## ASA Judicial Council Findings Regarding Expert Witness Testimony by J. Antonio Aldrete, M.D.

The ASA Board of Directors censured ASA member J. Antonio Aldrete, M.D. for failing to abide by the ASA "Guidelines for Expert Witness Qualifications and Testimony" ("Guidelines"). The Resolution of Censure, approved August 19, 2007, also admonished Dr. Aldrete that an expert witness must clearly distinguish between opinions regarding what the standard of care is and what the expert believes the standard of care should be.

In accordance with ASA Administrative Procedure No. 6, Section XIII-F, the Judicial Council findings submitted to the ASA Board of Directors are posted below.

## **FINDINGS**

- 1. Michael F. Mulroy, M.D. brought a complaint (the "Complaint") against J. Antonio Aldrete, M.D. alleging that Dr. Aldrete failed to abide by the ASA Guidelines for Expert Witness Qualifications and Testimony (the "Guidelines") in expert witness testimony given in *Thomas v. Novant Healthcare, Inc, et al.*, No. 04 CVS 3368, Superior Court for Forsyth County, North Carolina (the "*Thomas* case"). Dr. Aldrete served as an expert for the plaintiffs. Dr. Mulroy served as an expert for the defendants. Dr. Aldrete's testimony was given by deposition on April 26, 2005. The *Thomas* case was dismissed by plaintiffs without any payment or settlement on November 28, 2005. Drs. Mulroy and Aldrete are members of the ASA and are bound by the ethical requirements set forth in the Guidelines.
- 2. The Complaint and Dr. Aldrete's written response were reviewed by the Administrative Council. The Administrative Council found that there appeared to be a substantial question whether Dr. Aldrete's testimony violated the Guidelines. The matter was therefore referred to the Judicial Council for a hearing. We find that the matter is properly within our jurisdiction as prescribed by ASA Bylaws.
- 3. The Judicial Council held an oral hearing on March 24, 2007. Each member spent approximately 40-50 hours reviewing the written record, including Dr. Aldrete's voluminous responses to the Compliant. The Judicial Council also heard testimony and argument on behalf of the Administrative Council and Dr. Aldrete.
- 4. The patient in *Thomas* underwent a post partum tubal ligation at a Forsyth, North Carolina hospital in 2001. Anesthesia was administered by an anesthesiologist and nurse anesthetist working under his supervision. Chloroprocaine was injected through a three-hole catheter that had been placed in the epidural space and used successfully for delivery approximately 14 hours earlier.
- 5. The patient experienced a high spinal (C5). It is assumed for purposes of this matter that the high spinal was the result of unintended delivery of chloroprocaine

into the subarachnoid space. It is further assumed that the patient developed residual neurological dysfunction as a result of the subarachnoid injection of chloroprocaine.

