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ACOG Committee Tackles Expert Testimony Issue Within Their Specialty Area

The issue of expert testimony and the duty of obstetricians and gynecologists who provide such testimony has been the focus of the American College of Obstetricians and Gynecologists (ACOG) for some time. An August 2007 Committee opinion from the organization addressed the ethical considerations that the organization feels obstetrician and gynecologist experts should follow in providing expert testimony in medical malpractice cases and offered proposed guidelines to physicians who act as experts in such cases.

As general principles, ACOG set forth that it understands it is the duty of obstetricians and gynecologists testifying on behalf of any party or the government to provide testimony within their judgment based on the merits of the case. However, ACOG cautioned that it is unethical for witnesses to provide misleading expert testimony because the witness "does not have appropriate knowledge of the standard of care or the particular condition at the relevant time" or "because the witness knowingly misrepresents the standard of care relevant to the case." ACOG indicated in its August 2007 opinion that a great number of liability claims involving physicians are a result of a society that is litigation based due to the advance of healthcare resulting from technological breakthroughs. These technological breakthroughs have led to patients with "unrealistic expectations". The organization noted that due to new technology, the benefits and risks of treatment increase, thus making the practice of medicine without complications less likely. Accordingly, the ACOG Committee sought to make a distinction between medical "maloccurrence" and medical "malpractice". The Committee defined medical maloccurrence as a bad or undesirable outcome unrelated to the quality of care provided. It gave three examples of medical maloccurrences that were not medical malpractice.

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The first is where a complication was anticipated but is offset by the benefit of the procedure and therefore represents an unavoidable risk. The second is a complication that cannot be anticipated but is still unavoidable. The third is a complication resulting from a specific decision made by a patient and a physician with informed consent, but appears retrospectively to have been the less optimal option among several options. All of these "maloccurrences" have the thread of the uncertainty of medicine running through them. The Committee contrasted malpractice as an occurrence where substandard practice occurs that causes damage to the patient.

The ACOG Committee also set forth specific responsibilities and offered guidelines for physicians who seek to act as expert witnesses. Namely, that the obstetrician and gynecologist should limit his or her testimony to their area of medical expertise and be prepared. The expert must also have experience and a knowledge base relevant to the time period of the incident in question and the specific clinical area under scrutiny. Further, the Committee indicated expert witness fees greatly disproportionate to professional services fees customarily charged "can be construed as influencing testimony" provided by the witness. Additionally, the Committee reiterated that it is unethical for the witness to accept any type of contingency fee based on the result of the litigation. Further, with regard to specific guidelines for an expert witness, the Committee enumerated the following principles:

1. The physician must have experience and knowledge in the area of clinical medicine that enable him or her to testify about the standards of care that applied at the time of the occurrence that is the subject of the legal action.
2. The physician's review of medical facts must be thorough, fair and impartial and must not exclude any relevant information. It must not be biased to create a view favoring the plaintiff, the government or the defendant. The goal of a physician testifying in any judicial proceeding should be to provide testimony that is complete, objective and helpful to a just resolution of the proceeding.
3. The physician's testimony must reflect an evaluation of performance in light of generally accepted standards, neither condemning the performance that falls within generally accepted practice standards or endorsing or condoning performance that falls below these standards. Experts should recognize that medical decisions often must be made in the absence

- of diagnostic and prognostic certainty.
4. The physician must make a clear distinction between medical malpractice and medical maloccurrence.
 5. The physician must make every effort to assess the relationship of the alleged substandard practice to the outcome. Deviation from the practice standard is not always substandard care or causally related to a bad outcome.
 6. The physician must be prepared to have testimony given in any judicial proceeding subjected to peer review by an institution or professional organization to which he or she belongs.

(ACOG Committee – August 2007).

Clearly, the American College of Obstetricians and Gynecologists is on the cutting edge of trying to police their own specialty area when it comes to expert witness testimony. In putting forth the Committee opinion of August 2007, they are setting out ethical considerations for their members to follow when acting as expert witnesses for plaintiffs, defendants or the government. Time will only tell whether other professional organizations for various specialties will follow suit and provide some guidance for their physicians who act as expert witness in medical professional liability lawsuits.

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