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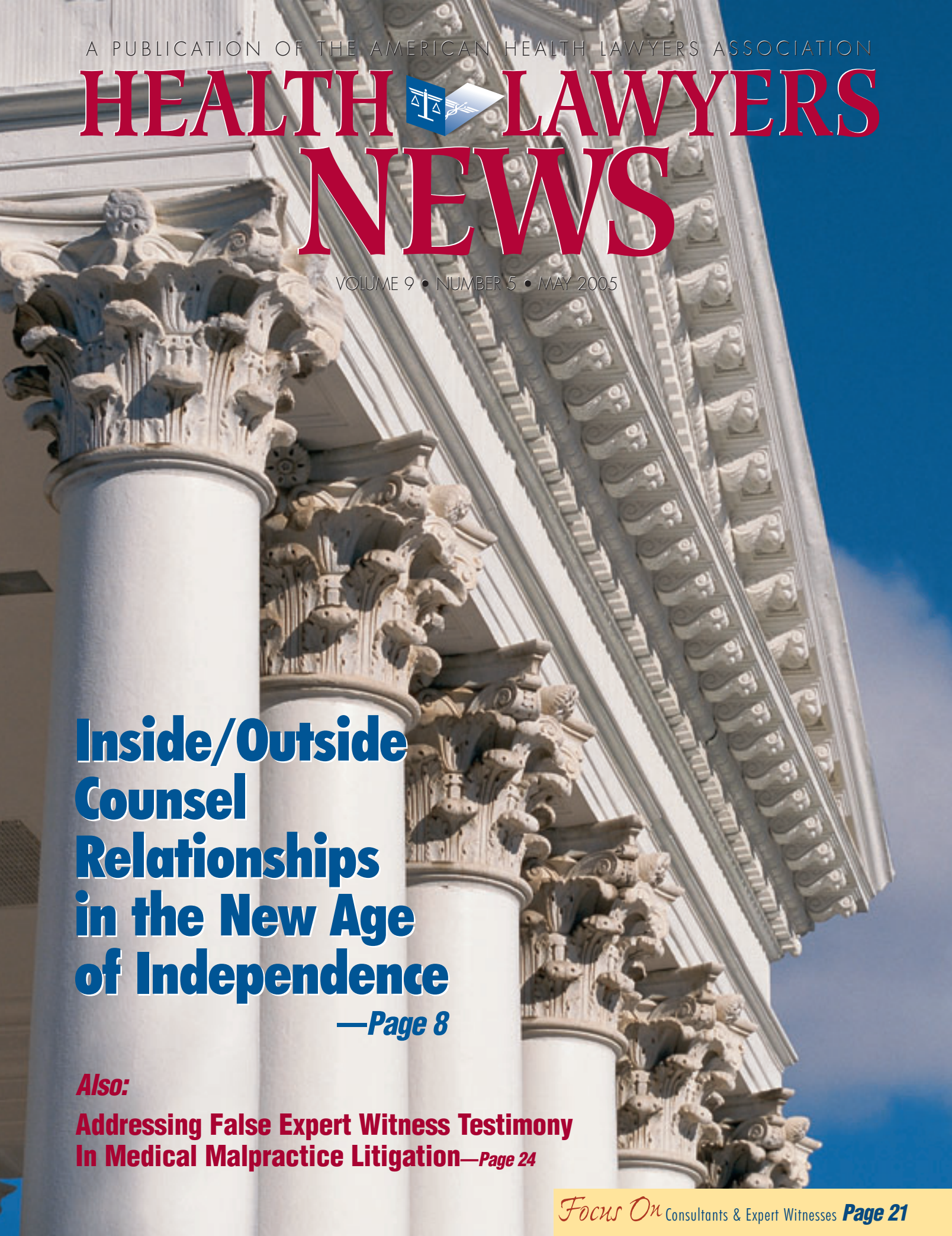

