

“DO-IT-YOURSELF” TORT REFORM?

FOCUS ON MEDICAL EXPERTS COULD EBB TIDE OF MALPRACTICE LAWSUITS

by

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Introduction. The medical community is waiting for the day that legislators deliver on the promise of tort reform. Many states have failed to act on that promise, providing at best a limited number of cosmetic changes. Physicians nationwide are being hit with higher malpractice premiums. Declining reimbursement rates from third-party payors has made this cost more burdensome.

But not all the changes in the practice of medicine are for the worse. To understand what could be done, it is important to first review the role of expert witnesses. The proper role of an expert is to testify as to the standard of care. He should explain the medical facts and presumed negligence. By focusing on the expert, physicians can enact a “do-it-yourself” tort reform.

Expert Witnesses. Many experts participate honorably in the medical-legal process. Others become advocates for the plaintiffs. Hired gun experts are often those who have limited clinical responsibilities. They testify primarily for plaintiffs. Also, it is not uncommon for such experts to deliver testimony that directly contradicts testimony they have given elsewhere. Another type of plaintiff’s advocate is the well-intentioned expert, who “roots for the home team.” This expert believes, in good faith, that his role is to assist the attorney in supporting the plaintiff’s case.

It is generally believed that an expert is immune from any penalties related to his testimony. In other words, an expert is free to deliver any opinion he wants, as long as he does not lie or misstate facts. While this is true to some extent, it is patently incorrect to believe that an expert should not be accountable for his words.

Many respected professional medical societies have bylaws stating the basic requirements for the delivery of expert testimony. Those who provide expert testimony appear more credible if they are members of such societies. The thicker their *curriculum vitae*, the more believable they appear. So as members of those societies, it is fair that they be subject to their bylaws, which dictate that deviation from their standards could subject the offender to sanctions ranging from reprimand to expulsion.

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Many professional societies have had such bylaws on their books for years, but generally have refused to enforce them, ironically for fear of being sued. In 1998, *Austin vs AANS* changed the landscape. Austin was a neurosurgeon who served as a plaintiff's expert on a case where the surgery resulted in hoarseness. Most neurosurgeons recognize this as an undesirable, yet, unavoidable risk of the procedure. Austin disagreed, arguing that the complication was caused by negligence. The defendant won and asked the American Association of Neurological Surgeons (AANS) to review the testimony, and render sanctions. The AANS concluded that its bylaws were violated and suspended Dr. Austin. He sued, claiming that such a suspension interfered with an important economic interest, namely, his ability to make a living as an expert witness. The AANS won and Austin appealed. U.S. Court of Appeals for the Seventh Circuit Judge Richard A. Posner, in *Austin vs. American Association of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001), affirmed the verdict for the AANS, arguing that Austin had used his membership to bolster his credibility. Who would be better than a collection of neurosurgeons to determine what is reasonable neurosurgical testimony? This judgment gave judicial cover to professional societies intent on disciplining members who abuse their credentials to enrich themselves by delivering frivolous testimony.

If an expert witness offers medically accurate opinions, a meritless case should never reach the legal system. And, if it does, such a case should readily be dismissed. An organization called Medical Justice™ Services, Inc. focuses on the expert witness as one who can make or break a frivolous case. The organization provides notice to the plaintiff's attorney that all participants in a frivolous case will be held accountable. If such a case is pursued, the defendant physician has the financial backing (through Medical Justice™) and will seek recourse from the proponents in a number of venues, including professional societies or licensing boards, once the underlying case is complete.

Using these methods, physicians may indirectly change the forum in which testimonies are determined frivolous or not — from the courts to the professional societies (and, by definition, the experts' peers). As Judge Posner noted, the professional societies are in the best position to evaluate the nature of the testimony. Not surprisingly, plaintiff's attorneys have cried foul, arguing that such actions could intimidate or alter expert testimony. Furthermore, they argue that such threats have a chilling effect making it nearly impossible to secure/procure any expert to deliver an opinion.

Witness Intimidation? Discussions of witness intimidation normally arise in cases which involve terrorism, organized crime, drug trafficking, gangs, and violence within a family. Witness protection programs have been instituted to allow intimidated individuals to testify. When discussed within this context, intimidation of *expert witnesses* seems inane.

