Editor's Notes

Litigation Pox[1]

By Stephen Jackson, M.D., Editor

We in anesthesiology have what I categorize as terrorists among us! I am referring to the repugnant sub-species of our colleagues who repeatedly commit ethical transgressions with dishonest and irresponsible "expert" witness testimony, most commonly for the plaintiff. Many of them make their living—wholly or in part—from such shameful unprofessional conduct. When written in 1967, the ASA's *Guidelines for the Ethical Practice of Anesthesiology*[2] did not specifically address this unethical behavior because it fell outside the Committee's comprehension of what an unethical physician actually might do. Later on, however, the ASA believed that it was necessary to write *Guidelines for Expert Witness Qualifications and Testimony*[2] and did so in 1987, amending them in 1990. This pithy document, currently undergoing a fortifying revision, is reproduced here; the emphasis is mine.

ASA Guidelines for Expert Witness Qualifications and Testimony[2]

Preamble

The integrity of the civil litigation process in the United States depends in part on the **honest, unbiased testimony of expert witnesses**. Such testimony serves to **clarify and explain technical concepts and to articulate professional standards of care**. The ASA supports the concept that such expert witness testimony by anesthesiologists should be readily available, **objective and unbiased**. To limit uninformed and possibly misleading testimony, experts should be qualified for their role and should follow a clear and consistent set of ethical guidelines.

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A. Expert Witness Qualifications

1. The physician (expert witness) should have a current, valid and unrestricted license to practice medicine.
2. The physician should be board certified in anesthesiology or hold an equivalent specialist qualification as recognized by the American Board of Anesthesiology.
3. The physician should be familiar with the clinical practice of anesthesiology at the time of the occurrence and should have been actively involved in clinical practice at the time of the event.

B. Guidelines for Expert Testimony

1. **The physician's review of the medical facts should be thorough and impartial** and should not exclude any relevant information to create a view favoring either the plaintiff or the defendant. **The ultimate test for advocacy and impartiality is a willingness to prepare testimony that could be presented unchanged for use by either the plaintiff or defendant**.
2. **The physician's testimony should reflect an evaluation of performance in light of generally accepted standards**, neither condemning performance that clearly falls within generally accepted practice standards nor endorsing or condoning performance that clearly falls outside accepted medical practice.
3. **The physician should make a clear distinction between medical malpractice and adverse outcomes not necessarily related to negligent practice.**
4. The physician should make every effort to assess the relationship of the alleged substandard practice to the patient's outcome. Deviation from a practice standard is not always causally related to poor outcome.
5. Fees for expert testimony should relate to the time spent and in no circumstances should be contingent upon outcome of the claim.
6. **The physician should be willing to submit such testimony for peer review.**

Repeated abuses of these *Guidelines* were reported to the ASA, and a past president of the Texas Society of Anesthesiologists initiated a process that mandated

the ASA to study and strengthen these Guidelines. In particular, the ASA began to focus on the final item (B6), that "the physician should be willing to submit such testimony for peer review."

The ASA Committee on Ethics had looked into this very issue about a decade ago but was advised that the best way to oppose faulty testimony by the unethical "expert" witness was to counter with an even more credible and worthy expert. Of course, this does not eliminate the extensive emotional and economic damage wrought by the psycho/sociopathic hired guns labeled as "whore docs" by a *Wall Street Journal* editorial (February 2, 2002).

Now, the courageous American Association of Neurological Surgeons (AANS), responding to the devastating abuses and suffering inflicted upon many of its members by this "litigation pox," has, for the past two decades, deployed such a peer review mechanism as part of its professional conduct program. AANS has suspended or even expelled members for misconduct as an expert witness, and indeed, 20% of the approximately 50 neurosurgeons so reviewed have had meaningful disciplinary action taken against them. I used the term "courageous" because the AANS proceeded into uncharted legal waters while accepting that the price tag would be a hefty one. But the reward has been a highly beneficial program that is a paragon of professional self-regulation. Obviously, an adverse change in AANS membership status pursuant to an equitable and impartial peer review system is something that is unfavorable to have exposed in a judicial process.

In case you are wondering, yes, the AANS has been sued, but the 7th United States Circuit Court has upheld the AANS's suspension of its members due to expert witness testimony which, according to established peer review process, failed to be supported by science and generally accepted practice. Moreover, the Court praised the AANS program and stated that judges need assistance in screening expert witness testimony! And most welcome of all, in January 2002, the United States Supreme Court affirmed the Circuit Court's opinion! To the AANS: a hearty "thank you" from all of medicine for your principled behavior, fortitude and the economic expenditures that you were willing to risk.

Spearheaded by President-Elect Roger Litwiller, an ASA plan has been initiated to deal with this "moral and ethical imperative that is an ASA priority" (2002 Reference Committee report, ASA House of Delegates). The objective of this work-in-progress is to permit the ASA "to discipline members who give expert witness testimony that is not appropriate." There will be, of necessity, multiple "fronts" of attack in order to effect meaningful change. Although this project may

cost the ASA as much as one million dollars, support among members is overwhelming.

The ASA Committee on Ethics plans to amend its *Guidelines* (the only ASA document binding on its members) so as to comply with its belief that "a physician who serves as an expert witness in medical malpractice litigation is obliged to educate the jury/judge by providing accurate and dispassionate testimony that is honest, unbiased and reflective of scientifically supported data and of professional standards of care that are relevant to the medical practice and judgment in dispute." Concomitantly, the Committee on Professional Liability is reviewing the current expert witness *Guidelines* and will make any amendments deemed necessary to strengthen them. Furthermore, the Committee on Bylaws will prepare amendments to deal with noncompliance as grounds for censure, suspension or expulsion of an ASA member.

I certainly hope that these Herculean efforts by the ASA to enhance fairness and justice within the malpractice arena will come to fruition. As it was with the smallpox virus, we must eliminate this "litigation pox" from the medical landscape. We want to place this demon into an impenetrable grave.

[1] A term first coined by Cary Savtich, M.D., in a February 14, 2003, *Wall Street Journal* commentary on the issue of a voluntary program of massive smallpox immunization, one in which he advocated for placing the common good of humanity above the common fear of litigation.

[2] ASA *Standards, Guidelines and Statements*, October 2002. **http://www.asahq.org/publicationsAndServices/standards/07.html**