



Letter to the Editor

In defense of the defendant

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To the Editor – Surgical Neurology International:

We have read and reread Dr. Ausman's editorial comments to you in defense of Nancy Epstein, as it pertains to her "skirmish" and to subsequent concerns expressed regarding the Professional Conduct Committee and the AANS. We have developed opinions over the years about these matters that we share here.

One of the authors (Dr. Cohen) has recently spoken with Dr. Epstein and both have read her several lengthy and detailed writings relating to her PCC experience. Both of us have read the publications of Drs. Epstein, Watts, and Ausman regarding abuses of surgical decision making. In addition, we have had the privilege of utilizing Dr. Epstein as an expert on behalf of a client of ours who had undergone multiple unnecessary and inappropriate lumbar spinal operations (minimally invasive surgery at a surgeon-owned surgery center about whom we have written in the past^[3]), at an outpatient facility, near where we practice law (in South Florida). South Florida is also the place where one of us (Dr. Cohen) has practiced neurosurgery for over 30 years (including while attending law school part time). Our opinions have been forged upon our shared experience within our respective and shared disciplines. We have been associated for over 20 years now.

Both of us consider Dr. Epstein to be among the finest, most qualified, and well-prepared expert witnesses we have observed in our more than 80 years of combined experience in law and in medicine. She represents, in our experience, a formidable neurosurgeon and a formidable expert witness for either an aggrieved patient or a defendant surgeon. We have never learned of anything negative about her in any sphere or endeavor. She is a knowledgeable teacher and able to credibly support her opinions. She told us directly and overtly when we were off base in our positions advocating for our patient and, most importantly, why. Her scientific articles (of which there are hundreds) are all well thought out and her positions supported by not only her own literature but also by a diversified group of articles and authors. Our intent is to share our opinions in this neurosurgical forum.

In the only case Dr. Epstein actually testified for us there was no jury, but instead three seasoned and very professional senior arbitrators who heard and decided the case. The defendant surgeon was himself defended by a physician who had not performed spinal surgery in decades and who was once the subject of a 60 Minutes TV piece. Among this "panel" of arbitrators, one was a senior defense malpractice attorney with more than 30 years of experience and another was a retired jurist. After Dr. Epstein's testimony and the cross-examination, the panel expressed to us their collective admiration for Dr. Epstein's breadth of knowledge, her extensive publishing commitment and its scope, and spoke to her fairness on the issues before her.

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In short in our view Nancy Epstein is exactly the wrong person for AANS censure or “punishment,” unless intimidation and threats of censure for those willing to share their experience in contested matters against other AANS dues-paying members are among the goals of the AANS.

If Nancy Epstein was to require any testimony that this misguided AANS censure effort was costly to her career and income, we had been in conversations with her for a year or more about another spinal surgery case we had, in which the issue was a postoperative lumbar CSF leak and meningocele, in which the operating surgeon (not a neurosurgeon) had made 7 or 8 attempts to seal the leak through repeat blood patches, in each case utilizing the same totally inappropriate method(s). As in many cases, Nancy had all of the proper credentials to review this dural leak case on behalf of our client. Unfortunately, when we heard (actually directly from Nancy in a personal phone conversation having to do with her potential involvement in this case) about the censure effort, we made the difficult decision not to retain her. Not only did this represent a substantial loss of income for Nancy (to compensate for her commitment and time), but it represented a loss of testimonial credibility offered to the trier of fact on behalf of our permanently disabled client seeking justice. Congratulations AANS and PCC-job well done.

Yet, there is more to say. Speaking as a neurosurgeon, and as a 45-year medical malpractice trial attorney, there is something to be said for the AANS position. We are probably unlikely defenders of the AANS, but taking a broad view of the landscape, and borrowing from the opinion of Justice Posner in the now-landmark case of *Austin v AANS*,^[2] the AANS is a private voluntary professional organization.

There is no requirement for a practicing neurosurgeon to be a member. When you apply for membership, you are accepting a benefit and agreeing to be bound by a set of rules and regulations. You make a risk-benefit choice. Both you as a paid member and the AANS organization share a set of duties and responsibilities. Among these are a set of Expert Witness Guidelines.

