

Medical Expert Witness Testimony and the Need for Professional Self-regulation

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The American Association of Neurological Surgeons (AANS) established the Professional Conduct Program in 1983 to provide an internal process to evaluate charges by a member alleging that a fellow member has failed to maintain good professional standing. Charges are evaluated by the Professional Conduct Committee (PCC) in accordance with certain procedural guidelines to ensure a fair process and adequate opportunity for the parties (known as the complainant and respondent) to present and defend against the charges.[1] Unless the charges do not support a possible violation upon preliminary review, the PCC conducts a hearing and, based on its findings, makes recommendations to the voting members of the Board of Directors. The respondent may appear before the Board to oppose an adverse recommendation. The respondent also may appeal an adverse decision by the Board to the association's general membership for a final decision on the charges. Outcomes include dismissing a complaint when the charges are not sustained and censuring, suspending or expelling the respondent where charges are sustained and discipline is warranted.

In accordance with the AANS Bylaws, failure to maintain good professional standing may be evidenced by such things as a violation of the AANS Code of Ethics, as amended from time to time, a violation of the Rules for Neurosurgical Medical/Legal Expert Opinion Services or engaging in conduct that is illegal or deemed to be unprofessional by the AANS.[2] While the Professional Conduct Program permits charges involving a wide array of unprofessional conduct, the majority of charges to date have involved expert witness testimony. The AANS does not control which charges are brought forward to the PCC; rather, these are brought directly to the PCC from individual members.

The significance of self-regulation in the area of expert medical testimony cannot be overstated. Consistent with the views expressed by the American Medical Association (AMA), it is the responsibility of the medical profession to ensure that expert testimony is subject to the same exacting standards of professional conduct that are expected of physicians in other aspects of medical practice.[3] Among other things, self-regulation discourages irresponsible or unethical testimony and serves the public interest by protecting the health care system and furthering the administration of justice. In addition to medical licensing boards implementing ethical guidelines for medical-legal expert opinion services and undertaking regulatory action, it is also incumbent upon the AANS and other professional medical associations and specialty societies to engage in this important cause.

Protecting Medical and Health Care Services

Putting aside whether medical-legal expert opinion services constitute the practice of medicine, most would agree that expert testimony by a physician falls within the purview of professional conduct relating to the practice of medicine and should, therefore, comply with professional standards as articulated by the medical profession. Physicians who fail to meet these standards should be subject to discipline. To do otherwise would sanction poor medical practice and violate the public trust placed in the medical profession to monitor physicians and promote only the best medical practices. To this end, the AANS adopted the Rules for Neurosurgical Medical/Legal Expert Opinion Services[5] and incorporated them into the Code of Ethics.[6]

The Rules for Neurosurgical Medical/Legal Expert Opinion Services apply to all AANS members providing expert opinion services to attorneys, litigants and the judiciary in the context of civil or criminal cases. The rules are broken into three sections: (A) impartial testimony, (B) subject matter knowledge and (C) compensation. They serve to ensure that expert testimony given by AANS members will be nonpartisan, scientifically correct and clinically accurate in order to maintain high standards of truthfulness, accuracy and impartiality in the provision of expert testimony.

The Rules for Neurosurgical Medical/Legal Expert Opinion Services also serve to ensure that expert testimony is available to all litigants. They are impartial and apply equally whether the member testifies for a plaintiff or defendant. The rules do not favor defendants in medical

malpractice cases over patients, nor do they deter members from testifying against other neurosurgeons. Any such criticism has been rejected by the Seventh Circuit Court of Appeals in a seminal decision, *Austin v. AANS*, which involved an action brought by a now former member who had been disciplined for certain expert testimony.^[7] In ruling in favor of the AANS, Judge Posner, writing on behalf of the Court, found that the aim of the Professional Conduct Program and the Rules for Neurosurgical Medical/Legal Expert Opinion Services is to encourage and ensure that all expert witness testimony — whether for the plaintiff or the defense — is correct, informative, balanced, complete and impartial.^[8]

The AANS has been a pioneer in defining and enforcing expert witness rules, and other professional medical associations and specialty societies have followed suit, in part because irresponsible and unethical expert medical testimony adversely impacts the welfare of patients and the quality of health care services.^[9] Such testimony serves to erode professional standards, exposes qualified physicians to baseless malpractice claims, allows incompetent or negligent physicians to go unidentified and, ultimately, leads to excessive medical malpractice insurance and encourages defensive medicine. Such testimony also increases the cost of medical practice, which drives physicians out of their specialty practice and can price patients out of the market for medical services.^[10]

