Regulating Physician Expert Witness Testimony

To the Editor: In their Commentary on the role of professional organizations in regulating physician expert witness testimony, Drs Kesselheim and Studdert\(^1\) assert that the antipathy of professional organizations toward malpractice litigation creates a conflict of interest in regard to expert witness testimony review that cannot be mitigated by procedural safeguards. We disagree.

The authors imply that the goals of diminishing malpractice litigation and promoting scientifically sound expert witness testimony are mutually exclusive. Based on the guidelines of the American Academy of Neurology for expert witness testimony\(^2\) and its disciplinary action procedures,\(^3\) we believe that these goals are compatible and achievable and do not carry a “deep-seated conflict of interest”\(^1\) as long as (1) the standards for the provision and review of expert witness testimony are just, written, and available to all members in advance; (2) all complaints are examined in accordance with the expert witness testimony standards and review process by a committee of members with experience or expertise in such review; (3) the review process complies with long-standing legal notions of the assumption of innocence and burden of proof; and (4) the policy goals for diminishing malpractice litigation do not subvert the professional and civic obligations of physician expert witnesses to assist a court or other lawful forum in understanding medical evidence or determining medical facts at issue.\(^2\)

One of the tenets of a profession is that its members set and enforce standards for themselves. Thus, we would find the creation of an extramural body within a state government as antithetical to professionalism and doubt that it would be any more or less free of bias than professional organizations in regard to malpractice litigation. There already exists a potent counterbalance for perceived or actual bias on the part of expert witness testimony review because aggrieved expert witnesses can and have sued professional organizations for defamation.\(^4\) We believe that properly established and conducted procedures by medical societies to review physician expert witness testimony can serve the courts and the public in an unbiased manner as possible without the need for further governmental intervention.

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First, as the authors recognize, the impartiality of regulating experts is likely to be incomplete. Physicians willing to participate in reviewing medical malpractice testimony may have their own agenda. Second, physicians have opinions about how medicine should be practiced, but they often do not know the opinions or practices of other physicians. Therefore, the opinions of 1 or 2 physicians may not be adequate to determine the relevant standard of care, which the law bases on customary care or reasonable care. Third, it is often difficult to recruit expert physicians for service in legal cases.

An alternative method to evaluate medical testimony is to assess how it compares with standards determined by a survey of the relevant physician population. In the survey method, the physicians are provided the essential information about the case and questioned about the key decisions. A compilation of physician responses to these surveys provides an objective assessment of whether the medical community considers that the care provided was customary or reasonable. This method has been shown to be practical to implement and to have low cost, little bias, and high physician participation rates. It may have a role in the assessment of physician witnesses.

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In Reply: The responses by Dr Larriviere and colleagues and Drs Hartz and Green to our Commentary provide useful insights from physicians and lawyers with direct experience in efforts to oversee the conduct of physicians who act as expert witnesses in medical malpractice litigation. The ultimate goal of any such oversight is promoting accurate, high-quality testimony. Sound expert testimony gives plaintiffs who have suffered injury due to negligent care the best chance of receiving appropriate compensation for their losses; it also helps guard against the possibility that defendants’ conduct will be judged on the basis of faulty theories of causality or misrepresentations of the standard of care.

Based on our limited investigation of programs for reviewing expert witness conduct that are housed within medical professional organizations, we have been generally impressed by the rigor of their procedures and thoughtful application of the people involved in implementing them. At the same time, we believe the concerns of plaintiff lawyers and patient advocates about conflicts of interest are valid.

The phrase conflict of interest refers to a set of conditions in which professional judgment concerning a primary interest is vulnerable to undue influence by a secondary interest. Because medical professional organizations often oppose malpractice litigation and actively support legislative reforms to reduce its prevalence, conditions are ripe for partiality when it comes to acting as a neutral arbiter over litigation-related matters. We are not alleging specific instances of bias: that would be a statement about the effects of a conflict of interest, whereas ours is a statement about the existence of a set of conditions.

Another salient consideration with conflicts of interest is that perceptions matter. This is particularly relevant in the current context. If plaintiffs perceive that they may not get a fair review of a physician who gave testimony against their claim from a panel of that physician’s fellow members in a professional society, then they will be reluctant to come forward. The result would be asymmetric application of expert witness oversight, with reviews much more likely to address the conduct of witnesses who testify for plaintiffs.

This outcome is not the fault of review programs. They can only evaluate complaints they receive and do so as impartially and expeditiously as possible. The problem is with the intrinsic constraints of these programs’ regulatory reach. This is why we advocated the supplementation of the professional organizations’ programs with alternative oversight mechanisms based elsewhere. The profession’s lead is commendable, but comprehensive oversight of the quality of physician expert witness testimony requires effort from outside the profession as well.

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