

## At Your Defense



# Repair the Medicine-Patient Relationship to Decrease Malpractice Risk

By Carlo Reyes, MD, JD

The medical field used to be a sacred thing. My father was a general practitioner in a small Kentucky town when I was a child, where patients would sometimes pay for his services in homemade apple pie and Sunday dinners. He was so proud of his chosen field. His parents could only afford to send one child to medical school. He immigrated to the United States from the Philippines after he graduated, hoping to give his kids the same opportunity his parents gave him.

My father practiced medicine from the 1970s to the 1990s during the meteoric rise of malpractice litigation that penetrated medicine's most sacred foundation: the doctor-patient relationship. The adversarial approach of malpractice litigation in particular by the use of doctors as expert witnesses may actually threaten the trust relationship between the patient and medicine, which I call the *medicine-patient* relationship.

### Expert Witnesses

The court's use of expert witnesses to determine the standard of care and causation elements in a malpractice action threatens the trust between patients and physicians. Opposing each other on the witness stand, two well-dressed, gray-haired "experts," trained by the same medical system can somehow provide conflicting standards of care or theories on causation. But how can a jury trust the medical field when two well educated physicians give contradictory testimony based on the exact same facts? The jury can only come to one conclusion: one of the experts is telling the truth, and the other is a "hired gun" and therefore must be lying or at least stretching the truth for the benefit of his "employer."

The legal field pits doctors against each other at the expense of the medical field. The more diametrically opposed the testimony, the more damaging the result.

Courts are starting to distrust expert witnesses, too. The Court of Appeals in *Barrow v. May*, (Miss. Ct. App. July 17, 2012) affirmed the trial court's directed verdict in favor of the defendant physician, finding the expert's causation analysis to be "too speculative."

The expert in *Barrow* testified that the plaintiff-decedent, suffering from chronic CHF, died *after* oral surgery because her *anticipation* of the surgery caused an acceleration of her CHF that produced a "surge of adrenaline [sending her] into a 'lethal vicious circle' [and] ultimately led to her death."

Expert witnesses who provide improper testimony risk disciplinary sanctions from medical organizations and state medical boards. Legally contesting such sanctions is usually futile, but that did not stop one orthopedic surgeon from filing a defamation claim, false light, and other claims against the American Academy of Orthopedic Surgeons (AAOS) after the organization suspended the surgeon for failing to meet professional standards as an expert witness. (*Graboff v. Collern Firm*, 2010 U.S. Dist. LEXIS 118732 [E.D. Pa. Nov. 5, 2010].) Dr. Graboff, an experienced orthopedics expert witness, prepared a written draft report and concluded that the defendant-orthopedist was negligent in his care before he reviewed the plaintiff's CT scans and the complete chart. (See FastLinks.)




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firm. Daniel Rhynehart, the attorney for the AAOS, appealed the false light verdict, and anticipates a reversal because "how can there be a false light when there is no false statement in the newsletter?"

Mr. Rhynehart contends that the AAOS compliance program "is a good program with a noble purpose, to make sure that doctors live up to truthfulness, impartiality, and medical accuracy when they testify in a courtroom. As an expert in a courtroom, the jury, the judges, and the lawyers ... are not equipped to know that an expert is testifying truthfully or accurately."

### Repairing the Relationship

The most important component to repairing the medicine-patient relationship is to protect the integrity of the medical profession. Expert witness testimony that affirms an appropriate standard of care and provides a reasonable causation analysis protects patients, which will strengthen medicine's relationship with patients. Expert witnesses are on a stage, and serve a vital role for medicine: they help define the standard of care and determine causation in negligence actions. Just as important, experts portray the image of medicine to attorneys, juries, and judges. This is why we must scrutinize our experts carefully: to protect medicine's image to society and to repair the medicine-patient relationship. 

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■ Visit Dr. Graboff's site at [www.drgraboff.com](http://www.drgraboff.com).

■ Read Dr. Reyes' past columns at <http://bit.ly/ReyesAtYourDefense>.

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