctor, the reasonable measure of damages may be the avoidable financial harm to which the defendant is exposed, by virtue of the erroneous testimony. The statute of limitations for tort claims against a medical expert who testifies negligently will vary by state law, and will be similar to the statutes governing tort claims in general.

Discussion

The purpose of this report was to examine the potential liability risks that apply to physician-experts who choose to testify in medical malpractice litigation, and discuss the historical basis for expert testimony, the concept of expert immunity and the erosion of such in modern law, sanctions by professional licensing boards and organizations to discourage misleading and erroneous testimony, and the proper role of expert testimony by a physician.

Historically, professional testimony has been necessary in legal cases alleging medical negligence; this concept is embodied both in the Federal Rules of Evidence, and in corresponding rules of evidence adopted in state courts. These rules specify that a witness qualified by knowledge, education, and skill in a particular area of scientific or

technical expertise can testify in court, if such testimony will help lay jurors understand the applicable standard of care. In practice, except for the rare case where substandard medical care is obvious from the facts, almost all lawsuits alleging medical negligence require expert testimony from another physician.

Traditionally, physician-experts who testified in court were immune from civil liability for the content of their testimony. But with increasing recognition that expert testimony may not always be truthful, courts began to recognize the professional duty of the expert witness to other parties in the litigation whose interests could be adversely affected by erroneous and misleading testimony. Breach of this duty can make the expert legally liable to the party that retained the expert, or to another party who is adversely affected by negligent testimony. Practically, this means that testifying experts can no longer deliver testimony with the knowledge that courts will grant them immunity against a lawsuit related to the testimony.

The AMA has specified that expert witness testimony is akin to the practice of medicine; some state licensing boards have extended this concept to review the expert testimony of their physicians, when so requested by a party to a medical malpractice lawsuit. Existing case law in this area is yet sparse, but suggests under appropriate circumstances, state professional boards can revoke the medical license of a physician who is found to have delivered false testimony in a medical malpractice lawsuit. Disciplinary actions against members that are instituted by professional associations to curtail misleading and inaccurate expert testimony have even stronger legal foundation. The AAOS is among many professional associations that have instituted formal programs to facilitate peer-review of expert testimony by its members, with serious sanctions instituted for testimony that violates the AAOS Standards of Professionalism. The integrity of such expert monitoring programs was tested in the mid-1990s when a physician disciplined by the American Association of Neurological Surgeons filed suit against the association. A federal court of appellate jurisdiction upheld the expert review program in question, noting it promoted public policy and patient interests by sanctioning improper witness testimony.

Other sources of unanticipated legal liability can arise as well; in at least one medical malpractice lawsuit, the testifying experts were sued by the patient for participating in unauthorized discussion about the patient's condition with opposing counsel. This case suggests heightened concerns about patient confidentiality, privacy, and safety can open new sources of legal liability for testifying physicians.

Expert witness work may be attractive to physicians as a personal interest, service to fellow physicians who are sued, opportunity for peer review, and as a source of income. Most physicians who offer expert testimony in medical litigation provide a service by informing the legal profession about the correct standard of care governing the medical care in question. The judicial system relies on experts to inform the jury, so that justice can be rendered efficiently and fairly. But, there is an ethical conflict for the expert who is paid to testify; promoting the outcome of a legal case by testifying leads to increased visibility and marketability of the expert; potentially leading to more income. Arguably, ethical conflicts may also exist for professional associations who discipline their members. Such associations are charged with ensuring the competence of their members, but they are also advocates of their constituents and want to protect them from lawsuits.

The proper preparation of an orthopaedic surgeon who chooses to testify as an expert includes thoughtful consideration of the above potential conflicts, and a careful review of the Standards of Professionalism set forth by the AAOS. In addition, the surgeon should consult the AMA Code of Medical Ethics; the Code recognizes that as professionals with special training and skills, physicians have an ethical obligation to assist in the administration of justice. The Code requires that medical experts have recent and substantive experience in the area in which they plan to testify, and that they should limit testimony to their area of expertise. The Code also cautions that the expert witness should not become an advocate of either party in a legal proceeding.

Finally, as a practical matter, a physician who contemplates testifying in medical malpractice cases on a regular basis should consider the value of insurance protection. The medicolegal liability of professional experts is an emerging area of law; and recent case law has generally supported disciplinary actions by professional medical associations, sanctions by state licensing boards, and lawsuits by the litigants themselves against experts who deliver allegedly false or misleading testimony. Accordingly, it may be prudent for the expert to carry liability coverage that will support a legal defense in the event that expert witness work triggers a lawsuit against the testifying expert.

Appendix 1: Standards of Professionalism (SOPs) of the American Association of Orthopaedic Surgeons®

Orthopaedic Expert Witness Testimony

(Adopted[1] April 18, 2005)

AAOS Standards of Professionalism (SOPs) establish the minimum standards of acceptable conduct for

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orthopaedic surgeons. Violations of any SOP may result in professional compliance actions against an AAOS Fellow or Member found in violation. Not prepared using a systematic review, SOPs are developed through a consensus process and are ultimately adopted as official AAOS statements by a two-thirds vote of the AAOS Fellowship casting ballots.

