

A surgeon in court and the “whore” expert witness

Ten months after “publishing” this piece on my web-site I received a letter from the lawyer of Dr. XYZ (the legal whore under discussion) with a threat: “take off this article immediately or we’ll sue you!” Of course, there is nothing in this article which has not been admitted by the “whore” himself in court (and on video), except the definition “legal whore”. But as I have no desire to waste time and money on futile legal battles I have immediately removed the article from online.

I am now returning this modified version: personal details of the “whore” were removed and an addendum has been added.

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December 2008

February 2008

After a long week in court, being accused of negligence and malpractice, most surgeons would want to forget the nightmare—to leave it behind. But I wish to share with you my own court experience, last week, in a small town in Iowa. Perhaps it would be instructive (or entertaining?) to some of you.

It is the fourth day of the trial. We are listening to the closing arguments by the plaintiff’s lawyer, a smooth talking local attorney.

The Plaintiff’s lawyer approaches the members of the jury, stares at their eyes, points a long finger at my direction and says: “Dr. Schein was negligent! Because of his carelessness Mr. S (now he points at the plaintiff) has lost his elbow joint! Because of this doctor’s negligence this man is not the man he used to be. He can’t swim in the Mississippi, he can’t bow-hunt, he can’t use his gun, and he can’t fish. Because of this negligent doctor my client can’t role on the carpet with his grandkids. And consider the impact of Dr. Schein’s malpractice on Mrs. S. (Now he points to the plaintiff’s wife). She is the one who has to carry, in deep snow, water to the horses; no more can she enjoy rides with her husband on their Harley Davidson...” The counsel lowers his voice to a hush: “Since mistreated by Dr. Schein my client and his wife’s sex life ...”.

The members of the jury: seven women—four of them could be anyone’s grandmothers, and an obese farmer in denim overall –listen attentively but show no visible emotions. On day 1 of the trial this jury was selected out of a larger group of candidates. The formula is known to any trial lawyer: men, particularly employed men, tend to favor the defense; female jurors, on the other hand, are somehow plaintiff-leaning. Thus, all men in the jury candidate group, but one, were promptly eliminated by the plaintiff’s lawyers. On the defense side, my lawyer eliminated any jury candidate who, on prolonged questioning, admitted having any personal history of medical litigations or bad experience with doctors—evidently, in any group of people there are not a few who

would fall within such category. One young lady offered immediately: “I simply don’t not trust doctors...”—of course we eliminated her.

“The defense rests”, concludes the plaintiff’s counsel. My own lawyer—a statuesque blond lady in her early 40’s— has already presented her closing arguments. Now the white haired and mustachioed Judge, from his elevated stand, starts to calmly lecture the jury about the methodology of reaching their verdict. I look at the jury and think: Did these old women understand the case? Could they follow the medical evidence presented to them by the experts? Do they possess any commonsense? Are they emotional, favoring the poor fat truck driver –a good old Iowa boy--and his toothless wife, over that rich surgeon (aren’t all surgeons rich?) with the foreign accent? Yes, on the paper we have made our case; we should win—but will we?

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Oh yeah: I have to say a few words about the case—why was I sued?

The facts briefly are:

- The plaintiff was involved in a lawnmower accident, sustaining a deep laceration to the region of his left elbow. He was brought to the emergency room of a small rural hospital. I—the general surgeon on call —was summoned within an hour to treat him. The single orthopedic surgeon in town was on leave.
- Physical examination by me excluded vascular or nerve injury and radiography excluded any bony injuries.
- I took the patient to the operating room (3 hours after the injury) and under i.v sedation and local anesthesia cleansed the heavily contaminated wound. Exploration revealed exposed but intact periosteum overlying the olecranon and an intact elbow joint. I sutured the laceration in layers.
- Patient received adequate pre and postoperative prophylactic antibiotics.
- I closely followed up the progress of the wound—seeing the patient in office every few days. The wound was swollen but healing with good range of elbow motions. Patient returned to work.
- Three weeks after the injury the patient presented with evidence of wound infection. I taped the wound with a large bore needle, in search for deep pus formation, but found none. I diagnosed superficial wound infection and started wide spectrum oral antibiotics and local care. The wound improved drastically within 2-3 days.
- Five weeks after injury the patient presented with clinical evidence of deep pus formation in the wound. Now I suspected septic arthritis: I summoned the orthopedic surgeon, who took over the case.
- The patient required two additional operations to treat, first the septic arthritis, and a few months later, adjacent osteomyelitis. He lost some function of the involved elbow and required long-term antibiotics.

