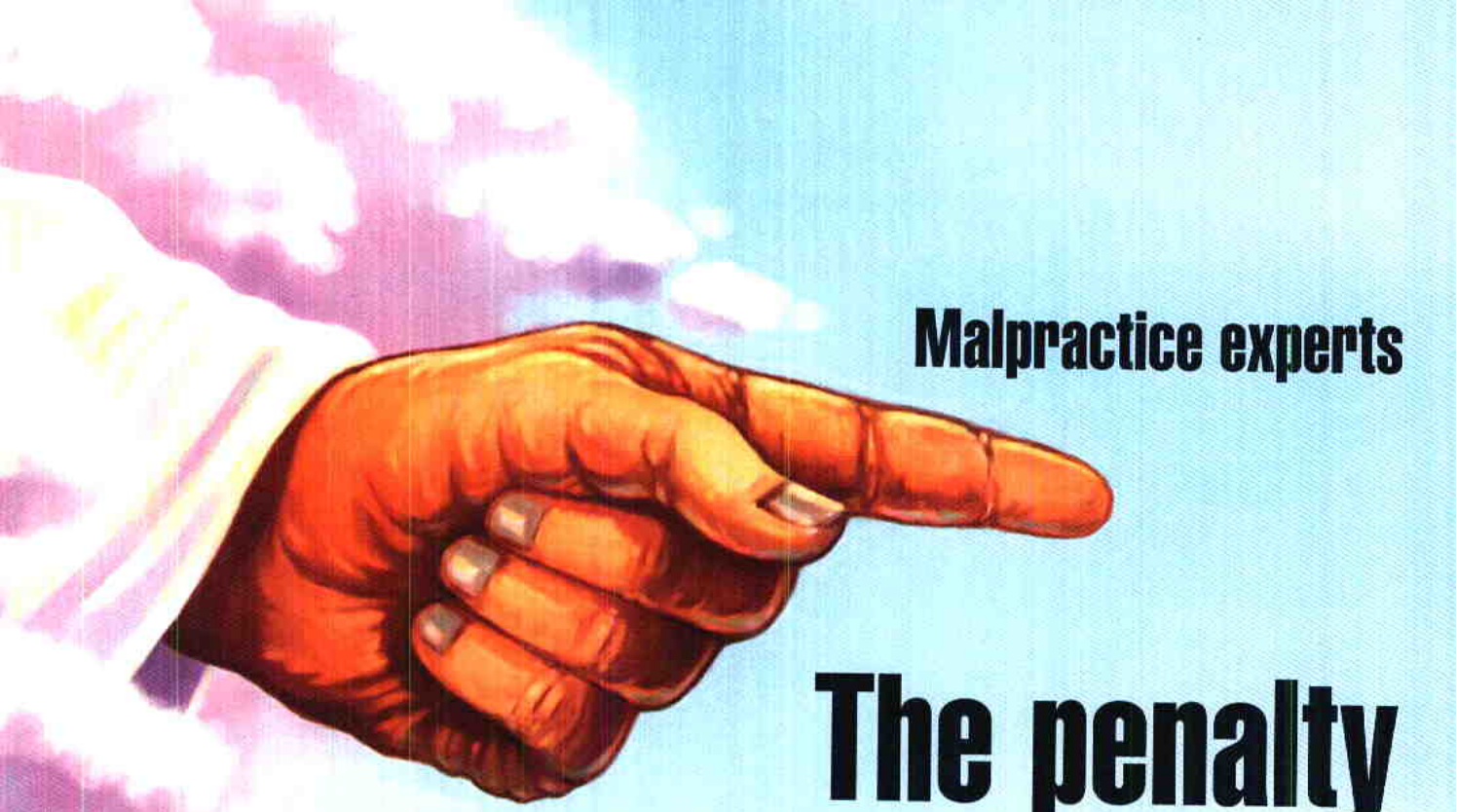


Malpractice experts

The penalty for bearing false witness

Doctors who end up in court as malpractice defendants curse the plaintiffs' medical experts as "hired guns"—or worse. Some dream of revenge, but usually get talked out of it. For Michael Ditmore, dreaming wasn't enough.

Ditmore, a neurosurgeon in Columbia, MO, was sued by a patient who suffered permanent damage to her recurrent laryngeal nerve during an anterior cervical fusion. The injury resulted in a paralyzed vocal cord, difficulty swallowing, and shortness of breath, requiring a tracheostomy.