Inside/Outside Counsel Relationships in the New Age of Independence

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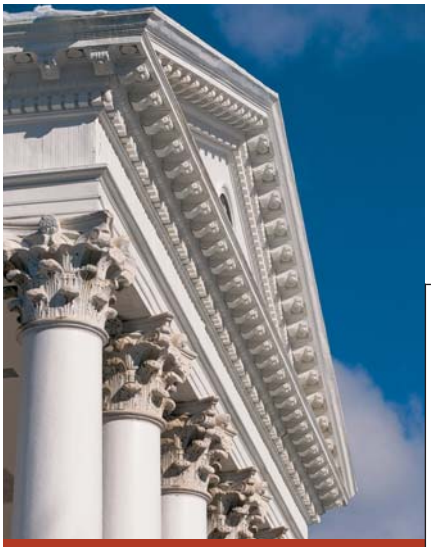

On the Cover

In-house counsel have often been perceived as having the upper hand in controlling relationships with outside counsel, but this one-sided relationship does not appear to be so one-sided anymore. The article, "Inside/Outside Counsel Relationships in the New Age of Independence," written by Michael L. Silhol, Senior Vice President, General Counsel, and Secretary Radiologix, Inc., Dallas, TX, and William W. Horton Haskell, Slaughter Young & Rediker, LLC, Birmingham, AL, examines the new legal landscape in-house counsel face with respect to their outside counsel relationships in the wake of the Sarbanes-Oxley Act of 2002 and changes to the Model Rules of Professional Responsibility.

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HEALTH LAW ANALYSIS
MAY 2005

Addressing False Expert Witness Testimony In Medical Malpractice Litigation

By Michael J. Sacopulos, Sacopulos Johnson & Sacopulos, Terre Haute, IN

I. INTRODUCTION

From the mainstream media to presidential debates, we are constantly told that the medical community is suffering from a "malpractice crisis." Among the list of usual suspects for the cause of the malpractice crisis is the hired gun expert witness. Dealing with meretricious expert witnesses is not a straight forward procedure.

Having suffered from the unfounded theory propounded by expert witnesses in a malpractice action, the defendant physician often wishes to take action. Most physicians are surprised to learn that no private right of action exists for the delivery of false expert testimony in a medical malpractice action.

In *Kahn v. Burnam,*[1] a physician alleged defamation, negligence, and fraud against a physician who gave deposition testimony as an expert witness in a malpractice action. The court found that the deposition testimony in question was absolutely protected against civil liability. A recent case from Tennessee delineates the current state of the law:

> In most, if not all, American Jurisdictions—including Tennessee—statements made in the court of judicial proceedings which are relevant and pertinent to the issues are absolutely privileged, and therefore cannot be used as basis for a libel action for damages (citation omitted). This is true even if the statements are known to be false or even malicious (citation omitted). It is said that the policy underlying this rule is that access to judicial process, freedom to institute an action, or defend, or participate without fear of the burden of being sued for defamation is so vital and necessary to the integrity of the judicial system and it must be made paramount to the right of an individual to a legal remedy where he or she has been wronged thereby.[2]

On its face, this would seem to leave little accountability in medical malpractice litigation for the expert witness. While private civil rights of action may not exist against the unscrupulous expert witness, there are several places to turn for redress. This article examines the alternative venues for pursuing expert witnesses that have deviated from appropriate standards of testimony. Several novel approaches to the situation are also examined.

II. MEDICAL SOCIETIES: POLICING THEIR OWN

Professional medical societies in recent years have begun to express interest in their members' activities as expert witnesses in medical malpractice actions. Expert witnesses' membership in professional societies is often used by counsel to demonstrate the witness' experience and knowledge of the standard of care that is the subject of the litigation. To this end, membership in professional medical societies gives an expert witness a cloak of credibility. While membership may "have its privileges," it also now has its responsibilities.

The Seventh Circuit took up directly the issue of a professional society disciplining a member for expert witness testimony given by that member in a medical malpractice action. *Austin v. American Association of Neurological Surgeons*[3] provided the court the opportunity to determine if a member of a professional society could be sanctioned for giving irresponsible testimony. Dr. Austin, a neurosurgeon, was suspended for six months by the American Association of Neurological Surgeons (AANS). Dr. Austin filed suit against the organization alleging in part that his suspension was based on revenge for having testified as an expert witness for the plaintiff in a medical malpractice suit brought against another member of the association.

