

## Peer Review of the Inexpert Witness, or... Do You Trust Chickens To Guard the Coop?

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We've just had an interesting session at our State Medical Society Council on Ethics and Judicial Affairs. It dealt with peer review of medical expert testimony.

Some members asked us to look into a perceived problem. Occasionally, a physician retained as an expert in a legal case offers an opinion or gives testimony that is dubious, inaccurate, or outlandish enough to offend fellow professionals. Our medical society was urged to discipline physicians who render unprofessional testimony. This request originated in some people's indignation at certain adverse opinions in medical malpractice trials.

Initially, our discussion did focus on medical malpractice, but we also considered other kinds of personal injury claims, criminal matters, environmental cases, and other issues. There are actually a fair number of occasions when doctors appear in court. We didn't discuss experts who appear in the media (including those who write columns for journals), Internet advice givers, or authors of medical books. Actually, when you think of all the ways that medical people communicate with the world, those that are "peer reviewed" are probably in the minority. (I can't quantify this, but it seems right.)

What we did ask ourselves was whether there is a need for oversight of physician legal testimony by state medical societies, and whether this would be an appropriate activity for state societies to undertake.

Our conclusions were "No" and "No." In the first place, there is already a plethora of mechanisms in the law to reign in truly bad witnesses. Granted, these don't always work, but adding another party to the mix wouldn't necessarily help. Second, a state medical society — or the AMA for that matter — has neither legal nor ethical standing that would allow it properly to exert power over the speech of witnesses. Plus, subjecting doctors to the threat of sanction for their statements under oath would conceivably intimidate good practitioners as much as bad ones.

Powerful talisman

Legitimate and ethical peer review is a burden a profession proudly imposes upon itself. It is a wellspring of good, and a powerful talisman against abuse. However, again depending on the state where we practice, many of us have felt the dark side of this force, in the form of biased, irresponsible, or outright fraudulent testimony from our less worthy colleagues.

It's understandable that physicians unfamiliar with legal procedure would look to their own organizations for protection against rogue colleagues. But, as sweet as it sounds to punish villains who vouch indefensible fictions under oath, this quest is fraught with legal and ethical perils when conducted by fellow physicians. Any professional or trade organization faces serious problems if its actions might be interpreted as muzzling its members' free speech — let alone if it presumes to control, guide, or tamper with legal witnesses.

You see how this looks? Even in the name of evidence-based testimony, we must be terribly careful to avoid the appearance of circling our professional wagons.

As doctors, we have always to bear in mind the accusation some are always ready to hurl, that our professional societies constitute "protective guilds" or "good-old-boy networks." To our shame this has been, and continues to be, sporadically true of medical communities at some times and places.

Although this medical *cosa nostra* culture is a dying serpent today, there is still poison in the fangs. Organized medicine must be scrupulous to avoid giving any perception that our motives are to protect physicians at the expense of patients.

Another reason the medical society would be off base in second-guessing physician experts is the strong belief courts have that only they are entitled to determine who is qualified to serve as a witness in any given case.

The AMA's position is a bit contrary to this legal principle. In Policy H-265.993, "Peer Review of Medical Expert Witness Testimony," it holds that "(1) the giving of medico-legal testimony by a physician expert witness be considered the practice of medicine, and (2) all medical-legal expert witness testimony given by a physician should be subject to peer review." Although these statements make initial intuitive sense, I have reservations that neither can logically hold up under scrutiny.

For one thing, the credibility of legal testimony is a matter of withstanding cross examination, as well as other legal tests that can be very technical, depending on the matter and the venue.

All kinds of experts may figure in a medical case. Psychologists, pharmacologists, toxicologists, biomedical engineers, nurses, chemists, and numerous other professions may be called to support or rebut a physician's testimony. I don't see that being a medical doctor, in itself, is different from these others in a way that makes physician testimony subject to a special qualification.

I grant there is a slippery slope on which it's sometimes tempting to say, "Everything a doctor does that involves professional skill constitutes the practice of medicine." But, there are some preserves of "professional" activity that don't fit my concept of "practice of medicine." Courtroom testimony is one. Others are teaching, lab research, and serving as technical adviser to a TV show.

Defining something as "practice of medicine" allows the state's medical practice act and the jurisdiction of its licensing board to be invoked with respect to some activity. But, these powers are off target when it comes to medical testimony. The medical practice act typically guards against "practice of medicine without a license," while the licensing board determines "unprofessional conduct." These are not really the best rubrics by which to control physicians of whose opinions we disapprove.

The latter is clearly the intent of the AMA's policy. If medical testimony constitutes the practice of medicine, then "mal-testimony" might comprise unprofessional conduct of the sort that could

trigger a licensure hearing.

This knife cuts two ways. Almost certainly, fear of adverse actions against their licenses (admonition, suspension, or revocation) would tend to "chill" the enthusiasm of irresponsible witnesses. Likewise, it would inhibit the participation of some of the most honest and knowledgeable experts. Lawyers for both plaintiffs and defendants would routinely come to use the threat of license review as a damper on the other side's experts.

Given the imperfection of board reviews, it is inevitable that someone's valid and sincerely expressed opinion will someday put its author in serious professional jeopardy. Are we secure enough in our peer review process — and our own opinions — to wish this?

We should not despair that local medical societies are ruled out as defenses against "mal-testimony." The job isn't a good fit for them. For better and worse, it's to our judicial system that we have to look for improvements in the judicial system.

I've always detested that sophomoric argument that you shouldn't have a fox guarding your chicken coop. If I had a chicken coop, I sure wouldn't want chickens guarding it. I'd want foxes and wolves and saber-toothed tigers. The courtroom is not the place for peer review. The best defense against bad witnesses is simply — good witnesses.