I learned about the lawsuit almost a year after I had left Iowa. On reading the accusations against me, my reaction typically consisted of anger combined with

surprise and frustration. Anger of being sued after providing the best care I could. Anger for the undermining of my self esteem (e.g. “who are they to tell me how to treat surgical infections? I write books about surgical infections...”). Anger and frustration for the hassle, which I knew, would be prolonged. Surprise because I remembered that patient very well as a “nice guy”, with whom I seemed to have a warm and friendly rapport.

As always the process started with each side deposing the other. I had to travel to Iowa –a few days lost out of my yearly vacation...many more such days will be lost. Next the expert witnesses for both sides were deposed.

The allegations against me hinged on the “expert” opinion of Dr. XYZ, MD, FACS (see picture below), an orthopedic surgeon from a Large City, who works at the X Medical Center, which is affiliated with the XY Hospital. Dr. XYZ is an Associate Professor at XY University but PUBMED search shows three publications to his name (not as the first author).



At his deposition Dr. XYZ claimed that I had deviated from the standard of care by:

- Not calling an orthopedic surgeon to treat the laceration.
- Not doing a “saline test” or “dye test” – that is, inflating the joint capsule to assess its integrity–thus missing the (alleged) joint penetration.
- Not taking a wound culture when the patient presented with wound infection three weeks after injury.

A date for the trial was scheduled but, as always is the case, the plaintiffs’ side came up with an offer to settle before trial, asking for \$ 90,000. We declined. By settling the case I, the defendant, would admit my fault, thus staining my “malpractice record” forever. Obviously, the insurance company, which pays for the defense, can accept any settlement irrespective of the sued surgeon’s wishes, and this is what they would do should they estimate that the case were not easily defensible.

A month before the trial I was prearranged to attend a “mock trial” organized by my lawyer and conducted by TrialGraph-x --a Chicago trial consulting company (<http://www.trialgraphix.com/SubPage.aspx?CatPageId=5>).

We met in a hotel near Minneapolis. My lawyer, who flew from Iowa, acted the role of the plaintiff’s counsel; the “consultant”—a forty something African-American lady, –videod the mock trial and re- playing the tape to us, criticized it: ”Sit straight, keep your head up, do not look defensive, look at the jury, maintain eye contact; take your time, listen to the questions, think—count, silently, to four before speaking—do not let them pace you...” After lunch we repeated the *spiel*. “Much better! Now you look the sympathetic doctor the jury has to see. We want you to reflect an image of a warm, caring doctor...” My lawyer added: “Remember, your task is to answer the factual questions the best you can—nothing more. Leave the rest—the actual defense of what you did, and how good you think you are, to our expert witnesses and me.”

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On the evening before the trial we arrived at the small town where the County Court is situated, checking in a cozy riverside inn. My lawyer arrived with her paralegal aid and the Chicago legal consultant. Again, for long hours I was briefed, questioned and criticized, including the color of my shirt and the tie to go with it.

Day 1 in court:

The morning hours are consumed by the selection of the jury. My lawyer memorizes the names of the 15-jury candidates in five minutes. For a long hour she is interviewing them, calling each in his name, without looking at her notes. I am very impressed. When she returns to her sit she whispers in my ear: “Didn’t you know that I’m a genius?”