Dr. Austin had been retained to testify on behalf of a woman whose "recurrent laryngeal nerve was permanently damaged in the course of an anterior cervical fusion."[4] The patient had suffered a paralyzed vocal cord and difficulty in swallowing. Ultimately, the patient was obliged to undergo a tracheotomy. Dr. Austin testified that the defendant in the underlying malpractice action "must have rushed through the operation and as a result retracted the tissues adjacent to the recurrent laryngeal nerve too roughly."[5]

Dr. Austin's testimony at the underlying medical malpractice action was grossly flawed. He attempted to bolster his position with citations and two articles in the medical literature relating to anterior cervical disc procedures. The Seventh Circuit found that the articles referenced by Dr. Austin did not support his testimony.[6] In short, Dr. Austin's testimony as an expert witness for the plaintiff in the malpractice action was erroneous.

The court acknowledged that Dr. Austin had in part bolstered his credibility by being a member of the AANS:

> By becoming a member of the prestigious American Association of Neurological Surgeons, a fact he did not neglect to mention in his testimony in the malpractice suit against Ditmore, Austin boosted his credibility as an expert witness. The Association had an interest—the community at large had an 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.[7]

The court went on to look at the situation from the point of view of a trial judge:

> When a member of a prestigious professional 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.[8]

Finally, the court left no uncertainty in its message to professional societies when it stated:

> We note finally that there is a strong national interest, which we doubt not that Illinois would embrace, 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 an 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.[9]

The implications for members sanctioned by their professional organization can be considerable. Actions taken by the professional societies that result in the suspension of membership or expulsion are reported to the National Practitioners Databank. Reprimands and censures of the organization's members are not, however, reported.[10] Even if reprimands and censures are not reportable to the National Practitioners Databank, they are discoverable during the litigation process. Litigation counsel in medical malpractice actions will in most cases look unfavorably upon a potential expert witness who has been sanctioned or reprimanded by his or her professional society.

The volume of disciplinary proceedings against members of professional organizations is difficult to determine. Counsel for the AANS reports that in twenty years that organization has issued twenty formal letters of censure for unprofessional conduct while testifying as an expert witness in medical malpractice litigation. Eleven other members had their membership in the organization suspended and one member was expelled from the organization for a second offense.[11] The AANS is not alone in the expulsion of a member. In July 2004, the American College of Radiology expelled a member for giving inaccurate expert testimony. The expulsion of this expert, a neuroradiologist at Cedars-Sinai Medical Center in Los Angeles, received some press attention and found its way to being posted on the World Wide Web.[12]

Fifteen years ago, few professional medical societies gave their members any guidance on testifying as expert witnesses in medical malpractice litigation. Today, most profession-

al societies have directly or indirectly developed policies for their members acting as expert witnesses.

Some organizations take a minimalist approach. The American Academy of Orthopaedic Surgeons in its Code of Medical Ethics and Professionalism for Orthopaedic Surgeons states:

> Orthopaedic surgeons are frequently called upon to provide expert medical testimony in Courts of law. In providing testimony, the orthopaedic surgeon should ensure that the testimony provided is non-partisan, scientifically correct, and clinically accurate. The orthopaedic surgeon should not testify concerning matters about which the orthopaedic surgeon is not knowledgeable. It is unethical for an orthopaedic surgeon to accept compensation that is contingent upon the outcome of the litigation.[13]

However, the American Academy of Orthopaedic Surgeons does have its members execute an "Expert Witness Affirmation Statement." This statement addresses standards for the quality of the testimony and compensation structures for offering testimony.[14]

Other organizations have developed more extensive positions on the issue. The Society for Vascular Surgery (SVS) has issued "Guidelines for Testimony by Vascular Surgeons Serving as Expert Witnesses in Litigation." These guidelines "apply to all SVS members providing expert testimony services to attorneys, litigants, or the judiciary in the context of civil or criminal matters including written expert opinions as well as sworn testimony."[15]

Arguably, these guidelines apply to pre-litigation situations in which a surgeon is called upon to review the factual basis of a potential malpractice action.

The American College of Obstetricians and Gynecologists (ACOG) first issued the organization's position on its members' expert testimony in April 1999. A revised statement from ACOG was issued in January 2004. Unlike some organizations that set guidelines to affirmative duties of its members in providing expert testimony, ACOG explores potential deviant testimony.

> ACOG cannot condone the participation of physicians in legal actions where their testimony will impugn performance that falls within accepted standards of practice or, conversely, will support obviously deficient practice.