Orthopaedic surgeons are frequently called upon to provide medical testimony in legal or administrative proceedings. It is in the public interest for orthopaedic testimony to be readily available, knowledgeable and objective. As a member of this profession, an orthopaedic surgeon must recognize a responsibility to provide testimony that is truthful, scientifically correct and in accordance with the merits of the case. To this end, the American Academy of Orthopaedic Surgeons and the American Association of Orthopaedic Surgeons ("AAOS") have adopted the following Standards of Professionalism.

The Standards of Professionalism draw from the aspirational Code of Medical Ethics and Professionalism that appears in bold Italics. The statements that follow the aspirational Code establish the minimum standard of acceptable conduct for orthopaedic surgeons when providing expert witness testimony. Violations of these minimum standards may serve as grounds for formal complaint to and action by the AAOS as outlined in the AAOS Bylaws Article VIII.

These Standards of Professionalism apply to all AAOS Fellows and Members who provide expert opinion services to attorneys, litigants, administrative agencies or the judiciary in the context of administrative, civil or criminal matters and include written expert opinions as well as sworn testimony. Only an AAOS Fellow or Member may file complaints of an alleged violation of these Standards of Professionalism regarding another AAOS Fellow or Member.

A. Impartial Testimony

Aspirational: AAOS Code of Medical Ethics and Professionalism for Orthopaedic Surgeons, V.C.:

Orthopaedic surgeons are frequently called upon to provide expert medical testimony in courts of law. In providing testimony, the orthopaedic surgeon should ensure that the testimony provided is non-partisan, scientifically correct, and clinically accurate.

Mandatory Standards:

1. An orthopaedic expert witness shall not knowingly provide testimony that is false.
2. An orthopaedic expert witness shall provide opinions and/or factual testimony in a fair and impartial manner.
3. An orthopaedic expert witness shall evaluate the medical condition and care provided in light of generally accepted standards at the time, place and in the context of care delivered.
4. An orthopaedic expert witness shall neither condemn performance that falls within generally accepted practice standards nor endorse or condone performance that falls outside these standards.
5. An orthopaedic expert witness shall state how and why his or her opinion varies from generally accepted standards.
6. An orthopaedic expert witness shall seek and review all pertinent medical records related to a particular patient prior to rendering an opinion on the medical or surgical management of the patient.

B. Subject Matter Knowledge

Aspirational: AAOS Code of Medical Ethics and Professionalism for Orthopaedic Surgeons, V.C.:

Orthopaedic surgeons are frequently called upon to provide expert medical testimony in courts of law. In providing testimony, the orthopaedic surgeon should ensure that the testimony provided is non-partisan, scientifically correct, and clinically accurate.

Mandatory Standards:

7. An orthopaedic expert witness shall have knowledge and experience about the standard of care and the available scientific evidence for the condition in question during the relevant time, place and in the context of medical care provided and shall respond accurately to questions about the standard of care and the available scientific evidence.
8. An orthopaedic expert witness shall provide evidence or testify only in matters in which he or she has relevant clinical experience and knowledge in the areas of medicine that are the subject of the proceeding.
9. An orthopaedic expert witness shall be prepared to state the basis of the testimony presented and whether it is based on personal experience, specific clinical or scientific evidence.

C. Qualifications

Aspirational: AAOS Code of Medical Ethics and Professionalism for Orthopaedic Surgeons, V.C.:

The orthopaedic surgeon should not testify concerning matters about which the orthopaedic surgeon is not knowledgeable.

Mandatory Standards:

10. An orthopaedic expert witness shall have a current, valid, and unrestricted license to practice medicine in any state or U.S. territory.
11. An orthopaedic expert witness shall maintain a current certificate from the American Board of Orthopaedic Surgery (ABOS), the American Osteopathic Board of Orthopaedic Surgery, or the certifying body, if any, in the country in which the orthopaedic surgeon took his or her training.
12. An orthopaedic expert witness shall be engaged in the active practice of orthopaedic surgery or demonstrate enough familiarity with present practices to warrant designation as an expert.
13. An orthopaedic expert witness shall not misrepresent his or her credentials, qualifications, experience or background.

D. Compensation

Aspirational: AAOS Code of Medical Ethics and Professionalism for Orthopaedic Surgeons, V.C.:

It is unethical for an orthopaedic surgeon to accept compensation that is contingent upon the outcome of litigation.

Mandatory Standards:

14. An orthopaedic expert witness shall not agree to or accept an expert witness fee that is contingent upon the outcome of a case.
15. Compensation for an orthopaedic expert witness shall be reasonable and commensurate with expertise and the time and effort necessary to evaluate and testify on the facts of the case.

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