Courts Address Medical Societies' Peer Review Authority

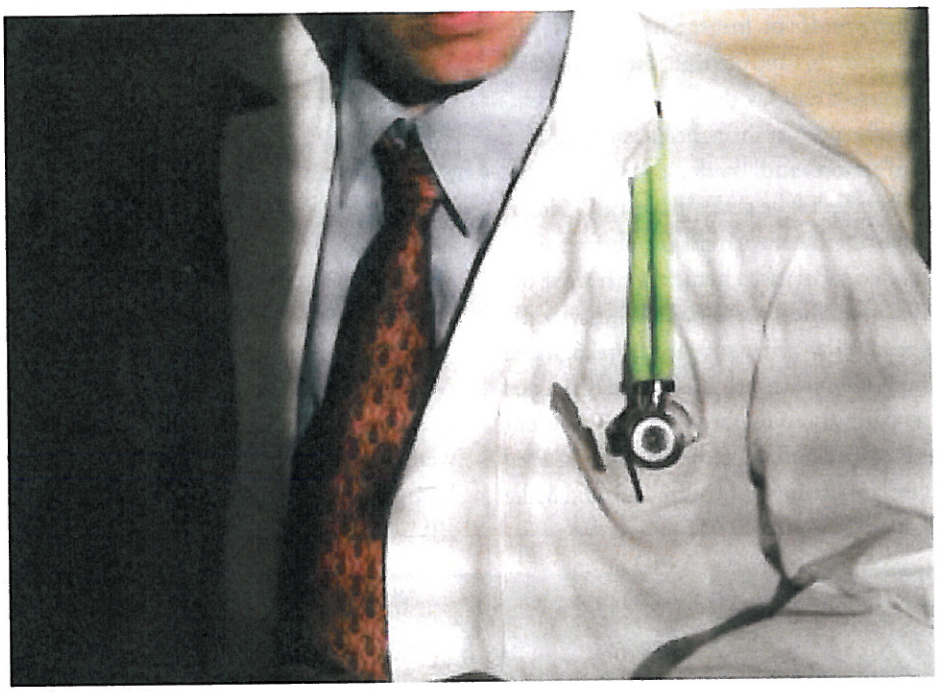
Professional Self-Regulation or Witness Intimidation?

By Matthew Passen

Medical malpractice litigation necessarily involves competing testimony of expert witnesses. In nearly every state across the country, a medical expert is required for such a case to proceed. For example, in Illinois, medical experts must explain "the proper standard of care against which the defendant physician's conduct is measured; an unskilled or negligent failure to comply with the applicable standard; and a resulting injury proximately caused by the physician's want of skill or care." *Purtill v. Hess*, 111 Ill. 2d 229, 241-42 (1986). Most courts demand medical expert testimony because such information is outside the scope of general knowledge of a jury.

Physicians must follow important ethical guidelines when they testify as expert witnesses; they must offer truthful, objective, and impartial testimony. To ensure proper testimony, courts possess "gatekeeping" authority to exclude unreliable expert testimony under either the *Daubert* or *Frye* standards. Notwithstanding this broad authority to screen expert testimony, judges are unable to completely eliminate the problem of unethical medical expert testimony. As Judge Posner stated in *Austin v. Am. Ass'n of Neurological Surgeons*, "[i]t is no answer that judges can be trusted to keep out such testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field, such as neurosurgery." 253 F.3d 967, 972 (7th Cir. 2001).

Because courts are unable to entirely screen out unethical expert testimony, medical specialty groups have taken matters into their own hands through initiation of "peer review" programs designed to regulate and sanction improper medical expert testimony. These medical professional organizations are thought to have a collective interest in punishing physicians who testify fraudulently under oath. In 1983, the American Association of Neurological Surgeons ("AANS") organized the nation's first professional review program to examine expert testimony. Since then, many specialties have developed similar peer review programs, including the American Society of Anesthesiologists, the American College of Emergency Physicians, the American College of Obstetricians and Gynecologists ("ACOG"), the American College of Surgeons, the American Society of Plastic Surgeons, the American College of Radiology, and the North American Spine Society.



Under such programs, a professional conduct committee usually will entertain formal complaints made by society members against other physicians for violations of the organization's guidelines for expert testimony. A finding of ethical violations may result in suspension or expulsion from the medical society. Furthermore, the society may report sanctions to the state licensing boards or to the National Practitioner Data Bank, an organization established by Congress to track incompetent doctors.

The question becomes: Do medical experts have any legal recourse when medical societies misuse their peer review authority to intimidate expert witnesses from testifying against their peers?

Judicial Endorsement of Peer Review Authority

Medical societies' peer review authority obtained judicial endorsement from the United States Circuit Court of Appeals for the Seventh Circuit in *Austin v. Am. Ass'n of Neurological Surgeons*. The case involved a suit against the AANS by Dr. Donald Austin, a neurologist whose AANS membership was suspended for six months after allegedly providing unethical medical expert

testimony. Austin claimed the sanction was an act of "revenge" for testifying as an expert witness against a fellow neurosurgeon in an earlier medical malpractice case.

Judge Posner, writing for the majority, upheld the legitimacy of the AANS' program. He recognized the AANS' interest "in Austin's not being able to use his membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves." *Austin*, 253 F.3d at 972. The Court held that Austin was barred under Illinois law from challenging the AANS' private, internal procedure because he failed to demonstrate that the AANS' suspension deprived him of an "important economic interest," despite the fact that Dr. Austin's annual income from testifying as an expert witness, which was $220,000 prior to AANS' action, had fallen by 35 percent following the suspension. *Id.* at 971.