The document goes on to state:

> The American College of Obstetricians and Gynecologists considers unethical any expert testimony that is misleading because the witness does not have appropriate knowledge of the standard of care for the particular condition at the relevant time or because the witness knowingly misrepresents the standard of care relevant to the case.[16]

Members of other professional societies are unequivocally told that delivering expert testimony that is misleading or false may subject them to disciplinary action. Organizations such as the American Board of Plastic Surgery, Inc. put its members on notice that false or misleading medical expert testimony is considered a specific offense to the organization.[17] The Society of Interventional Radiology (SIR) provides its members with guidance on offering expert testimony in legal cases. SIR's Code of Ethics then describes the fully developed disciplinary procedures and process by which complaints against members will be dealt with by the organization.[18]

Finally, some organizations have gone so far as to create a certification program for their members to be expert witnesses. In March 2004, the American Society of General Surgeons (ASGS) established an expert witness certification program. "By virtue of this program, the American Society of General Surgeons is on record that it will not tolerate false testimony by physicians during medical-legal proceedings."[19] The certification requirements include the need for letters of recommendation, completion of an ASGS-approved expert witness course, and significant continuing medical education. Additionally, the ASGS sets forth procedures to establish a review panel for the specific purpose of reviewing expert witness testimony.[20] The ASGS expert certification program clearly demonstrates the concern and response of some medical societies to the issue of inaccurate or misleading expert witness testimony in medical malpractice actions.

Medical societies appear to have entered into an era of self-help when dealing with the issue of aberrant witness testimony. The *Austin* case alone cannot explain the attention and mental energy directed towards members' activities as expert witnesses by a professional specialty society. Without a doubt, there is a perceived need for medical specialty societies to at a minimum establish ethical standards for members that are going to offer expert testimony. The American Academy of Pediatrics claims to be among the first medical specialty societies to articulate a policy on medical expert witness testimony.[21]

The American Academy of Pediatrics is certainly no longer unique in this regard. The establishment of guidelines for expert witness testimony in medical malpractice actions and disciplinary procedures for violation of these guidelines has now become common place with medical specialty societies.

III. EXPERT WITNESS TESTIMONY AND THE PRACTICE OF MEDICINE

Medical specialty societies are not alone in their desire and willingness to sanction physicians for offering inaccurate and misleading expert testimony. Some licensing boards have found themselves to have jurisdiction over their licensees when it comes to ethical testimony. Reprimands, monetary fines, and license revocation have all been used by boards of medicine in disciplining licensees for aberrant expert witness testimony.

The mechanism by which jurisdiction is obtained over a physician by a board of medicine is the defining of the "practice of medicine" to include the offering of expert witness testimony. In *Joseph v. District of Columbia Board of Medicine,*[22] the District of Columbia Court of Appeals affirmed the District of Columbia Board of Medicine's categorization of the offering of expert witness testimony as the "practice of medicine." While appearing as an expert witness for the plaintiff in a South Carolina medical malpractice case, Dr. Joseph testified falsely that he was board certified in thoracic surgery. Dr. Joseph went on to provide a curriculum vitae during the South Carolina medical malpractice litigation that contained false information about his academic credentials. Dr. Joseph claims to have been ranked first in his medical school class and to have graduated Phi Beta Kappa from Williams College.[23] Dr. Joseph attempted to define the practice of medicine solely in terms of patient care.[24] Dr. Joseph's arguments failed in the District of Columbia Board of Medicine's reprimand and the civil fine levied against Dr. Joseph was affirmed by the Court of Appeals.

In the case of *Deatherage v. State of Washington, Examining Board of Psychology,*[25] the Supreme Court of Washington explored the limits of immunity for expert witness testimony in malpractice actions. The State of Washington, Examining Board of Psychology brought a disciplinary proceeding against Dr. Edward L. Deatherage, Ph.D alleging that he failed to meet ethical standards while offering expert testimony in several child custody suits.[26] More specifically, the Board indicated that Dr. Deatherage failed to verify information and mischaracterized statements in the underlying litigation. Dr. Deatherage argued that his actions as an expert witness fell within the scope of absolute witness immunity in the State of Washington.[27] However, the Supreme Court of Washington disagreed:

