When and why was the expert witness program developed?

The process began approximately 15 months ago when the Board of Councilors of the American Academy of Orthopaedic Surgeons (AAOS) brought the issue of expert witness testimony to our attention. They identified problems that our fellowship has been facing with essentially fraudulent or unethical testimony by expert witnesses on both the defense and the plaintiff’s side in medical malpractice cases, workers compensation claims, accidents, and other types of cases.

Do other medical societies have similar programs? If so, how have they fared?

About half a dozen other medical societies have programs akin to this. The one with the longest track record is the American Association of Neurological Surgeons (AANS), which has had a program running for approximately 20 years.

Our program is similar to theirs and we use the attorney who runs their program as a consultant to help in the development phase, which is still underway. Programs also exist in radiology, obstetrics/gynecology, dermatology, and other specialties.

Have the other medical societies encountered any legal challenges with these programs?

The AANS has expelled one of their fellows, but the due diligence that they had in place was ratified or upheld in subsequent reviews in the legal system up through the appellate court in Illinois, so the legal footing is quite solid.

What will the components of the expert witness program be?

It is still in development but nine components were developed and approved. They include: the adoption of a code of medical ethics and professionalism; an advisory statement, which is our way of communicating with third parties and external agencies on orthopedic medical testimony; ongoing continuing medical education opportunities at our annual meetings; monitoring the activities of national associations; develop-
ing a series of educational issues for the Bulletin and other AAOS publications, print and online; creating an expert witness affirmation statement program; participating in IDEX; reinvigorating the AAOS expert witness document clearinghouse; and assisting states with expert witness programs to draft model legislation and encourage state medical boards to take licensure action for fraudulent medical expert witness testimony.

What is the expert witness affirmation statement program?
The purpose is to define characteristics and behaviors that are consistent with provision of expert evidence and witness testimony. The expert witness affirmation statement says, essentially, that the member has read these ethical statements and agrees to conduct him- or herself as an expert witness consistent with them. Those statements were sent out to >17,000 members in mid June and we’ve already received about 5700 back, which is very good.

How would the clearinghouse project work?
The Academy has created a repository for testimony, complete depositions, and court testimony that’s given by orthopedic surgeons for both plaintiff and defense council in legal cases involving only orthopedic surgeons.

What is IDEX and how can Academy members use it?
IDEX is an organization that maintains the Collaborative Defense Network for Expert Witness Research. It’s a network of approximately 3800 law firms, insurance companies, corporations, and governmental entities that houses about 800,000 documents and records of expert testimony. It is growing at the rate of 4500-6500 new records a month. We have negotiated an agreement to allow our members to query that database for a lower fee than normal to do research on an expert witness’ record of testimony. It takes 2-3 days to get a report back. If there is no information on file about the expert witness, no charge is incurred.

What evidence is there that orthopedic surgeons or other expert witnesses have provided inaccurate or misleading testimony?
It is from individual reports from orthopedic surgeons around the country who have experienced such incidences either in their own practice or by their participation in providing expert witness testimony. The reports have ranged from as little as inconsistencies to problematic things such as false or misleading testimony either in live testimony or in so-called professional opinion documents, which are almost always required by legal counsel prior to a case going forward.

If an orthopedic surgeon acting as an expert witness is found to provide an opinion not consistent with the AAOS code of medical ethics and professionalism, will they be censured and how would that be handled?
We are working on the disciplinary component of the project and we want to get it approved at next year’s annual meeting. There are three possible options: 1) Censure. The fellow would receive a letter stating that he has varied from the guidelines and expectations of our code of ethics and professionalism, 2) Suspension. The fellow would be suspended for a defined period of time, and 3) Expulsion. The fellow would be expelled from the Academy.

What is the potential effect of this expert witness program on medical litigation for orthopedic surgeons and in general?
There are cases, clearly, of medical malpractice, and some are systems based and some are individual. For the system to be maintained properly, however, the attorneys will tell you that they are dependent on quality expert witness testimony. Their clients need it and they need it. The hope is that we won’t limit, in any way, appropriate use of the court system for medical negligence cases, but will in fact augment the system by ensuring that ethical, scientifically accurate, evidence-based medical testimony is provided on both sides of the aisle. That will benefit all parties, except those who are trying to bring a claim that is not founded in evidence-based medicine.