In the afternoon both sides present their opening statements: what is the case all about and how the plaintiff’s lawyers will prove my negligence, and what they wish the jury to award their client (at least \$ 500,000). My lawyer is well prepared: She presents the jury with large posters depicting the sequel of events, the main issues to be considered, how she’s going to argue for me; who will be our expert witness and finally tells the jury a little about her client’s background. Already now the differences in style between both sides are apparent: the plaintiffs’ counsels repetitive and emotional—preaching like in an Evangel church; my lawyer—straightforward, accurate, cool and rational.

Day 2 in court:

First the plaintiff and then his wife take the witness stand for a few hours recounting, prompted by exhausting and repetitive questions of their counsels, all their miseries which were caused by my treatment or mistreatment. Their cross examination by my lawyer is surprisingly brief and polite. “We have to appear sympathetic to them,” she explains to me, “we don’t want to rub the jury the wrong way...”

After lunch I am climbing on the stand. I have been prepared and tutored ad nauseum; I know the records of this case by heart, I know which questions my lawyer will ask me and I know what I am going to say; but still, I do not remember myself being so anxious for many years. Yes, I know that my life or livelihood does not depend on the outcome of this trial. But my honor and professional self-esteem does, and the risk of losing it fuels my anxiety. Replying to my lawyer questions about my professional life and the case's events goes smoothly—as planned. Even the cross examination seems surprisingly easy. I count to four before replying, look humbly at the jury, and occasionally slow the plaintiff's counsel pace by asking, "please could you repeat your question." My lawyer takes over again and asks me more questions. "I'm going to clear the shit after you, clarifying anything which you screw up", she promised before hand.

Day 3 in court:

The entire day is dedicated to the expert witness on both sides. The orthopedic expert XYZ is the first to appear—but not in person. Of course, the avid expert is not too keen to travel to remote, frozen rural locations, especially when he has to do it twice a month. Thus, his method is to testify on video taken a week prior to the trial. In the first hour of the video Dr. XYZ is questioned by the plaintiffs' lawyers about how I deviated from the standard of care (see above). My lawyer then starts her cross-examinations going straight to his jugular. Within 10 minutes the jury learns the following:

- He has never practiced outside an urban academic hospital.
- He is a habitual expert witness for plaintiffs against surgeons.
- He derives 55-60 % of his income from work as an expert witness.
- He commonly testifies against doctors around the country including in Delaware, North Carolina, Pennsylvania, Connecticut, Texas, Utah, Florida, Washington, D.C, Missouri, Maryland, Arizona and Minnesota.
- During the last 5 years he earned "about \$ 200,000 or slightly more" per year doing expert witness testifying.

Next, my lawyer calls on the experts for the defendant. Two of them are orthopedic surgeons, one of whom the chief of orthopedic trauma in the local University. The third is a general surgeon in practice. All are in their early fifties, well groomed and eloquent—good old Iowa boys. And all are well pre-rehearsed by my lawyer. They provide an opinion opposite to that of Dr. XYZ, that whatever I did was within the standard of care, namely:

- Such injuries can be, and are, managed by general surgeons or ER physicians.
- The joint "saline" or "dye" tests are controversial and not the "standard of care."
- No wound culture was required as cultures from superficial wounds are inaccurate and may be misleading. It was reasonable to start instead wide spectrum antibiotics and closely observe the patient.

On laborious cross-examination of my experts the plaintiff's lawyers try to confuse and discredit them by asking many "hypothetical" questions. But it seems to me that "my" experts are well received and appreciated by the jury.

Day 4 in court:

The last day. Since 4 am my lawyer was preparing her “closing arguments”. At 6 am she woke me up to show me what she’s going to say, asking for input. By now I have noticed how good she is, how well prepared and focused and how very seriously she takes on my defense –like a surgeon going to perform a major innovative operation.

As always, one of the plaintiff’s lawyers starts with his closing arguments. The same emotional *spiel* over and over again. Now he talks about our expert witnesses: “Do not be influenced by the number of the experts on the defendant’s side”, he preaches the jury, “all experts are well paid for their time. Supported by the malpractice insurance company the defendant can afford any number of experts—we can’t! What matters are the facts of the case, the evidence! Follow the evidence presented to you-- not the number of the experts.”

