

ACOG Has Sanctioned 3 In Its Peer Review Process

BY ROBERT FINN
San Francisco Bureau

SAN FRANCISCO — Since the American College of Obstetricians and Gynecologists established a procedure for peer review of expert witness testimony in 2002, approximately 20 cases have been brought, and three fellows of the college have been sanctioned for egregious testimony. Charles B. Hammond, M.D., said at the annual meeting of the college.

Two of those cases have been brought by Arnold W. Cohen, M.D., who described the process as cumbersome and tedious but very fair.

In one of those two cases the physician accused of egregious testimony resigned from ACOG before the grievance process could be completed, Dr. Cohen of the Albert Einstein Medical Center and Thomas Jefferson University, both in Philadelphia, said in an interview with this newspaper. No decision has yet been rendered in the other case, he said.

Before a 2002 case involving the American Association of Neurological Surgeons (AANS), ACOG was reluctant to undertake the review of unethical testimony for fear that ACOG would be sued by the sanctioned member, said Dr. Hammond of Duke University, Durham, N.C., who is a past president of ACOG.

But that attitude changed in January 2002 when the U.S. Supreme Court let stand a lower court ruling, which held that a professional society may discipline a member concerning courtroom testimony. The AANS had been sued by a neurosurgeon whose membership was suspended after a hearing that determined his expert testimony in a certain case had been egregious.

The ACOG grievance procedure has a number of requirements. First, an ACOG fellow must be reported by another fellow. The original court case must be closed, with all appeals concluded. The reporting fellow must provide court transcripts with all names removed. A committee then reviews those materials, and if it decides that the allegation has merit, both the reporting fellow and the one accused of egregious testimony are invited to a hearing, where they may be represented by attorneys if they wish.

The committee issues its decision, and if the allegation of egregious testimony is found to have merit, the committee may impose sanctions, including termination of ACOG fellowship.

"ACOG has a very fair process," Dr. Cohen said. "It's fair to both the person who has given the testimony as well as the person who feels it's egregious. It's

a very tedious process, and it's a confrontational process, when you're there with the other person in the same room [with] you saying that he said something wrong, and he's saying that he believes in what he said even though facts don't support it."

Dr. Cohen was not directly involved in either case, except as the individual who reported the allegation. In the first case, an ob.gyn. testified for the plaintiff in a case that alleged that her doctor (the defendant) performed stripping the membranes, causing the baby to die of a β -streptococcal infection. The defendant declined to report an allegation of egregious testimony himself for fear of a countersuit, so Dr. Cohen, who has long been involved in the Coalition and Center for Ethical Medical Testimony and other medical-legal matters, chose to make the report. The ob.gyn. who testified on behalf of the plaintiff resigned from ACOG before a hearing could be held.

This option is an escape hatch that ACOG hopes to block in the future, Dr. Hammond said. One possibility is to rule that a fellow cannot resign before the hearing. Another is to report the committee's decision to the National Practitioner Data Bank as if the fellow had not resigned.

In Dr. Cohen's second case the expert witness testified that the use of home uterine activity monitoring to prolong pregnancy has a 95% chance of ensuring that babies go to term, an assertion Dr. Cohen said is not supported by the facts.

"It takes about 9 months to a year to get to the point where you finally give the testimony in front of ACOG," Dr. Cohen said.

Neither Dr. Cohen nor the other physician chose to be represented by an attorney at the hearing. The committee chairman allowed each to make a 30-minute opening statement along with rebuttals, and each responded to questions from committee members.

"The process was very fair yet very formal," Dr. Cohen said.

It's a process that's still evolving. For example, ACOG has recently decided to publicize the names of physicians who have been sanctioned for egregious expert testimony, Dr. Cohen said.

