Policing Expert Testimony: The Role of Professional Organizations

Paul S. Appelbaum, M.D.

The quality of expert testimony is a perpetual concern of the courts. Recent decisions of the U.S. Supreme Court have reinvigorated the role of the trial judge in screening testimony that is likely to be misleading (1,2). But anyone with courtroom experience knows that the ability of judges to determine the scientific or clinical validity of proposed testimony is imperfect at best. Do professional organizations, including medical groups, have a role to play here?

Dr. Donald Austin, a neurosurgeon who often serves as an expert witness in malpractice cases, thought not. Austin testified at a malpractice trial on behalf of a woman whose recurrent laryngeal nerve was damaged during the course of an anterior cervical fusion performed by another neurosurgeon. According to Austin's testimony, which the trial judge ruled admissible, such an injury is always the consequence of the surgeon's negligence.

Moreover, Austin maintained that the majority of neurosurgeons would agree with this conclusion. In contrast, expert witnesses for the defendant, a neurosurgeon who had performed 700 anterior cervical fusions without a similar injury, testified that the patient's injury was an unavoidable consequence of the surgery and not the result of negligence. The jurors concurred, rejecting the patient's malpractice claim and seemingly bringing the case to a close.

Dr. Appelbaum, *who is editor of this column, is A. F. Zeleznik professor and chair in the department of psychiatry at the University of Massachusetts Medical School, 55 Lake Avenue North, Worcester, Massachusetts 01655 (e-mail, appelbap@ummhc.org).*

However, as far as the defendant was concerned, the matter was not over. After his vindication by the jury, he filed an ethics complaint against Austin with the American Association of Neurological Surgeons (AANS), of which Austin was a member. The complaint alleged that Austin had no factual basis for testifying that most neurosurgeons would agree that nerve damage implied surgical negligence. He was accused of violating provisions of the AANS ethics code that requires members who testify as experts to do so "prudently," to "identify as such personal opinions not generally accepted by other neurosurgeons," and to "provide the court with accurate and documentable opinions on the matter at hand."

A hearing was held before a board of neurosurgeons, at which Austin was represented by an attorney and had an opportunity to testify in his own defense. The hearing panel, like the jurors at the malpractice trial, found Austin's claims implausible, held that he had violated the AANS ethics code, and suspended him from the association for six months.

Given the passions that clearly had been aroused in this case, it is no surprise that Austin too then sought redress. He filed suit against AANS, claiming that his suspension came as revenge for his having served as a plaintiff's expert witness. Austin asked for damages to compensate him for the decline in the income he received as an expert witness since his suspension and for an injunction requiring that the record of the action against him be expunged (3). Interestingly, he did not seek reinstatement as a member-in-good-standing of the association.

Austin's claim was controlled by Illinois law, because AANS is incorporated in that state. As a voluntary association, AANS would ordinarily be governed by its contractual agreements with its members, and Austin did not claim that a breach of contract had occurred. However, Illinois law also recognizes that membership in a voluntary association may have substantial economic benefits. Thus Illinois allows an additional cause of action for members who demonstrate that an organization's act substantially impaired an important economic interest and involved procedural irregularities or bad faith. Bad faith on the part of AANS was precisely what Austin alleged. Moreover, he claimed that it was "against public policy for a professional association to discipline a member on the basis of trial testimony unless the testimony was intentionally false" (3).

The federal district court in which the case was filed granted summary judgment to AANS (4), after which Austin appealed to the U.S. Court of Appeals for the Seventh Circuit. There, the case was considered by a three-judge panel, including Judge Richard Posner, one of the country's leading jurists and the author of the opinion in the case. Posner found multiple grounds for upholding the dismissal of Austin's claim. His opinion has clear implications for other professional organizations that may seek to police their members' testimony.

Posner began, in contrast to the district court, by denying that Austin ever met the threshold requirement of having an "important economic interest" at stake. Although Austin's annual income from expert testimony had dropped by more than $140,000 after his suspension, the court noted that providing testimony was just a sideline

for Austin, who continued to receive most of his income from his clinical practice. Moreover, Austin had made about $80,000 a year as an expert witness even after AANS's action.

Posner could have stopped there, as one of his colleagues did in a concurring opinion. Had he done so, the opinion would have been of only passing interest. But Posner seemed determined to use the case to offer a strong judicial endorsement of efforts by medical and other professional organizations to oversee their members' courtroom testimony. Perhaps he was motivated in part by what he saw as the egregious nature of the testimony in this case. Posner himself read both pieces of medical literature that Austin cited in defense of his claim that nerve injury was always associated with negligence, and he found neither of them supportive.