“Your honor,” the counsel approaches the Judge, “can my client expose his elbow and show his original wound to the members of the jury? We wish to clarify the site of injury which has been inaccurately described by the various witnesses.”

“Please do”, approves the Judge. The plaintiff folds up the long sleeve of his flannel sweatshirt and approaches the benches of the jury.

“Jessica,” I whisper to my lawyer, “since the injury he’d undergone three additional operations, extending the size of the scar over and over again. What they see now doesn’t reflect the site of the original laceration.”

“OK, I am going to bring you to the stand just now, you will clarify this issue. Are you ready?”

“No, it is not proper for me to have a direct confrontation with the patient in front the jury. You can include this when you close...”

And close she does, calmly and eloquently, going, again, step by step over the events of the case, bringing up the allegations about me and all the arguments to refute them. She lectures about the difference between “complications” and “adverse outcomes” and malpractice or negligence. She speaks about the “monday morning quarterback”, alluding to people who criticize or pass judgment from a position of hindsight. She concludes: “This trial has focused on the unfortunate injury sustained by Mr. S. –and rightly so—on the suffering it caused him and his wife, for whom we are all sorry, including my client. But please do consider that by ruling for Mr. S. not only you will award compensation to the S. family but also you will be unjustly punishing my client. (I put on my serious, dedicated Doc face and look meekly at the jury). The defense rests your honor.”

The final word is reserved to the plaintiffs. One of their counsels rises to offer a retort; he approaches the members of the jury, stares at their eyes, points a long finger at my direction and says: “Dr. Schein was negligent!” and so on and so forth.

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This little legal saga of mine is of course not unique and not original. Thousands of surgeons find themselves in that situation each year—at least one third having committed no error at all. A random sample of 1452 “closed” malpractice claims from five liability insurers showed that more than one third of the claims seemed to be frivolous and that the majority of such “unjustified” claims (84 percent) did not result in compensation, while most that involved injuries due to error did (1). But this is hardly comforting to the surgeon who has to defend such frivolous claim: the many uncompensated days, the travel expenses, and the cost of strain. This study also showed that for every dollar spent on compensation, 54 cents went to administrative expenses--including those involving lawyers, experts, and courts (1)—clearly, a huge army of legal and paralegal parasites is nourished by this system, meaning they are fed by our own work.

In my case, the two small town lawyers knew where to find the famous Dr. XYZ—an “**orthopedic legal whore**”; they could count on him to come up with some pseudoacademic list of alleged errors committed. They probably guessed that their chance to win is no more than 50/50 but they did not invest much in this case except a few hours of work on and off. Most probably the \$ 8000 paid to Dr. XYZ (the whore) was squeezed directly out of the plaintiff. So, if the plaintiff’s lawyers have nothing to lose—why shouldn’t they sue indiscriminately, hoping for an occasional downfall of a million?!

I do not wish to dwell into the discussion about tort reform, but isn’t there a more human and faster (to both sides) and cost effective approach to compensate patients with adverse outcomes, irrespective of whether associated with negligence or not? And how are we to address the “**expert whores**” who are behind all frivolous lawsuits?

I almost forgot to mention who “won” in my case. Luckily, the 7 old women (the Jury) returned a verdict in favor of the DEFENDANTS. Most probably, I would not be writing this if it would be otherwise. Of course the plaintiff has the right to appeal...

1. Studdert DM, Mello MM, Gawande AA, Gandhi TK, Kachalia A et al. Claims, errors, and compensation payments in medical malpractice litigation. *N Engl J Med.* 2006;11;354:2024-33

See next page for Addendum

On February 2008 I wrote to the Central Judiciary Committee (CJC) of the American College of Surgeons:

RE: Complaint regarding expert witness testimony

Dear Sir,

I am writing to complain about Dr. XYZ, FACS, who is an orthopedic surgeon, practicing in X, YZ.

