

ASMBS statements/guidelines

## American Society of Metabolic and Bariatric Surgery patient safety committee policy statement on the qualifications of expert witnesses in bariatric surgery medicolegal matters

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The Patient Safety Committee of the American Society for Metabolic and Bariatric Surgery (ASMBS) encourages its members to testify in court to promote safe and responsible bariatric surgical care. The widespread availability of expert opinion to both defendants and plaintiffs is critical in meeting the Society's social responsibility. The expert witness in a medical malpractice suit is of critical importance. The purpose of expert witness testimony in medical malpractice matters is to describe the standards of care relevant to a given case, identify any breaches in those standards, and, if so noted, render an opinion as to whether those breaches were the most likely cause of injury. The expert must be able to distinguish between negligence (substandard medical care that results in harm) and an unfortunate medical outcome (recognized complications as a result of medical uncertainty). Defendants and plaintiffs deserve expert witnesses who demonstrate integrity and expertise in the field for which the opinion is being rendered.

Only the courts can determine the eligibility, reliability, and relevance of an expert witness. No organization can interfere with or influence any member's right to testify or provide an opinion in medicolegal matters. However, the ASMBS can provide guidance for expert witness qualifications in bariatric surgery medicolegal matters.

The field of bariatric surgery has evolved substantially in recent decades. Bariatric surgical services are now wide-

spread nationally, a large body of clinical research has refined the development of evidence-based practices, and highly experienced bariatric surgeons are now commonplace. Thus, the availability of expert opinion should be sufficiently widespread such that both the defendant and plaintiff should have access to high-quality bariatric surgeons willing to provide expert witness testimony.

This Policy Statement is offered to provide guidance to ASMBS members and nonmembers and to nonsurgeon members of the medicolegal community regarding the qualifications of expert witnesses in bariatric surgery medicolegal matters. This Policy Statement differs from the Expert Witness Guidelines contained in the ASMBS Code of Ethics in that the Code of Ethics applies only to ASMBS members and, in addition to providing guidance for ethical behavior, can be the basis for disciplinary action against a member. This Policy Statement is intended for a wider audience and is not intended as the basis for disciplinary action against an ASMBS member.

The Patient Safety Committee supports without reservation the guidelines set forth by the American College of Surgeons and the Expert Witness Guidelines in the ASMBS Code of Ethics.

### **Guidelines for the Qualifications of Expert Witnesses in Bariatric Surgery Medicolegal Matters**

1. Although there is currently no accredited specialty certification for bariatric surgeons, there is a widely accepted standard in the surgical community that bariatric surgery is

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a subspecialty of general surgery. Some states courts have affirmed that expert witnesses must hold the same specialization as the defendant in medical malpractice cases. The ASMBS endorses this standard. As such, the expert witness in a bariatric surgery legal matter should hold or have held privileges for the specific procedure at issue in the legal matter at the time the alleged malpractice occurred. At least 1 expert witness each for the defense and the plaintiff in bariatric surgery malpractice litigation should be a surgeon with expertise in bariatric surgery.

2. A bariatric surgeon under consideration for providing expert opinion or testimony should have the following credentials:

- a. The bariatric surgeon should only provide expert opinion regarding procedures for which he or she has significant direct experience. Experts can be asked to give an opinion regarding nonstandard procedures, emerging technologies, or relatively uncommon clinical situations. In these situations, in which the identification of an expert with “significant direct experience” could be burdensome to the litigants, the expert should at least have direct experience with procedures technically similar to the procedure in question and with similar clinical management. The ASMBS believes that “significant direct experience” is demonstrated if the expert has performed bariatric operations and has treated the pre- and postoperative bariatric patient in substantial numbers such that he or she has a thorough understanding of the standards of care for that procedure. The ASMBS encourages both the plaintiff and the defense to identify the most experienced bariatric surgeons that are also able to give articulate testimony based on a reliable scientific foundation.
- b. The expert should show a dedication to the practice of bariatric surgery through a history of clinical practice that incorporates the care of the bariatric patient. Identifying experts whose clinical practice is accred-

ited by national organizations (i.e., ASMBS Center of Excellence or American College of Surgeons Bariatric Surgery Center Network), certificated by health insurance companies or similar other outside entities, is strongly encouraged.

- c. The expert witness should have a minimum of 24 hours of the American Medical Association Physicians Recognition Award Category 1 credits continuing medical education in bariatric surgery every 3 years. The expert witness should be current with this minimum when rendering any expert opinion.
  - d. The expert must have met all these criteria at the time the alleged negligence had taken place.
3. Expert witnesses are advised that they must respect the privacy of all parties involved with the litigation. Expert witnesses must not discuss the case with colleagues, other attorneys, or any third parties unless given explicit permission to do so by the attorney who retained the expert witness. All information is confidential until a part of the public record.
  4. The expert witness should make all reasonable efforts to maintain integrity and avoid conflicts of interest. Potential conflicts of interest include providing an expert opinion for a close friend or providing expert testimony against a direct competitor. The expert witness should avoid any possibility of professional advantage from serving in this capacity. If unavoidable, any questions of potential conflicts should be explicitly disclosed to the attorneys for both the defense and the plaintiff.
  5. The ultimate test for medical accuracy and impartiality is a willingness to prepare testimony that could be presented unchanged for use by either the plaintiff or the defendant. Expert witnesses are encouraged to make initial recommendations and reports without regard to whether the hiring attorney is representing the plaintiff or the defendant.