Then, in an unusual move for an appellate judge, Posner searched the World Wide Web and identified "an abundance of up-to-date relevant literature" that characterized damage to the recurrent laryngeal nerve as a known complication of the surgical procedure, not necessarily related to negligence. Thus he described Austin's testimony as "irresponsible" and concluded that "if the quality of his testimony reflected the quality of his medical judgment, he is probably a poor physician."

In the opinion, Posner went to great lengths to explain why it is decidedly in the public interest for a professional organization to be able to sanction members who have provided irresponsible testimony. "It is no answer that judges can be trusted to keep out such testimony," Posner wrote. "Judges are not experts in any field except law. Much escapes us, especially in a highly technical field such as neurosurgery." Therefore, jurists need help from professional associations in evaluating the quality of expert testimony. "[T]he community at large had an interest in Austin's not being able to use his membership [in AANS] to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves." Finally, "the judge's ruling that expert testimony is admissible should not be taken as conclusive evidence that it is responsible testimony" and so should not preclude an ethics proceeding by a professional organization.

Of course, as the Seventh Circuit's opinion notes, medical and other professional groups are not without potential liability for the disciplinary actions they take. Austin would have had recourse to the courts for compensation for defamation if he had been able to prove that AANS had intentionally and falsely impugned his competence to testify. And had the association not provided reasonable due process in adjudicating the complaint, the finding could have been overturned and damages imposed.

Whether professional associations are well situated to review their members' courtroom testimony has been much debated. On the downside, there is a risk that the interests of the profession—rather than those of the public—will come to dominate the process. Where testimony in malpractice cases is concerned, allowing professional groups to define the contours of acceptable testimony could result in a constriction in the range of opinions that can be offered on behalf of the plaintiff.

Indeed, although the Seventh Circuit dismissed the contention, Austin claimed that AANS had acted in his case only because he testified in support of a claim of malpractice. In other sorts of legal cases, one could imagine professional organizations being tempted to sanction members whose testimony supported unpopular points of view that exposed the profession to public opprobrium.

These risks, which admittedly are real, are counterbalanced by some fairly profound advantages of having professional organizations review expert testimony (5). As Posner noted, "One only has to read the transcript of the disciplinary hearing, and particularly the questions that the members of the hearing panel, all neurosurgeons of course, directed to Dr. Austin, to realize how far the ordinary *voir dire* of an expert [the process by which a witness' testimony is explored before a ruling on its admissibility] can fall short." In addition to having greater substantive expertise, professional groups have a wider range of interventions available to them than the courts. Punitive sanctions can be complemented by educational interventions whose potential impact goes far beyond a particular case.

An example of such a process is the work of the peer review committee of the American Academy of Psychiatry and the Law (AAPL). Stimulated by a series of resource documents produced by the American Psychiatric Association (6,7), AAPL has been conducting voluntary peer review of expert testimony for almost a decade. Members can elect to have their testimony critiqued in confidence by the committee, or can volunteer to have a videotape of their testimony shown at the AAPL annual meeting, where comments are solicited from a panel of peers and from members of the audience. The annual session is one of the most popular features of the AAPL meeting, and those who have gone through the process have generally reported that it was very helpful.

The Seventh Circuit opinion in *Austin v. AANS,* with its embrace of the value of peer review of expert testimony, may well stimulate other professional groups in medicine, mental health, and other fields to become involved in such activities. As desirable as this may be, it will not absolve the courts of their responsibility to determine the validity of proposed expert testimony at the time of trial; peer review, after all, is inherently retrospective. But whether by imposing sanctions or by providing educational feedback, over time professional associations can elevate the level of expert guidance that our courts receive. The *Austin* case demonstrated that as long as this task is performed in good faith and with respect for the rights of the accused member, it is likely to be upheld by the courts and insulated from the threat of subsequent liability. ♦

References

1. Daubert v Merrell Dow Pharmaceuticals, 509 US 579 (1993)
2. Kumho Tire v Carmichael, 526 US 137 (1998)
3. Austin v American Association of Neurological Surgeons, 253 F 3d 967 (7th Cir 2001)

Continues on page 399

Continued from page 390

4. Austin v American Association of Neurological Surgeons, 120 F Supp 2d 1151 (ND Ill 2000)

5. Appelbaum PS: Forensic psychiatry: the need for self-regulation. Bulletin of the American Academy of Psychiatry and the Law 20:153–162, 1992

6. Council on Psychiatry and Law, American Psychiatric Association: Peer review of psychiatric expert testimony. Bulletin of the American Academy of Psychiatry and the Law 20:343–352, 1992

7. Task Force on Peer Review of Expert Testimony, American Psychiatric Association: Resource document on peer review of expert testimony. Journal of the American Academy of Psychiatry and the Law 25:359–373, 1997