- 6. Dr. Aldrete testified that it was below the standard of care to administer chloroprocaine using a catheter that had been left in place after delivery some 14 hours beforehand because 50 percent of catheters left afer delivery migrate to the subdural or subarachnoid space.
- 7. Chloroprocaine is FDA-approved for use as an epidural anesthetic; it is specifically recommended for post partum tubal ligation by one of the leading textbooks on obstetrical anesthesia; and it was commonly used in North Carolina for post-partum tubal ligations in 2001. Chloroprocaine is not approved for spinal anesthesia, that is, for injection into the subdural or subarachnoid space.
- 8. Dr. Aldrete testified, "I read an article that says 50% of the catheters that are left after obstetrical [procedures] migrate into either subdural or subarachnoid space." He reiterated several times that catheters "frequently" perforate the dural tissue: "I show you that 50% of catheters placed epidurally if left . . . longer than for the delivery . . . migrate into the subarachnoid space." Dr. Aldrete concluded that "putting a catheter that migrates and proceeding to inject the anesthetic, that is negligence." Taken as a whole, Dr. Aldrete's testimony is most fairly interpreted as stating that it was negligent to use an indwelling epidural catheter to administer an anesthetic not approved for use in the subarachnoid space because 50 percent of such catheters migrate to the subdural or subarachnoid space.
- 9. Dr. Aldrete did not identify the article referred to during his deposition however, in an addendum to his response to the Complaint, he identified Phillips D.C., "Epidural Catheter Migration During Labour," *Anaesthesia*, 1987, volume 42, 661-63, as the basis of his testimony. Dr. Aldrete also offered nine other publications in support of his testimony regarding the incidence of catheter migration.
- 10. The Judicial Council carefully reviewed the literature cited by Dr. Aldrete. The Phillips article states that it found that 50% of epidurals migrated inward or outward by ½ to 3 cm, but it does not indicate what, if any, percentage of the catheters migrated into the subdural or subarachnoid space. Several of the articles offered by Dr. Aldrete are case reports of individual incidents of migration. They state that subdural migration is "possible," "very rare" and "uncommon." Based upon the evidence offered by Dr. Aldrete, the Judicial Council concludes that there is no support in the literature for his testimony that indwelling catheters migrate into the subdural or subarachnoid space "frequently," much less 50% of the time.
- 11. Dr. Aldrete's testimony condemns the use of an indwelling catheter to perform a tubal ligation 14 hours after surgery based on the purported 50% risk of catheter migration to the subdural or subarachnoid space. As such, his testimony violated Guideline 2: "The Physician's testimony should reflect an evaluation of performance in light of generally accepted standards, reflected in relevant literature, neither condemning

performance that clearly falls within generally accepted practice standards nor endorsing nor condoning performance that clearly falls outside accepted medical practice." This testimony condemns the use of an indwelling catheter to administer an anesthetic inappropriate for use in the subarachnoid space based upon a patent misinterpretation of the relevant literature on catheter migration.

- 12. Dr. Aldrete also testified that the use of a three hole catheter for aspiration to detect possible misplacement of the catheter fell below the standard of care. He testified that a three hole catheter presented a risk that the end-hole could penetrate the subarachnoid space while the lower, side holes drew fluid from the epidural space: "The portion of the catheter has one hole, is in the subarachnoid space, which is probably what happened, and two holes are outside. What she aspirates, it would be negative." Dr. Aldrete testified that the aspiration technique fell below the standard of care, "Because it was [performed with] a catheter with three holes, yes."
- 13. In his written response to the Complaint however, Dr. Aldrete acknowledged that use of single hole vs. multi-hole catheters is a matter of individual preference: "Neither one, or the other, is the 'standard of care." "There is no agreement as to the multi vs. single eye catheter, with plenty of evidence for each side." Likewise, at Judicial Council hearing, Dr. Aldrete acknowledged that "it's a matter of opinion." "I ... would have been more comfortable [with] one-hole epidural catheters, but I have worked in institutions where they only have three-hole catheters, and I used them, but if it is my choice, I use one." There is ample evidence in the record to support the conclusion that the standard of care did not require use of a single-hole catheter for aspiration.
- 14. Although Dr. Aldrete offered reasoned arguments and medical literature in support of his preference for the single hole catheter, his deposition testimony failed to distinguish between his personal preference and the standard of care. Thus, we find that Dr. Aldrete's testimony violated Guideline 2: "The Physician's testimony should reflect an evaluation of performance in light of generally accepted standards, reflected in relevant literature, neither condemning performance that clearly falls within generally accepted practice standards nor endorsing nor condoning performance that clearly falls outside accepted medical practice." This testimony condemns the use of a three hole catheter as below the standard of care despite the acknowledgment before the Judicial Council that there was no standard of care requiring use of a single hole catheter.
- 15. The Administrative Council proved the foregoing violations of the Guidelines by clear and convincing evidence. The Administrative Council also contended that Dr. Aldrete's testimony violated the Guidelines in several other respects however, it did not meet the high standard of proving those other alleged violations by clear and convincing evidence.