At trial, the plaintiff's expert witness testified that "the majority of neurosurgeons" would agree that the woman's injury could only have occurred as a result of Ditmore's negligence. The witness, Detroit neurosurgeon Donald Austin, testified that Ditmore had probably caused the injury by "rushing" the operation. Nonetheless, in 1995, a jury found that Ditmore wasn't liable.

Ditmore then filed a complaint against Austin with the American Association of Neurological Surgeons, charging that there was no basis for his statement that most neurosurgeons would agree that he was negligent. The

Hired guns who give questionable expert testimony can be disciplined by medical societies, a court rules.

By Berkeley Rice
SENIOR EDITOR

Illustrations by Gil Adams

association's professional conduct committee held a hearing at which Austin admitted that he'd performed only 25 to 30 anterior cervical fusions over his 30-year career. In contrast, Ditmore had done 700, and this was the first time one had resulted in this type of injury.

Austin said he'd based his opinion on articles by two authorities on anterior cervical fusion. In fact, neither of those articles supported Austin's opinion. He offered no other sources, and admitted that he hadn't consulted any other experts.

The association suspends Austin, and he fights back

The AANS committee concluded that Austin had provided "inappropriate" and "unprofessional" testimony, thereby violating the association's ethics code that requires members serving as expert witnesses to testify "prudently."

In 1996, the specialty society suspended Austin for six months. He responded by resigning from the society and suing it, claiming the AANS had suspended him "in revenge" for having testified against a fellow member. Austin based his suit on Illinois case law that protects members of professional organizations if they can show that the group's actions were taken in bad faith, and substantially impaired their professional livelihood.

Austin accused the AANS of denying him due process, failing to show that his trial testimony was intentionally false, and acting in bad faith. This last claim was based on the fact that the society had disciplined only members who testified for malpractice plaintiffs—never those who testified for the defense.

Austin sought damages to compensate him for the "disastrous" drop in his expert-witness income, which he claimed had declined from more than $220,000 a year to less than half that amount following his suspension. While Austin didn't demand his reinstatement as an AANS member, he did seek a court injunction expunging the record of his suspension. The federal trial judge threw out the suit, stating that Austin had received "as much due process as anyone might hope for."

Austin appealed the case to the Seventh Circuit US Court of Appeals. The AMA, American College of Surgeons, and Illinois State Medical Society filed a joint "friend of the court" brief supporting the AANS. Austin's lawyer, Henry Krasnow, argued that the AANS's expert witness rules were "designed, adopted, and enforced in order to intimidate, discourage, and punish members who provide admissible testimony as expert witnesses for plaintiffs." The threat of suspension from a professional organization, said Krasnow, "is a serious deterrent for any doctor who considers testifying against another physician."

In June 2001, a three-judge appellate panel unanimously upheld the dismissal of Austin's suit, finding no grounds for his claim that he'd been denied due process. The US Supreme Court declined to review the case.

The appellate court skewers the expert witness

The appellate court rejected Austin's claim that the AANS suspension represented an unreasonable interference with his professional livelihood. Judge Richard Posner noted that membership in the AANS is not a requirement for neurosurgeons, as evidenced by Austin's continued practice after his suspension and the fact that he wasn't seeking reinstatement. And although the suspension led to a significant decline in Austin's income as a medical expert, he continued to testify "extensively" in malpractice cases. Besides, Posner wrote, there was no evidence that the suspension had affected Austin's income from his "primary" career as a practicing neurosurgeon.

The court also rejected Austin's "bad faith" claim against the AANS for taking disciplinary action only against members who testified for plaintiffs (which was in fact true). Instead of

bias, the court found a more "obvious and innocent" explanation. "If a member of the Association is sued for malpractice, and another member gives testimony for the plaintiff that the defendant believes is irresponsible, it is natural for the defendant to complain to the Association," Posner wrote. The defendant doctor is unlikely to file a complaint about his own defense expert. And if the plaintiff's expert believes that a defense expert has testified irresponsibly, he's not likely to complain, because such testimony doesn't imply negligence on his part, and isn't likely to affect his professional reputation or damage his practice.

Finally, the court considered Austin's claim that the AANS had violated public policy by suspending him for irresponsible—but not knowingly false—testimony. Austin argued that the mere threat of such sanctions could deter physicians from offering expert testimony, and was thus "a disservice to, indeed an interference with, the cause of civil justice." The court disagreed, asserting that the society's self-regulation policy "rather furthers than impedes the cause of justice."