Dr. XYZ served as the sole expert witness for the plaintiff supporting a lawsuit against me. In this complaint against Dr. XYZ I contend that he had violated the following portions of the College's Statement 8:

1. The physician expert witness should be familiar with the standard of care provided at the time of the alleged occurrence and should have been actively involved in the clinical practice of the specialty or the subject matter of the case at the time of the alleged occurrence.
2. The physician expert witness should be prepared to distinguish between actual negligence (substandard medical care that results in harm) and an unfortunate medical outcome (recognized complications occurring as a result of medical uncertainty).
3. The physician expert witness should review the standards of practice prevailing at the time and under the circumstances of the alleged occurrence.

The lawsuit, based entirely on Dr. XYZ testimony (which was video recorded on 1/7/08 and then played in court) who claimed that I have deviated from the standard of care by:

1. Not calling an orthopedic surgeon to treat the laceration.
2. By not doing a "saline test" or "dye test" to assess the integrity of the joint –thus missing the joint penetration.
3. Not taking a wound culture when the patient presented with wound infection three weeks after injury.

At trial the three expert witnesses— two orthopedic surgeons and one general surgeon (all from Iowa) for the DEFENDANT claimed otherwise— that whatever I did was within the standard of care, namely:

1. Such injuries can be, and are, managed by general surgeons or ER physicians.
2. The joint "saline" or "dye" tests are controversial and not the "standard of care."
3. No wound culture was required as cultures from superficial wounds are inaccurate and may be misleading. It was reasonable to start instead wide spectrum antibiotics and closely observe the patient.

The jury returned a verdict in favor of the DEFENDANTS (see copy of the order re dismissal of case by Judge MJ Schilling, February 25, 2008).

I contend that Dr. XYZ supported a frivolous lawsuit against me:

1. He, an orthopedic surgeon, who never had practiced outside an urban academic hospital, claimed that by not calling an orthopedic surgeon to manage such soft tissue injury I (a rural surgeon with vast experience n trauma) violated the standard of care. (See pages 119--126 in his attached testimony).
2. He claimed that not doing a “saline” or “dye” test deviated from the standard of care (see pages 125,126) , while such tests are known to represent only an “option” but are not mandatory or universally practiced.
3. He claimed that by not taking a wound culture I deviated from the standard (pages 128-131) while the issues concerning cultures from superficial post traumatic wounds are well known to surgeons.
4. Dr. XYZ clearly is a “habitual expert witness for plaintiffs against surgeons”:
 - He derives 55-60 % of his income from work as an expert witness (see page 151).
 - He commonly testifies against doctors around the country including in Delaware, North Carolina, Pennsylvania, Connecticut, Texas, Utah, Florida, Washington, D.C, Missouri, Maryland, Arizona and Minnesota (see pages 149, 150).
 - During last 5 years he earned “about \$ 200,000 or slightly more” per year doing expert witness testifying (see page 152).
 - He never appears in court but submits his “expertise” on video.

Outcome of my the complaint

- Two weeks later, an administrator from the American College of Surgeon called me, thanking for the complaint and assuring that it would be considered promptly and thoroughly.
- Eight months later I received a letter from the American College of Surgeon, stating laconically that “following discussion and due process the Central Judiciary Committee agreed to take no further action regarding this matter.”

I responded:

“I would like to hear more: would it be possible to receive a transcript of the CJC deliberations on this case? Or, at least, a detailed summary of the reasons for not taking “further action”—thus making my complaint to seem inappropriate or erroneous. Without knowing why was my complaint dismissed—how would I know whether to complain in the future? It is the American College of Surgeons that has declared a “drive” against expert witnesses who “misbehave” and is thus actively procuring complaints against them. But without transparency on the “due process”, Fellows like me may loose trust and consider such efforts no more than a lip service.

