

“Who's the Expert?”

One of the major contributors to the medical liability crisis has been the inability to qualify “expert witnesses,” and to restrict testimony to medical facts rather than opinions that may or may not be founded on scientific proof. Concern over this issue has spawned several letters to the Medical Society on the subject. As I promised in my first *Round-up* article I would hope to mirror the concerns of my colleagues in these pages rather than purely recite my own agenda. The “expert” seems to be high on the list of your concerns.

By way of review we should recall that recent legislation has been passed covering this area of the law. A bill introduced last year by Barbara Leff and subsequently signed by the governor mandates that those who would testify in this capacity be disclosed when a suit is filed. A bill before the legislature (which has provisional support of the governor at the time of this writing) includes qualifications for the expert in medical liability cases in that the individual's training and current practice must be commensurate with the area in which they will give testimony. The final form of this legislation remains to be seen but I would suspect that before it reaches the governor's desk the trial bar will tamper with it sufficiently to satisfy the legions of litigators.

There are two basic components of medical expert testimony that need to be addressed. It is important that we focus our efforts on both of these factors. The first is obvious to all physicians. If one is presumed an expert it is imperative that this individual be trained in the same specialty, hold the same degree, practice actively in that specialty, and of course hold a current, unrestricted medical license. The second area involves legal procedure.

In a courtroom the validity of medical opinion is based on “medical probability.” Lawyers have explained to me that this translates to “more likely than not” or in other words “51% of the time.” Would a competent surgeon routinely perform surgical procedures that work “51% of the time?” Do we prescribe medications that “more likely than not” treat a disease? Medicine is based on the laws of science and for a scientific proof to be valid it must pass statistical tests; it is subjected to a mathematical proof, a higher standard. If the FDA, already under fire, were to adopt screening to approve new drugs that meet the courtroom test of “more likely than not” would the lawyers, armed with class action suits, still go after the pharmaceutical manufacturers (when as we know, the path to FDA approval is far more rigorous)?

Organized medicine in the form of specialty societies, state and local medical societies can take an active role in insisting that medical expert testimony be delivered by only licensed, practicing physicians, trained in the area of their purported expertise. We must also insist that the testimony is based on the medical literature published in generally accepted juried medical journals and texts. A registry of those who agree to abide by this mandate has been developed by many specialty societies. A reporting system for members of those specialty societies to file grievances against those who give false and misleading testimony has been put forward by some societies as well. The penalty for a serious or repeated violation can be expulsion or censure.

One of the arguments against tort reform has been that it's "bad doctors and bad medicine" that are at the root of the problem. Patients need to be protected. We do share in this responsibility and in order to be perceived as the patient's advocate and protect the public -- which I believe we need to demonstrate more actively -- it is imperative that we acknowledge that there are those who fall below the "standard of care." It is therefore in our interest to be sure that properly trained, qualified, licensed, honest physicians supported by the preponderance of established medical literature be heard in court if negligence is evident. We can not restrict (nor can we appear to do so) scientific truth; the standard of care can be defined and should be applied. It is equally as important to guarantee that those who meet stringent qualifications are heard and those who do not are disqualified before they are deposed thereby saving millions in legal expense.

The other component of "expert" testimony will require procedural reform. Changing the rules of evidence admitted in trial will require Herculean effort on the legislative level. This strikes the very heart of the tort system as it relates to personal injury litigation. You no doubt have seen the billboards, bus signs, full page newspaper ads and phonebook covers that attest to the millions of dollars at stake in the personal injury "industry." In this fight the "paramedical" forces of the Chiropractors, etc. will be arrayed against us in alignment with the trial lawyers. The "personal injury mill" has spawned a network of "experts for hire" and the financial stakes are great. To change courtroom procedure and the rules of evidence as they apply to only medical liability cases would seem to be the more approachable, but still a monumental, task.

The first steps in this area are simple ones. Contact your specialty society to learn of programs already in place to qualify expert witnesses. Let the legislators debating this issue know of your concerns in this area. The next step may be the establishment of peer review panels at the local level. When one is the victim of false or misleading testimony an investigation can then be instituted. Upon confirmation that unprofessional conduct has occurred, an action such as notification of a specialty society of this behavior could be initiated by the Medical Society rather than an isolated complaint by one individual.

I don't believe it has ever been demonstrated that lawsuits protect patients. Good medical care does. While negligence should lead to compensation for damages, it is imperative that false accusations and innuendos do not. Expert testimony must be defined by the scientific method and the preponderance of medical literature. This is the standard that the public deserves and the plaintiff's bar will not accept.

See you next month,

Marc J. Rosen, M.D.
President