In the law, there is a distinction made between two legal terms of art: “on its face” and “as applied.” There are few places in neurosurgery where this is more important than when dealing with the AANS Professional Conduct Committee. Among the concerns raised by Nancy Epstein in her critique of the PCC and AANS, is just this dichotomy: while it looks absolutely fair, is it being utilized and applied fairly? From every indication and from all viewpoints, it appears that the PCC and AANS overwhelmingly act against neurosurgeons who testify in support of a patient or for plaintiffs; infrequently, if ever, against neurosurgeon members who testify for defendants.

Judge Posner attempted to provide an explanation for this “appearance” in his 2001 court decision, but it rings hollow when it has been impossible to obtain statistics and information about the outcomes of the PCC’s activities over the years. Where is the data from AANS as to who it punishes and for what transgressions or on whose behalf over the past more than two decades?

In the interest of brevity, we both (whose professional lives span several generations now) equally share in our opinion; that is, we totally agree with Nancy in her criticism of the way in which the defendant surgeon(s) in the malpractice case acted. Asking another surgeon to carry out the operation as described in the articles, the billing practices, and doing a major operation without having seen and/or personally examined the patient beforehand are abhorrent to our way of thinking and should be deeply offensive to every practicing surgeon, neurosurgeon, or otherwise. Lawyers who handle both sides of such controversies will also “...get it.” However, as we understand the working of the Professional Conduct Committee, these “defenses” on Nancy’s part to place the onus on her accusers are not available to her in PCC proceedings brought against her.

As a member in good standing of the AANS for decades and before all of this, she was free to bring her own complaint as an AANS member alleging these identical concerns and issues to the Professional Conduct Committee against the surgeons involved in the malpractice case, in which she testified. Under those circumstances, if her complaints were properly “pled” or averred, and they asserted violations of the Expert Witness Guidelines, presumably the committee would have brought charges against the two surgeons, and they would have been required to defend themselves against her charges. Rightly or wrongly, that did not happen here despite the fact that Nancy’s allegations, if true, were far more serious and far more protective of and targeted to patient (not surgeon) concerns than her standard of care opinions in a situation in which the patient’s postoperative foot drop could conceivably have been directly related to the absence of a preoperative evaluation by the operating surgeon (we do not have enough facts to have a firm opinion on this).

As such, condemning her accusers in this forum may not have been an option available to her as a defense. While in our opinion morally and ethically disturbing, we concede that is not a legitimate legal criticism of the PCC or the AANS. In civil litigation, counter-claims can properly be brought in certain defined circumstances, but to the best of our knowledge (and neither of us has ever been a member of the PCC), there are no provisions for “counter-claims” to be brought by the accused at this PCC hearing. Each claim must be brought independently (and incidentally, only by one member against another member). If Nancy did make

any accusations against her accusers and brought them to the PCC as a “counter-grievance,” the fact that there was no evident censure or punishment meted out to him/her or them (for what, as best we can determine, was conduct and behavior in their clinical care and billing practices that can, in our opinion, best be described as anathema to basic tenets of surgical practice), nothing could more convincingly make our point regarding concerns for the fairness of the PCC hearings “as applied” (as opposed to “on its face”).

Several years ago, we authored an article in *Trial Magazine*,^[4] in which we expressed concern about attempting to silence experts and many of its implications. Those criticisms are more salient today than they were then. Credible plaintiffs' attorneys considering neurosurgical cases are aware how difficult it is to obtain a quality expert neurosurgical witness for a meritorious case today. If in fact, the AANS's goal was to intimidate seasoned neurosurgeons from testifying for plaintiffs, it would appear they have by and large succeeded. Good for them. Bad for courts, for injured people, and bad for justice. This would appear to us to be the gravamen of Nancy Epstein's position and James Ausman's supporting letter. We write to clarify, but essentially to agree.

Finally, Ausman's criticisms should be assessed in light of his prior writings on the subject of unnecessary spine surgery^[1] because that dovetails completely into the ultimate concerns for us as neurosurgery is practiced today. There are so many apologists for so many different types and indications for spine surgery in the US today that, to even a critical observer, let alone a casual one, there is virtually no spine operation (short of an intentionally malevolent one) that cannot be defended by someone as somewhere within what is done or is acceptable today – either for indications or for approach/technique/extent. Trial lawyers know of the “Martian Virus” defense. This is a contrived defense invoked in some cases of otherwise indefensible and negligent care. The defense expert deems the complication neither foreseeable nor avoidable. Often, there is no real literature support for such a defense position. It is based on expert opinion testimony and experience. It is used to explain substandard care in otherwise indefensible cases to save an errant practitioner. Today, someone will testify to it.