"I hope that members of the college will recognize that if you [witness] egregious testimony . . . you now have a resource, a place you can go and have it heard with the real option of sanctions being taken," Dr. Hammond said. "I hope and pray that medical expert witnesses who provide clearly egregious testimony—the hired guns—I hope they hear this loud and clear, and I hope we have a way to at least improve the medical liability system as it now exists." ■

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Check Vitals to Evaluate Your Defense in Malpractice Case

BY SHERRY BOSCHERT
San Francisco Bureau

KOHALA COAST, HAWAII — You're a physician, not a lawyer. How do you know that the lawyer defending you in a malpractice lawsuit is doing a good job?

When a physician gets sued, the malpractice insurer assigns the case to a legal defense firm. According to Annette Friend, M.D., a psychiatrist, physicians should expect five basic things from a competent lawyer: a plan of action, clear communication, ongoing communications, management of your expectations, and clear explanations of billing policies.

A review of disciplinary actions against lawyers suggests more than half stemmed from clients' complaints that the lawyers were neglectful, failed to communicate, or failed to represent clients diligently or competently. Another complaint—that failure to communicate billing policies led to fee disputes—is an increasing cause of disciplinary dockets, Dr. Friend, who also is a lawyer, said at a conference on clinical dermatology sponsored by the Center for Bio-Medical Communications Inc.

"We want to satisfy you, but you have to insist on being satisfied," Dennis J. Sinclitico, J.D., a defense lawyer, said in a presentation at a conference in Cabo San Lucas, Mexico, on obstetrics, gynecology, perinatal medicine, neonatology, and the law.

Get a copy of the malpractice insurance company's guidelines on expectations of lawyers to know what the insurer expects for your case, said Mr. Sinclitico of Long Beach, Calif.

To get your lawyer to do the best job for you, Dr. Friend and Mr. Sinclitico advised, think about the following factors:

► **Plan.** The physician and lawyer jointly plan a course of action. The lawyer should explain what is involved in the case, what needs to be done, what may happen next, and various means of resolving the case. The client makes the final decision about how to resolve the legal matter, said Dr. Friend of Fort Lauderdale, Fla.

She suggested asking whether the lawyer has ever handled this type of case, and if there is a way to settle the matter without going to trial. Your bill for an inexperienced lawyer may be higher as more hours are needed to learn the matter.

► **Communicate.** Expect plain speaking, clear writing, and good listening skills from your lawyer. When a complex legal issue can be explained in a way that one's grandmother might understand, that's clear speaking, she said. If you don't understand something your lawyer wrote, chances are the judge and others won't understand it, either. The lawyer should be able to listen to the client and think about the case without being distracted by calls, e-mails, or an overload of other cases.

If your lawyer isn't communicating well, or you don't get along, demand a new lawyer from the firm's associates or the insurer's panel of lawyers, Mr. Sinclitico said.

Communication is a two-way street, he added. If you see an article in the medical literature that's pertinent to your case, send it to the lawyer. Insist on participating in selecting the medical experts whom your attorney will rely on.

► **Communicate some more.** The legal process can drag on for years, so expect ongoing communication from your legal team, preferably from your lawyer personally, Dr. Friend said.

Request regular, periodic status reports from the lawyer, Mr. Sinclitico advised. If the flow of paper stops, or if you call several times without a response from the lawyer, that's a red flag something's wrong.

► **Manage expectations.** As the lawyer continually analyzes and updates you on the pros and cons of the legal proceedings, options should be articulated in a commonsense way without exaggerating the probable success of the case and without painting an overly bleak outcome.

► **Explain billing.** Demand an up-front, detailed accounting of billing policies. Law firms may bill for face time with the client, phone calls, conversations between firm members, time spent reviewing documents, legal research, preparation of forms or documents, revisions, document reviews, travel time and expenses, and other services. If the lawyer in charge of the case changes while the case is in progress, the client should not have to pay for the firm to bring a new lawyer up to speed on the case, Dr. Friend said.

Ask whether legal interns will bill at the same rate as senior lawyers, and be sure that you'll get access to all legal work generated on your behalf, she added. ■

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