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
association's professional conduct committee held a hearing at which Austin admitted that he had 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 had 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 inno-
cent" explanation. "If a member of the Associa-
tion is sued for malpractice, and another mem-
ber gives testimony for the plaintiff that the
defendant believes is irresponsible, it is natural
for the defendant to complain to the Associa-
tion," 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 ir-
responsibly, 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 testi-
mony, and was thus "a disservice to, indeed
an interference with, the cause of civil jus-
tice." The court disagreed, asserting that the
society's self-regulation policy "rather fur-
thers 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 skepti-
cal scrutiny that shoddy testimony deserves.

"When a member of a prestigious profes-

**While many medical and special-
ly societies have policies gov-
erning expert testimony by
members, few of those policies
include the threat of sanctions
against those guilty of unprofes-
sional testimony. Even when they
do, enforcement is rare.

The American Association of Neu-
rological Surgeons is one of the only
groups that vigorously enforces its
guidelines. In response to com-
plaints over the past 20 years,
the AANS has reviewed expert
testimony by about
20 members—all of whom
had testified for plaintiffs.

The society has 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
loath to take action in such cases is
that there's still some question about
whether giving expert testimony con-
stitutes the practice of medicine. For
example, in the case of neurosur-
gon Donald Austin (discussed in
the accompanying article), US Cir-
cuit Judge Richard Posner stated:
"Although Dr. Austin did not treat the
malpractice plaintiff for whom he tes-
tified, 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
state medical boards
for disciplinary action, and
some have done so. In a
few of those cases, how-
ever, physicians cited for giving
false testimony about their cre-
dentials 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, physi-
cians 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 testi-
mony constitutes the practice of
medicine, and the practice of medici-
ne 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 intimida-
tion." 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 Asso-
ciation 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.
A trial's expert witness income, A declined from more than $20,000 a year to less than half that amount, following his suspension.