Some have argued that holding an expert accountable will keep him from testifying. With thousands of potential experts able to opine on a given case, one would have to argue that such a remedy chills the entire field of experts. Let us examine the evidence for such claims. A recent Google search for "expert witness" and "hire" returned 27,600 hits. One company, NLJexperts.com, has an exhaustive list of experts for hire, including 343 neurologists, 319 orthopedists, and 296 psychiatrists. The attractions of the expert witness job are obvious: payment upfront, no overhead for collections, and potential for repeat business.

Professional societies have traditionally disciplined wayward experts for providing aberrant testimony. Likewise, medical licensing boards can already treat frivolous testimony as the "practice of medicine" and regulate it appropriately. As stated earlier, *Austin* concluded that medical societies not only have a right, they have a duty to police their members. Judge Posner concluded in that case that "Judges need the help of professional organizations in screening experts More policing of experts is required, not less." After the Supreme Court denied review in January of 2002, *Austin* now stands as the leading Federal precedent on medical societies' regulation of expert witness testimony. Such policing not only allows remedies to ensure accountability, it expects accountability from those who are paid to deliver testimony.

Other medical societies, such as the Florida Medical Association (FMA), have a system in place to discipline physicians who deliver frivolous testimony. University of Miami's Laurence Rose stated that the FMA has clear legal support for its scrutiny of doctors. "It would be one thing to say that they cannot testify, which

would violate First Amendment rights. It's another to rule on the competency of their testimony." Steve Ellman, <http://www.dailybusinessreview.com>, June 25, 2003.

Professional societies that enforce discipline among its members do so with an elaborate system of checks and balances. They do not recklessly pursue all cases. Any expert who delivers an opinion that mirrors that of the majority or respectable minority is not subject to sanctions.

Intentionally deceptive and/or reckless testimony can and should be punished. There are existing laws that prevent a plaintiff from bringing a frivolous cause of action. There are also laws against perjury. These laws could hardly be classified as "witness intimidation."

Witness intimidation involves overt coercion. Encouraging accuracy and accountability is not witness intimidation. Medical Justice™ seeks to protect against false, baseless testimony knowingly purchased from an expert strictly for monetary gain. It would be equally absurd to argue that cross-examination or reminding an expert that perjury is a criminal offense is intimidating.

Witness intimidation, in the strict legal sense, generally addresses *criminal matters*. It does not generally refer to civil matters, such as medical malpractice. Witness intimidation is addressed in 18 U.S.C. §§ 1503, 1512. These statutes have two purposes: to protect the participants in proceedings from "being corruptly influenced or intimidated in the discharge of their duties" and to "preserve the integrity of judicial and administrative proceedings." Tina Riley, *Tampering with Witness Tampering: Resolving the Quandary Surrounding 18 U.S.C. §§ 1503, 1512*, 77 WASH. U. LAW Q. 249.

The specific language of 18 U.S.C. § 1512(d) states, "It is an affirmative defense to a charge of witness tampering ...that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully." When professional societies work to ensure that expert witnesses provide medically reliable testimony, they function to preserve the integrity of the judicial and administrative proceedings.

Plaintiffs' Attorneys Respond. Have there been any medical malpractice cases where witness tampering has been alleged? One was *Gilarmo v. Boca Raton Community Hospital and Boca Radiology Group*, Case No. 02-20-668-CA15 (Miami-Dade, Oct. 2, 2003). Gilarmo claimed the Boca Raton Community Hospital radiology group misdiagnosed breast cancer on a mammogram. Dr. G.K Eklund was retained as a plaintiff's expert. Dr. Eklund received a letter containing the article, *Say No To Peers Who Weaken Mammography*, Klein, Mark E., DIAGNOSTIC IMAGING, Aug. 2003, stating "Radiologists who profit from testifying against their colleagues are shameful, and it's past the time to let them know it is not OK...Shun them at professional society meetings. Let these radiologists know that such behavior will no longer be tolerated. Vote with your dollars; refuse to attend meetings in which they participate and raise your voice against this .. deadly group who threaten our ability to do our jobs."

The article was sent by Dr. Carol Adami, a defendant in the case. Gilermo's attorney filed a witness tampering charge, alleging that the article was intended to intimidate the expert. The judge ruled that Dr. Adami's actions were inappropriate and admissible at trial. *Regardless, Dr. Eklund stated he would not be deterred from testifying for the plaintiff.* In an analysis, Miami criminal defense attorney Neal Sonnett stated that any potential criminal charge against Adami would have limited chance of success. "An aggressive prosecutor could make a case, but, it's not the greatest. There's no direct threat." Steve Ellman, *Poisoned Pen*, MIAMI DAILY BUS. REV., Oct. 10, 2003.