> Permitting a professional to be subject to discipline for unprofessional conduct…serves to advance the court's goal of accurate testimony from expert witnesses, and furthers the disciplinary board's goal of protecting the public.[28]

The court also noted, "[c]ase law from other jurisdictions supports the conclusion that while civil liability is not available, professional discipline may be appropriate."[29]

Other jurisdictions do in fact define the offering of expert testimony as the practice of medicine. In order to determine the current disposition of medical boards on expert testimony as the practice of medicine, a survey was recently conducted. Roughly 30% of the responding board viewed expert testimony to be the practice of medicine.[30] Another 8% of responding boards indicated that they are currently considering the issue and have yet to take a firm position.[31]

In 2002, the North Carolina Board of Medicine revoked the license of a neurosurgeon from Florida for what it considered unprofessional conduct during the offering of expert witness testimony. The North Carolina Board of Medicine alleged that the expert witness had repeatedly made factual assertions without any evidentiary or good faith basis. Additionally, the North Carolina Board of Medicine believed that the expert witness had misrepresented the applicable standard of care.[32]

While the disciplining of physicians for unethical expert witness testimony can be a powerful remedy effectuated by licensing boards, it is infrequently used. A 1997 survey of the allopathic medical licensing boards of all fifty states revealed that 72% of the boards have never disciplined a physician witness for fraudulent courtroom testimony.[33] There does, however, seem to be an up tick in the overall number of disciplinary actions being taken by medical boards across the country. According to the Federation of State Medical Boards (FSMB) in the ten-year period from 1993 through 2002, license suspensions, revocations, probations, and other restrictions increased by 35%.[34]

"Boards are working harder and harder at identifying and bringing to action physicians who are not behaving appropriately or have quality issues," said James Thompson, M.D., chief executive officer of the Texas-based FSMB.[35] Whether the overall increase in disciplinary actions by boards will carry over into the sphere of expert witness testimony remains to be seen. Generally, medical boards have moved more cautiously and with less clarity than specialty medical societies when providing a remedy for unethical expert witness testimony.

IV. STATE MEDICAL ASSOCIATIONS' RESPONSE

In an effort to combat false or misleading testimony by expert witnesses, some states' medical associations have begun reviewing testimony when submitting their findings to boards of medicine. *Fullerton v. Florida Medical Association* is a case currently dealing with these issues that was brought before a trial court in Leon County, Florida. Dr. John Fullerton had given testimony for the plaintiff in a malpractice action. The defendant physicians complained to the Florida Medical Association (FMA) that Dr. Fullerton's testimony did not meet reasonable standards and was offered only for the purpose of promoting a frivolous lawsuit for financial gain. The physicians asked that should the FMA's review of Dr. Fullerton's testimony reveal substandard performance, the FMA submit its findings to the Florida Board of Medicine for disciplinary action against Dr. Fullerton. Dr. Fullerton's response to this request was to initiate litigation in the Circuit Court of Leon County, Florida alleging in part that the FMA expert witness peer review program is intimidating, hindering, and deterring individuals from appearing as expert witnesses on behalf of plaintiffs in medical malpractice actions. Dr. Fullerton's suit was dismissed in late September 2004 for failure to state a claim for recovery. However, Dr. Fullerton was granted the right to amend his complaint. In early November 2004, Dr. Fullerton filed an amended complaint against the FMA. Today the matter is pending before a Florida Appellate Court.[36] Issues related to reporting of expert witness testimony and immunity under the Health Care Quality Improvement Act are before the court. The ultimate disposition of *Fullerton v. Florida Medical Association* will provide some guidance to state medical associations wishing to act as self-appointed professional and ethical judges of expert testimony for state medical boards.

V. CREATIVE APPROACHES FOR ADDRESSING UNETHICAL EXPERT TESTIMONY

Some physicians have incorporated into their patient intake forms contractual provisions requiring the patient to use appropriately credentialed experts in the event of a future malpractice action by the patient against the physician. The idea is that expert witnesses appropriately trained and qualified in the same specialty of medicine as the defendant physician are less likely to give substandard testimony. The contractual provisions now being used by some physicians have yet to come before a court, but appear legally sound.