In our strong personal and professional opinions, it is not possible for a plaintiff to bring a negligence claim against a neurosurgeon for unnecessary lumbar spine surgery and find a neurosurgeon willing to testify for him or her without fear that, in doing so, the surgeon expert will be running afoul of the AANS PCC – a viable threat and deterrent to any potential credible neurosurgical expert. In essence, nothing a spine surgeon does today is indefensible. Anything now goes. There are no more real “indications” for lumbar spine surgery. Back pain and an abnormal imaging study are sufficient. These are found in the majority of the US population.

This unfortunate but, in our opinion and experience, current truth flies directly in the face of the many studies and authors (including in this august group Drs. Epstein and Ausman) who have written about the unacceptably high number of unnecessary spine operations. These positions are both unpopular and financially disruptive. While “on its face” the Expert Witness Guidelines of the AANS are fair, “as applied” they are nevertheless overtly and abjectly discriminatory in favor of the members of the AANS and antithetical to the aspirations of any number of deserving plaintiffs who have been harmed by the “product” currently being marketed and sold to the public by organized neurosurgery, most especially spine surgery whose catchment area seems to be limitless. Is this really why AANS members joined this voluntary organization? Is this what a young neurosurgeon should come to believe in? Is most everything defensible?

The AANS PCC may have been relevant and beneficial years ago when the indications for lumbar spine surgery were far more “defined” and structured. They are anything but that today (nor have they been for years). Dr. Watts is dead-on when he says that at some point the AANS shifted from an educational association to a trade organization and changed neurosurgery from an organization dedicated to the welfare of the patient to one dedicated to the benefits of the neurosurgeon as a business person and to the society that promotes the interests of the neurosurgeon.^[5]

Justice Posner, in *Austin versus AANS*, could not possibly have appreciated that shift in mainstream neurosurgery in his otherwise reasoned and nuanced opinion written in 2001, because it had not yet occurred. Had he the insight that Clark Watts (and now Drs. Ausman and Epstein) do and did, and had he applied it in today's world of neurosurgery that case might well have been decided differently and against the AANS.

The society of patients needs more Nancy Epsteins, more Clark Watts, and more Jim Ausmans. The AANS focus appears consistently financial and the PCC an integral part of it. It might be time for all neurosurgeons aggrieved such as Dr. Epstein and Dr. Austin (deceased April 29, 2018), to bring a claim against the AANS and the PCC for conducting its own “Star Chamber.”* We opine that it may be the right time for the rest of you to seize the day; return AANS to its

* A ‘Star Chamber’ proceeding is any judicial or quasi-judicial action, trial, or hearing which so grossly violates standards of “Due Process” that a party appearing in the proceedings is denied a fair hearing. The original ‘Star Chamber’ dates back to King Henry VIII of Great Britain, where a large room with a ceiling decorated with stars held secret hearings to punish disobedience of the proclamations of the King. The term ‘Star Chamber’ is today synonymous with unfairness and illegality from the bench.

aspirational and practice pinnacle, moving neurosurgery forward in a meaningful way, protective of patients, and away from a club that protects members by dissuading fair and open criticism of poor surgical decision making. Sadly, we opine, its protectionist harms continue to spread unchecked, based on a foundation that rests on a court decision rendered almost 20 years ago, whose underpinnings no longer even exist.

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Conflicts of interest

There are no conflicts of interest.

REFERENCES

1. Ausman JI. The death of spine surgery, sequel - 2014. *Surg Neurol Int* 2014;5:169.
2. Austin V. American Association of Neurological Surgeons. 253F3d967 (7th Cir 2001).
3. Cohen FL, Roberts GW. Multiple operations on the same patient. *Surg Neurol Int* 2012;3:S238-43.
4. DiPaolo T, Cohen FL, Roberts GW. Silence of the experts. *J Assoc Trial Lawyers Am* 2004;40:20-9.
5. Watts C. Neurosurgery: A profession or a technical trade? *Surg Neurol Int* 2014;5:168.

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