An obligation to prevent "shoddy testimony"

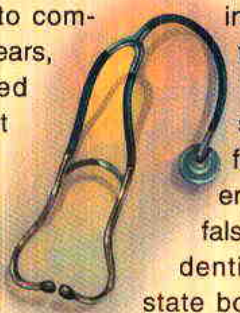
By becoming a member of the association, Posner wrote, "Austin boosted his credibility as an expert witness." The association thus had an obligation to prevent doctors from using their membership "to dazzle judges and juries, and deflect the close and skeptical scrutiny that shoddy testimony deserves.

"When a member of a prestigious profes-

Are hired guns practicing medicine?

While many medical and specialty societies have policies governing expert testimony by members, few of those policies include the threat of sanctions against those guilty of unprofessional testimony. Even when they do, enforcement is rare.

The American Association of Neurological Surgeons is one of the only groups that vigorously enforces its guidelines. In response to complaints over the past 20 years, the AANS has reviewed expert testimony by about 50 members—all of whom had testified for plaintiffs. The society sanctioned about 20 of them, usually by censure or suspension. It reported the suspensions and expulsions to the National Practitioner Data Bank.



One reason organized medicine is loathe to take action in such cases is that there's still some question about whether giving expert testimony constitutes the practice of medicine. For example, in the case of neurosurgeon Donald Austin (discussed in the accompanying article), US Circuit Judge Richard Posner stated: "Although Dr. Austin did not treat the malpractice plaintiff for whom he testified, his testimony at her trial was a type of medical service."

If expert testimony is, in fact, the practice of medicine, societies could theoretically refer cases involving false testimony to their state medical boards for disciplinary action, and some have done so. In a few of those cases, however, physicians cited for giving false testimony about their credentials have contested the state boards' authority to discipline them, claiming their testimony did not constitute the practice of medicine. In a Missouri case, an appellate court agreed; in a similar case, however, a Washington, DC, court affirmed the board's right to take disciplinary action.

According to AMA policy, physicians who give false testimony should be subject to peer review by their medical or specialty societies, and if appropriate, referred to their state medical boards for possible discipline. Says AMA President-elect Donald Palmisano: "The AMA believes that physician expert testimony constitutes the practice of medicine, and the practice of medicine should be subject to peer review. We are not opposed to minority opinion. We don't want false testimony."

But critics argue that the AMA's policy amounts to "witness intimidation." They say it has a chilling effect on doctors who are called upon to testify in malpractice cases, and makes it more difficult for plaintiffs' attorneys to find qualified experts. Says Mark Mandell, a malpractice attorney in Providence, RI, and a former president of the Association of Trial Lawyers of America: "We believe that judges and juries are fully able to hear, weigh, and resolve medico-legal disputes" without the need for peer review.

sional association makes representations not on their face absurd, such as that a majority of neurosurgeons believe that a particular type of mishap is invariably the result of surgical negligence, the judge may have no basis for questioning the belief, even if the defendant's expert testifies to the contrary.

"A judge's ruling that expert testimony is admissible should not be taken as conclusive evidence that it is responsible testimony," Posner noted. "Judges need the help of professional associations in screening experts." And if the AANS finds that one of its members has given "irresponsible expert testimony, that is a datum that judges, jurors, and lawyers are entitled to weigh heavily.

Austin's expert-witness income declined from more than $220,000 a year to less than half that amount following his suspension.

"There is a great deal of skepticism about expert evidence," Posner continued. "It is well known that expert witnesses are often paid very handsome fees, and common sense suggests that a financial stake can influence an expert's testimony, especially when it is technical and esoteric, and hence difficult to refute in terms intelligible to judges and jurors. More policing of expert witnessing is required, not less."

Posner did recognize that professional associations might also have their own axes to grind: "No doubt most members of the AANS are hostile to malpractice litigation, and this may impart a subtle bias to its evaluation of members' complaints." However, the court found no evidence of such bias in the association's suspension of Austin.

Russell Pelton, general counsel for the AANS, hailed the appellate decision as a victory not only for the AANS, but for all medical associations. "It reaffirms their right and responsibility to discipline their members if they testify unprofessionally in malpractice litigation," said Pelton. ■