Furthering the Administration of Justice

In addition to improving the quality of health care services, regulation of expert testimony through the Rules for Neurosurgical Medical/Legal Expert Opinion Services advances the administration of justice. Although admissibility and credibility of expert witness testimony is the proper function of the judiciary, judges often lack sufficient knowledge of medicine to effectively perform their gatekeeper function due to the highly specialized nature of the medical profession. This is especially true in the case of neurosurgery. Thus, a judge's ruling that expert testimony is admissible should not be taken as conclusive evidence that it is responsible testimony.

Similarly, expert medical witnesses often have differing opinions, and in many cases competent and responsible plaintiff and defense experts disagree about what constitutes a violation of the standard of care. However, when opinions differ, this does not mean that one expert is always wrong by definition and would therefore be in violation of expert testimony standards. Physicians often disagree about medical controversies. But, an expert witness violates expert testimony rules when testimony is given that diverges so far from professional consensus that no reasonable or responsible physician in that specialty would agree with it.

In rejecting an argument that the threat of discipline by a private association is a deterrent to expert testimony and therefore a disservice to the cause of justice, Judge Posner wrote that this kind of professional self-regulation “rather furthers than impedes the cause of

justice.”[11] Judge Posner went on to emphasize the importance of professional medical associations and specialty societies to the cause of justice in self-policing irresponsible and unethical expert testimony:

It 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. 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.[12]

Such awareness of the judiciary lends further support to self-regulating expert medical testimony, and if the AANS finds that a member has given irresponsible testimony, “that is a datum that judges, jurors and lawyers are entitled to weigh heavily.”[13] Junk science has no place in the medical profession or the legal system, and more policing is required in screening experts. Furthermore, because physicians who provide improper expert testimony are generally immune from suit, it is the responsibility of professional medical associations like the AANS and others to take whatever action is appropriate when false or misleading testimony is offered by physicians serving as experts in litigation.[14]

Promoting Self-Regulation and Due Process

Professional medical associations and specialty societies are best positioned and most equipped to identify and discipline irresponsible or unethical expert medical testimony. Membership in the AANS is voluntary and, just as members invariably promote their membership status when testifying as to their expert qualifications, the AANS has the responsibility to engage in self-regulation and impose disciplinary action to ensure compliance with its expert witness rules and other ethical guidelines of professional conduct. Professional medical associations and specialty societies should be encouraged to perform this important public service rather than be subjected to misplaced accusations that these programs are instruments of tort reform. Indeed, as the AMA has recognized, self-regulation stands “as the primary basis upon which this country reviews the competence and professional conduct of physicians. Until a different or better system is devised, we must take every reasonable step to ensure its success.”[15]

To ensure success of the Professional Conduct Program, the AANS provides a robust process in accordance with the Bylaws and Procedural Guidelines of the Professional Conduct Committee (Procedural Guidelines).[16] These procedures are intended to provide a fair process and guard against perceived bias or conflicts of interest. The Procedural Guidelines, for example, mandate that charges must identify the specific rules that a complainant contends were violated with a description of how the respondent allegedly violated each such rule. This ensures that respondents understand the nature of the charges

and can adequately respond to them. Respondents are provided three levels of review, including 1) a formal hearing before the PCC, where the parties may present evidence, may call witnesses and are provided opportunity to question one another; 2) a presentation to the Board of Directors; and 3) an appeal to the association's general membership. Parties may submit written statements at each stage of review and may have legal representation at all times.

The PCC prepares a written report of each grievance, which includes a summary of the clinical background and the underlying lawsuit, an overview of the dispute setting forth the basis for the charges and the response, describing the hearing that details the parties' statements and answers to questions and a discussion of the deliberations, including the rationale and reasoning underlying the PCC's findings and recommendations. Each report is accompanied by a transcript of the hearing taken by a court reporter. The PCC report and hearing transcript are provided to the involved parties and the Board of Directors, together with the entire record of the parties' written submissions and supporting materials.

