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Judge Posner further recognized that “judges need the help of professional associations in screening experts,” conceding that AANS “knows a great deal more about anterior cervical fusion than any judge, and if the Association finds in a proceeding that comports with the basic requirements of due process of law that a member gave irresponsible expert testimony, that is a datum that judges, jurors, and lawyers are entitled to weigh heavily.” Id. at 973.

In language that may be quoted in future cases, Judge Posner recognized the “great deal of skepticism about expert evidence,” and suggested that “more policing of expert witnessing is required, not less.” Id. (emphasis supplied).

Finally, the appellate court closed its opinion with recognition of the strong national interest “in identifying and sanctioning poor-quality physicians and thereby improving the quality of health care.”

Although Dr. Austin did not treat the malpractice plaintiff for whom he testified, his testimony at her trial was a type of medical service and if the quality of his testimony reflected the quality of his medical judgment, he is probably a poor physician. His discipline by the Association therefore served important public policy exemplified by the Federal Health Care Quality Improvement Act, 42 U.S.C. § 11101 et seq., which encourages hospitals to conduct professional review of its staff members and report malpractice to a federal database.

253 F.3d at 974.

On Jan. 7, the Supreme Court denied Dr. Austin’s petition for writ of certiorari, thus rejecting his final appeal. See 122 S. Ct. 807.

Expert Testimony and Peer Review

The Illinois State Medical Society, the American Medical Association and the Medical College of
Surgeons filed an amicus curiae brief in the Austin case, supporting a medical society’s right to discipline members after a due process hearing. These influential groups argued that providing expert testimony constitutes the practice of medicine and that the practice needs to be subject to peer review, an argument that Judge Posner’s closing paragraphs seemed to recognize and accept.²

In the past 15 years, the AANS has reviewed approximately 50 members for possible expert witness testimony misconduct, according to an AMA report. About 10 members have been suspended or expelled. The AANS is among several medical associations with ethical policies about expert witnesses, which attempt to keep untruthful or misleading testimony out of the courtroom.

More specifically, the AANS itself reported, in its summer 2001 bulletin, that it received 15 complaints in the years 1999 and 2000 from members alleging unprofessional conduct on the part of other members. Of those, four cases were dropped when the complainants elected not to proceed and present evidence supporting their allegations. In four other cases, the complainants had not yet submitted evidence supporting their allegations, but the files remained open. In the seven remaining cases, after considering the evidence submitted by both parties, the Professional Conduct Committee concluded that six warranted hearings and one did not because the allegations did not establish a prima facie case of unprofessional conduct. Hearings were conducted for the six cases in which the committee concluded that a prima facie case of unprofessional conduct had been established. Three resulted in recommended letters of censure, two recommended six-month suspensions of membership and one recommended expulsion. The recommendations of the committee were all approved by the AANS board.

Similarly, the Florida Medical Association has enacted regulations permitting a doctor to file a complaint against another physician who he or she believes gave false testimony in a court of law. After the association holds a hearing, it is authorized to send an opinion to the Florida Board of Medicine for action.

In this writer’s opinion, the Austin decision will be the forerunner of a number of similar actions designed to impose sanctions against testifying experts, particularly those who spend a greater percentage of their time in the courtroom rather than the operating room. When a professional society’s ethical guidelines are clear, and the disciplinary process itself fully accords with due process mandates, physicians offering testimony of an irresponsible, misleading or false nature should be expected to face professional discipline that may well include sanctions more severe than temporary or permanent suspension from a professional society.

(1) Quoted in American Medical News at amednews.com, Feb. 4, 2002.


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