Furthermore, the Court indicated in dicta that a professional review body was authorized by the federal Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C § 11101, *et seq.*, to assess the quality of a physician's testimony given in a medical malpractice action. The HCQIA "provide[s] qualified immunity from damages actions for hospitals, doctors and others who participate in professional peer review proceedings." *Brown v. Presbyterian Healthcare Serv.*, 101 F.3d 1324, 1333 (10th Cir. 1996). However, for immunity to apply, the review action must be taken in "furtherance of quality health care." 42 U.S.C. § 11112(a)(1). Accordingly, to find the AANS' actions subject to qualified immunity, Judge Posner speculated that expert testimony is "the practice of medicine" and review of medical expert testimony should therefore receive protection under the HCQIA. The American Medical Association's House of Delegates has since voted that "the giving of medico-legal testimony by a physician expert witness" should be considered "the practice of medicine." AMA Policy, H-265.993.

Liability for Peer Review Abuse

Two recent cases, *Fullerton v. Fla. Med. Ass'n*, 938 So. 2d 587 (Fla. Dist. Ct. App. 2006), and *Bundren v. Parriott*, 245 Fed. App. 822 (10th Cir. 2007), examine whether medical societies are immune from liability in actions brought by a medical expert alleging witness intimidation. In both cases, the court found that the HCQIA did not immunize medical associations from liability when the body acted to evaluate the testimony of a medical expert in a medical malpractice action. Therefore, the courts addressed the merits of each plaintiff's lawsuit against the medical associations, which included causes of action for defamation, witness intimidation, tortious interference with an advantageous business relationship, conspiracy through abuse of economic power and perjury.

In *Fullerton*, Dr. Fullerton was a prominent San Francisco physician who served as an expert witness for the plaintiff in a medical malpractice case against three physicians in Tampa, Florida. The case was tried before a jury, which returned a defense verdict of no liability. The three defendant doctors responded by sending a complaint

continued on page 54

Medical Societies' Peer Review continued from page 51

letter to the Florida Medical Association ("FMA") criticizing Dr. Fullerton's expert testimony. The FMA allegedly responded by submitting the letter to the Expert Witness Committee of the FMA's Council on Ethical and Judicial Affairs, which re-published the complaint letter.

Dr. Fullerton, named "Physician of the Year" in 2003 by the National Republican Congressional Committee's Physicians' Advisory Board, responded to publication of the complaint letter by filing a five-count complaint against the three doctors and the FMA. The Florida state court held that the federal HCQIA, as well as a Florida statute, immunized the FMA and all the individual defendant physicians from all liability. On appeal, the Florida appellate court reversed.

With respect to the HCQIA, the court addressed the "narrow question" of "whether the HCQIA can be reasonably construed as authorizing peer review of a physician's testimony given in a medical-malpractice action for the purpose of furthering the quality of health care. In our judgment it cannot." *Fullerton*, 938 So. 2d at 589. The court found the statute protects actions of a professional review body related to the "health or welfare of a patient or patients," but does not explicitly or implicitly protect the review of the quality of a physician's testimony in a medical malpractice case. *Id.* at 594.

Similarly, in *Bundren*, Dr. Bundren testified in a deposition that another physician, Dr. Parriott, deviated from the standard of care applicable to obstetricians by failing to warn a patient of the risks of giving birth at home. Dr. Parriott filed a complaint against Dr. Bundren with the ACOG, of which both doctors were members. The ACOG accepted the complaint for review and notified Dr. Bundren of the pendency of the complaint against him.

In response, Dr. Bundren filed a complaint against Dr. Pariott in the United States District Court for the District of Kansas. The district court held Dr. Pariott was immune from damages under the HCQIA because it found the complaint filed with the ACOG was a "professional review action" within the meaning of the statute.

On appeal, the United States Court of Appeals for the Tenth Circuit concluded that the district court's analysis was "insufficient to justify an award of qualified immunity under HCQIA." *Bundren*, 245 Fed. Appx. at 826. The district court simply concluded that ACOG's peer review procedure constituted a "professional review action," without further analysis. *Id.* This cursory analysis, according to the Tenth Circuit, improperly "converted HCQIA's qualified immunity into an absolute immunity for the ACOG participants." *Id.* Therefore, the Court addressed the merits of Dr. Bundren's claims against Dr. Pariott which included causes of action for defamation, perjury and tortious interference.

Conclusion

Unquestionably, medical societies are in a unique position to judge the quality of their members' expert testimony. Ethically improper testimony may escape judicial scrutiny, and medical peer review programs can hold dishonest medical experts accountable with appropriate repercussions.

Still, the sanctioning of expert witness testimony may raise serious First Amendment implications, if used to "chill" protected speech. Medical expert plaintiffs have a compelling argument that silencing a witness through unwarranted license revocation, or threats of such action, is a form of censorship proscribed by the First Amendment. *See, e.g., Kinney v. Weaver*, 367 F.3d 337, 362 (5th Cir. 2004) (holding that paid expert testimony qualifies as protected speech under the First Amendment). This "chilling effect" could become especially pervasive if physicians believe there are no viable responses to improper peer review actions.

When medical societies abuse their regulatory authority, just as unethical medical experts must be held accountable for their actions, so must abusive peer review organizations and participants. Consequently, if peer review programs are to continue to regulate what they believe to be unethical medical testimony, then the targets of such investigations must have a viable response for abuse of this regulatory power. As the courts in *Fullerton* and *Bundren* confirmed, medical societies do not possess blanket immunity to engage in expert witness intimidation. ■

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