To ensure that the Professional Conduct Program is not used for improper purposes, such as using the AANS decision to support one side in ongoing litigation, a complaint is not accepted by the PCC until all litigation is concluded and there are no appeals pending. Thus, a defendant AANS member in a medical negligence lawsuit cannot proceed with charges against a fellow member retained as an expert witness for the plaintiff, and vice versa while litigation is ongoing. A complainant also is obligated to sign a confidentiality agreement, whereby he or she agrees not to discuss matters pertaining to any charges until the grievance process is completed, up to and including any general membership appeal. Such confidentiality is not for the purpose of cloaking proceedings for the AANS to impose its arbitrary will. To the contrary, confidentiality ensures that the respondent is not unfairly prejudiced by the fact of the charges being disclosed prior to a final determination of the matter.^[17]

Potential Conflicts and Other Practical Matters

The PCC routinely reviews large volumes of documentation (both medical and legal) and imaging when considering cases. Each member must commit to providing a serious amount of volunteer time and energy before accepting a position on the PCC, as well as document any potential perceived conflicts of interest at the highest level of reporting utilized within the AANS per medical association standards. Furthermore, each member of the Board of Directors commits to thorough review of the written materials and imaging as part of their fiduciary duties to the AANS prior to Board presentations, which also involves enhanced disclosure of information for potential conflicts.

Presentations to the Board of Directors are held with the voting members of the Board only, in order to provide confidentiality to the complainants and respondents. All attendees have opportunity to ask questions and discuss the case. Any individual involved in the process

who has a direct relationship with a complainant or respondent, or is a competitor, for example, is recused from the process. If an allegation of conflict of interest is brought forward during a hearing or Board presentation, then the conflict is adjudicated immediately and may result in a recusal from the entire process, including further participation in the hearing or presentation or from the PCC or board member voting on the case, upon advice from counsel and PCC leadership. The hearing process benefits from having PCC and AANS Board of Director members from a broad range of practice types and subspecialty expertise backgrounds.

Decisions reached by the Board of Directors based upon PCC recommendations and testimony at the hearings relate only to a respondent's AANS membership status or censure and may result in no action being taken. Censure or suspension must involve a 2/3 majority in agreement, whereas expulsion requires a 3/4 majority and as many rounds of voting to achieve this level of consensus as needed are taken. Decisions may not agree with the original PCC recommendation, reflecting that there is active discussion and input from the Board of Directors, which has ultimate responsibility for membership actions. However, once the Board has voted on an action, the matter may be put to the voting AANS membership if a respondent elects to appeal an adverse decision. All active members of the AANS are solicited for voting and multiple electronic reminders are sent prior to closing the voting period in accordance with the AANS Bylaws. Electronic voting has significantly increased the response rate to this process, and all voting members are encouraged to participate in these important assessments. Ultimately, the response rates to voting requests are up to the individual members and cannot be manipulated by leadership.

In order for the Professional Conduct Program to achieve its goals, it is incumbent upon AANS members to understand and comply with the Rules for Neurosurgical Medical/Legal Expert Opinion Services. It is equally important that members pursue charges where fellow members provide expert testimony that is irresponsible or unethical and, thereby, runs afoul of the rules. Complaints are not limited to defendant neurosurgeons, although they are generally more inclined to pursue charges against a member who unfairly labeled their patient care negligent and, thereby, harmed their practice, forced them to stand trial and/or face increased liability insurance premiums.[18] Self-regulation also needs the involvement of AANS members providing medical-legal expert opinion services on behalf of plaintiffs to identify defense experts who violate expert testimony rules, even though their patient care has not been challenged. More symmetry will not only quiet critics who contend that the Program is not fair and balanced, but more importantly will better protect the integrity of the medical profession and serve the public interest and the administration of justice.

References

[1] *Procedural Guidelines of the Prof'l Conduct Comm.*, Am. Ass'n of Neurological Surgeons, [https:// www.aans.org/en/About-Us/Governance/Bylaws-Codes-and-Guidelines](https://www.aans.org/en/About-Us/Governance/Bylaws-Codes-and-Guidelines).