Medical Justice Services, Inc. is an organization created by a neurosurgeon to deter frivolous malpractice actions and to provide counter remedies in the event of such frivolous malpractice actions. The North Carolina-based organization has in excess of a 1,000 members and has the endorsement of such organizations as the Medical Society of New Jersey, the Florida Medical Association, and the Coalition and Center for Ethical Medical Testimony. One of the benefits offered to members of Medical Justice Services, Inc. is the systematic reporting and pursuit of expert witnesses that have offered false testimony against a Medical Justice member. Medical Justice routinely assists its members in filing complaints with specialty medical societies and licensing boards reporting expert witnesses' deviant testimony. "Most of our members are physicians that feel as though they have been or may be subjected to unscrupulous testimony by a hired gun expert witness in a malpractice action," said Medical Justice Services, Inc. founder, Jeffrey Segal, M.D.[37] Medical Justice appears to be effective in addressing unethical witness testimony.

VI. CONCLUSION

In the current legal and financial climate, many physicians and medical associations have felt the need to address the concern of unethical expert witness testimony. The common law immunity for witness testimony has resulted in a shift to other forums for redress. Specialty medical societies have become active in giving their members guidance on providing expert witness testimony. The medical specialty societies also have in some situations developed extensive disciplinary proceedings for violation of expert witness guidelines. A significant number of medical licensing boards have defined "practice of medicine" to include the offering of expert testimony thereby giving themselves jurisdiction to sanction licensees for improper testimony. Some state medical societies are starting the process of monitoring expert witness testimony as well. Finally, organizations such as Medical Justice Services, Inc. provide specialty assistance to physicians who feel they have been the victim of unscrupulous witness testimony. As the medical malpractice crisis continues to fester, it can be expected that further efforts will be made to see that expert witnesses are held accountable for their actions.

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END NOTES

1 *Kahn v. Burman,* 673 F. Supp. 210 (E.D. Mich. 1987), aff'd, 878 F.2d 1436 (6th Cir. 1989).

2 *Stanley's Excavating v. Meyer,* 2004 Tenn. App. Lexis 315 (Tenn. Ct. App. May 11, 2004).

3 *Austin v. American Ass'n of Neurological Surgeons,* 253 F.3d 967 (7th Cir. 2001).

4 *Id.* at 969.

5 *Id.* at 970.

6 *Id.*

7 *Id.* at 972.

8 *Id.* at 972-973.

9 *Id.* at 974.

10 Russell N. Pelton, "Medical Society Self-Policing of Unprofessional Expert Testimony," *Loyola University Chicago Institute for Health Law Annals of Health Law,* 13 Ann. Health L. at 557.

11 *Id.*

12 *Overlawyered.com,* "Radiology Group Expels Member Over Testimony," posting by Walter Olson, August 12, 2004.

13 *American Academy of Orthopaedic Surgeons, Code of Medical Ethics and Professionalism for Orthopaedic Surgeons,* Relationships with Orthopaedic Surgeons, Nurses, and Allied Health Personnel, Section V.C.

14 *See American Academy of Orthopaedic Surgeons,* Expert Witness Affirmation.

15 *Guidelines for Testimony by Vascular Surgeons Serving as Expert Witnesses in Litigation,* Society for Vascular Surgery, Vascular Web, Preamble.

16 *Ethics in Obstetrics and Gynecology, American College of Obstetricians and Gynecologists,* Committee Opinion 217, April 1999; Revised January 2004.

17 *American Plastic Surgeons Code of Ethics,* Section IV(C), www.abplsurg.org.

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19 *American Society of General Surgeons,* ASGS Expert Witness Certification Program, I Preamble.

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22 *Joseph v. District of Columbia Bd. of Med.,* 587 A.2d 1085 (D.C. 1991).

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30 "The Role of Licensing Boards in the Evaluation and Discipline of the Expert Witness," *Journal of Medical Licensure and Discipline,* Vol. 90 Number 3 (2004).

31 *Id.* at 16.

32 *Id.* at 17.

33 *See supra* note 10.

34 *Amednews.com,* "Medical Boards Feel Pressure, Get Tough," April 21, 2003.

35 *Id.*

36 *Fullerton v. Florida Med. Society,* No. 1 DOS-185 (Fla. Dist. Ct. App., action pending).

37 Dr. Jeffrey Segal, Telephone interview, March 31, 2005