In *Gilermo*, witness tampering hinges on an inflammatory article that makes no distinction between the types of testimony delivered by plaintiff's experts. According to the Klein article, all plaintiffs' experts who opine on mammography are complicit in the problem of medical malpractice. In general, medical professional societies who adopt due process use entirely different standards. In the service Medical Justice™ provides, it is precisely the character of the testimony that is important.

Medical Justice™ focuses upon the content of the testimony. The checks and balances inherent to the Medical Justice™ system are designed to prevent abuse, giving plaintiff's experts the benefits of due process.

Amidst all the debate, the real question remains: who is intimidating whom? In April 2004, Medical Justice™ Services, Inc. sent a note to a plaintiff's counsel informing him of their coverage of the defendant in their lawsuit. Plaintiff's counsel generally wanted to know what types and amount of coverage are available to a defendant. Such notification stated: "Pursuant to your letter to Dr. X, please be advised that Dr. X is a plan member for the Medical Justice™ Product. Medical Justice™ pays the expenses up to \$100,000 to bring counterclaims against proponents of *nonmeritorious* medical malpractice suits.

This noninflammatory, and strictly informational letter prompted the following reply:

Your letter is a threat to me and made to deter me from pursuing this case on behalf of my client, to deter plaintiff's witness from testifying, and to deter the plaintiff from pursuing her legal remedies. Such effort...is going to be met with appropriate action against you. Any suit for legal action against you and your client will be filed in Madison County, Illinois, We refer you to 720 ILCS §§ 5/32-4 and 5/32-4a regarding intimidation of parties or witnesses, both of which make such conduct felonies, punishable under 730 ILCS §§ 5/5-8-1 by imprisonment by not less than 3, nor more than 7 years, as to a Class 2 felony, and by not less than 2 nor more than 5 years, as to a Class 3 felony.... We trust you will resist the temptation to further provoke the undersigned ..or to inject yourself into these legal proceeding.

Letter to Jeffrey Segal, MD from John Dale Stobbs, Esq., Apr. 14, 2004 (copy on file with authors).

The irony of this exchange is that plaintiff's counsel is responding to a letter which states little more than the defendant in the case was in a financial position to take action if the nature of the expert witness' testimony made it necessary. For whatever reason, this request was perceived as "intimidating." More importantly, plaintiff's counsel threatened action in a venue far removed from the office of the physician and the home of the patient who initiated the original action. This attorney stated that he will file charges in one of the most plaintiff-friendly venues in the nation (Madison County). Sadly, the neurosurgeon who was sued, and his partner, are leaving their community. They provided coverage for a region of over 100,000 people. Why are they fleeing? Their medical malpractice premiums rose from approximately \$40,000 per year to over \$200,000 per year; partly due to their exposure to such medical malpractice claims. Unfortunately, they are the only neurosurgeons in the region who perform cranial surgery. Hence, the actions of a single individual have rippled to affect an entire region. This attorney is a zealous advocate posturing that anyone who requests that his witnesses be held accountable for the veracity of their opinions should be subject to criminal penalties in a county far away from where the original cause of action occurred. Fortunately, the Federal appellate courts of Illinois have already ruled that professional societies have not only a right, but a duty to hold such witnesses accountable. Truth is and has always been a defense for the charge of witness tampering.

Summary. Some of the public's contempt and distrust of the legal system comes from belief that experts can be "bought." Accountability for the contents of an expert's testimony is of paramount importance. Medical Justice™ seeks accountability for wayward experts.

Tort reform may offer hope of better days to come for physicians. However, many remedies are currently available for physicians who believe that they were improperly targeted for suit. Medical Justice™ provides an access point to the range of remedies available under most states' laws for experts that are falsely testified against.

The Medical Justice™ system is also designed to discourage the use of expert witnesses who deliver frivolous testimony; particularly when outside the scope of their expertise. These claims can be pursued in legal or extralegal venues. The system uses independent third party attorneys/experts to screen those cases that qualify for counterclaim prosecution. Expert witnesses should be notified accordingly.

Medical Justice™ is not designed to thwart attempts of plaintiff's seeking redress for *legitimate* complaints. On the contrary, Medical Justice™ is designed to support a level of integrity for the overall medical malpractice venue. Medical Justice™ is merely the funding agent for remedies already available to physicians in legal and extralegal venues."