- [2] *Bylaws*, art. II, § 3, Am. Ass’n of Neurological Surgeons, <https://www.aans.org/en/About-Us/Governance/Bylaws-Codes-and-Guidelines>.
- [3] Policy H-265.993, Am. Med. Ass’n, <https://policysearch.ama-assn.org/policyfinder/detail/H-265.993?uri=%2FAMADoc%2FHOD.xml-0-1842.xml> (“AMA policy is that: (1) the giving of medico-legal testimony by a physician expert witness be considered the practice of medicine, and (2) all medico-legal expert witness testimony given by a physician should be subject to peer review.”).
- [4] Medical licensing boards generally have authority to discipline physicians for fraudulent expert medical testimony. Report 18 of the Bd. Of Trs. of the Am. Med. Ass’n (1-98), Expert Witness Testimony (Reference Comm. B), at 1–2, Am. Acad. of Psychiatry & the Law, <http://www.aapl.org/expert-witness-testimony>.
- [5] *Rules for Neurosurgical Med./Legal Expert Op. Servs.*, Am. Ass’n of Neurological Surgeons, <https://www.aans.org/en/About-Us/Governance/Bylaws-Codes-and-Guidelines>.
- [6] AANS Code of Ethics § (F)(2), Am. Ass’n of Neurological Surgeons, <https://www.aans.org/en/About-Us/Governance/Bylaws-Codes-and-Guidelines> (“In providing expert opinion services, the AANS Member shall comply with, in all respects, the AANS Rules for Neurosurgical Medical/Legal Opinion Services.”).
- [7] *Austin v. Am. Ass’n of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001), <https://law.justia.com/cases/federal/appellate-courts/F3/253/967/576153/>.
- [8] *Id.* at 972–73.
- [9] Samuel D. Hodge, Jr. & Avi J. Cohen, *The Physician As Expert Witness*, The Practical Litigator, at 4–6 (Jan. 2010), http://files.aba.org/thumbs/datastorage/lacidoirep/articles/PLIT1001-Hodge_Cohen_thumb.pdf (listing professional medical associations and specialty societies that have issued ethical standards and guidelines for expert medical testimony).
- [10] See Report 18 of the Bd. Of Trs. of the Am. Med. Ass’n, *supra* note 4, at 3 (“Fraudulent testimony constitutes a threat to the quality of health care by possibly affecting the standard of care.”); Hodge & Cohen, *supra* note 9, at 2–3 (explaining how the public’s ability to obtain health care services is adversely affected by physicians who offer tainted expert testimony that causes higher insurance premiums and abandonment of high-risk procedures); see also Jennifer A. Turner, *Going After the “Hired Guns”: Is Improper Expert Witness Testimony Unprofessional Conduct or the Negligent Practice of Medicine?*, 33 Pepp. L. Rev. 275, 278–82 (Jan. 2006).

[11] *Austin*, *supra* note 7, 253 F.3d at 973.

[12] *Id.* at 972–73.

[13] *Id.* at 973.

[14] Russell M. Pelton, *Medical Societies' Self-Policing of Unprofessional Expert Testimony*, 13 *Annals Health L.* 549, 550–51 (Summer 2004)
<https://pdfs.semanticscholar.org/dec8/95f501d0647e8f976cff0a662f421e57a338.pdf> (“For all practice purposes, an expert who gives clearly false testimony in litigation is immune from being sued [because] [m]ost states recognize a qualified immunity”).

[15] 132 Cong. Rec. H11590 (daily ed. Oct. 17, 1986) (statement of Rep. Waxman) (offered in connection with debate on immunities provided for peer review under the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.*).

[16] *See supra* notes 1–2. The Procedural Guidelines supplement the Bylaws and promulgate the process by which the PCC evaluates charges of unprofessional conduct.

[17] *Austin*, *supra* note 7, 253 F.3d at 972–74; *see also* Report 18 of the Bd. of Trs. of the Am. Med. Ass’n, *supra* note 4, at 3–4 (recognizing that the AANS Professional Conduct Program provides “substantial due process”); A. Kesselheim & D. Studdert, *Professional Oversight of Physician Expert Witnesses: An Analysis of Complaints to the Prof’l Conduct Comm. of the Am. Ass’n of Neurological Surgeons*, at 2, <https://insights.ovid.com/crossref?an=00000658-200901000-00028#> (concluding that “[p]rofessional organizations may play a useful role in oversight of expert witness conduct, provided they maintain procedural fairness and strive for impartiality, as the AANS program seems to have done”).

[18] *Austin*, *supra* note 7, 253 F.3d at 972.

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