- The CJC Administrator replied: “There are several reasons, including confidentiality and advice from legal council, while details summaries of the deliberations of the CJC are neither prepared nor shared. I can promise you that your complaint was reviewed and considered carefully...but not every case that is recommended for review by this committee results I disciplinary actions,

So this is the way the American College of Surgeons deals with its Fellows who serve as habitual legal “whores”.

It seems however that the American Association of Orthopedic Surgeons (AAOS) does things differently. On June 14, 2008 our orthopedic expert (the same Dr. XYZ who had testified against me) was suspended by the AAOS for one of his legal expert activities.

I cite from AAOS webpage <http://www.aaos.org/news/aaosnow/aug08/youraaos9.asp>
(For obvious reasons I change his full name to XYZ.)

AAOS Board takes professional compliance actions

Two fellows suspended for violations of Standards of Professionalism

On June 14, 2008, the AAOS Board of Directors met in closed session to consider two grievances under the AAOS Professional Compliance Program. Based on the information presented and the recommendations of the Committee on Professionalism (COP) and the Judiciary Committee, the Board issued suspensions to two fellows for violations of Mandatory Standards under the Standards of Professionalism (SOPs) on Orthopaedic Expert Witness Testimony. **XYZ, MD**, received a 1-year suspension and **W. Thomas Jackson, MD**, received a 3-month suspension.

XYZ, MD
Baltimore, Md.
1-Year Suspension

In January 2007, a grievance alleging violations of the SOPs on Orthopaedic Expert Witness Testimony was filed against Dr. XYZ. The grievance was based on a case that arose from a total knee arthroplasty (TKA) on a 50-year-old man, who had undergone two prior right knee surgeries (an open meniscectomy and a proximal tibial osteotomy) many years prior.

The complex TKA had no excessive bleeding during the procedure, even after the tourniquet was deflated before closing. At the conclusion of the 2 hour, 10 minute surgery, while dressing the leg with the patient still under anesthesia, the orthopaedic surgeon noted that the patient had absent pulses. He contacted one of the vascular surgeons on staff. That surgeon examined the patient and then, due to personal reasons, advised the orthopaedic surgeon to call another vascular surgeon who was on call.

The on-call vascular surgeon performed a vascular saphenous graft to the transected popliteal artery. This surgery started about 90 minutes following the conclusion of the TKA. Unfortunately, adequate pulses were not restored, and the decision was made to transfer the patient to the nearest tertiary referral site. Despite additional attempts at vascular reconstruction that evening, perfusion was not successfully reestablished. The patient eventually underwent an above-knee amputation of the right leg.

The grievance was based on three reports that Dr. XYZ authored as the plaintiff’s expert witness and on Dr. XYZ deposition. The grievance alleged that Dr. XYZ gave opinions as a medical expert on the management of a vascular complication, an area in which Dr. XYZ is not an expert. Dr. XYZ claimed that he was given wrong information prior to his first two reports and believed that the vascular surgeon who did the repair was a general surgeon who sometimes performed vascular surgery. In fact, a vascular

surgeon performed the vascular surgical repair. Dr. XYZ opinions changed after the second report, and he was not critical of the vascular surgical repair in his third report and at deposition.

Dr. XYZ maintained that all the information in his reports and in his deposition regarding tourniquet time, vascular injuries, and the need to obtain vascular surgery consultation was based on orthopaedic surgery literature, not vascular surgery literature.

In October 2007, the COP conducted a hearing, at which Dr. XYZ appeared with counsel. Dr. XYZ appealed the COP's recommendations for professional compliance action. In March 2008, the AAOS Judiciary Committee conducted an appeal hearing of this grievance.

On June 14, 2008, the AAOS Board of Directors considered this matter and voted to suspend Dr. XYZ for 1 year for violations of the Mandatory Standards 3 and 8:

3. An orthopaedic expert witness shall evaluate the medical condition and care provided in light of generally accepted standards at the time, place, and in the context of care delivered.

8. An orthopaedic expert witness shall provide evidence or testify only in matters in which he or she has relevant clinical experience and knowledge in the areas of medicine that are the subject of the proceeding

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