

Expert Witness Reform

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Summary: The legal system depends on the medical expert for evidence. Doctors readily complain about frivolous cases that go to trial, yet a lawyer cannot bring a frivolous claim to trial without a physician expert witness stating that the claim is *not* frivolous. An insurance company cannot raise premiums without medical expert witnesses servicing the increasing litigation against the insured. Physicians must look to themselves as a major contributor to rising malpractice insurance costs. For without the physician expert witness, no medical malpractice lawsuit can take place. It is the expert physician, not the attorneys or insurance companies, who defines “meritless” and “frivolous” and who ultimately controls the courts’ medical malpractice caseload. (*Plast. Reconstr. Surg.* 120: 2095, 2007.)

The buck stops here.

—President Truman, 1945

In the Presidential Session of the 2005 Annual Meeting of the American Society of Plastic Surgeons, in Chicago, Illinois, Dr. Scott Spear moderated a debate between Richard Anderson, M.D. (insurance industry representative and chairman/chief operation officer of the Doctors Company) and Todd Smith, Esq. (a trial lawyers’ representative and immediate past-president of the Association of Trial Lawyers of America). Each side blamed the other for the current medical malpractice crises facing many states. This article neither discusses the information covered in the debate nor tries to apportion blame between insurance companies and lawyers; rather, it discusses what was omitted at the meeting: the physician’s blame.

When assigning blame, physicians must look to themselves, for without physician expert witnesses, no medical malpractice lawsuit can take place. The legal system depends on medical experts for evidence. Lawyers cannot bring frivolous claims to trial without physician expert witnesses stating that the claims are *not* frivolous. Insurance

companies cannot raise premiums without medical expert witnesses servicing the increasing litigation against the insured. In the debate, Dr. Anderson asserted that 75 percent of all medical malpractice claims are “meritless.” If true, then 75 percent of plaintiff expert witnesses support meritless claims—at premium prices. And when experts support meritless medical malpractice claims, medical malpractice crises ensue, for an expert who successfully supports a meritless claim today makes that same claim meritorious tomorrow. As such, the successful claim becomes precedent for future cases and redefines a higher standard of care.

Ultimately, expert physicians determine what is and what is not negligence. Expert physicians, not attorneys or insurance companies, define the terms meritless and frivolous and control the courts’ medical malpractice caseload. The buck stops with physicians, for without the lucrative medical expert business, the excessive medical malpractice personal injury and opposing defense industries could not exist. Physicians themselves have the power to cure their medical malpractice malady, as fundamentally, they are its source.

THE PROBLEM: ADVERSE INCENTIVES

Why is it so easy for an attorney to find an expert witness who is willing to testify against another physician, even with a marginal claim and with the expert’s full knowledge that the claim will cause the defendant physician hardship? The answer resides primarily in the physician’s adverse financial incentives. These adverse incentives induce unassuming physicians into a vicious downward spiraling cycle, where they themselves inflate their own medical malpractice tribulations.

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During the past 20 years, physicians have faced increasingly overwhelming paperwork, continually falling remuneration, insurance and health maintenance organization precertification requirements, and rebilling ploys—all of which are designed in part to reduce amounts reimbursed. While insurance companies were reducing reimbursements, they were simultaneously increasing malpractice premiums, crushing the physician between higher costs and lower reimbursements.

To meet increasing overhead with declining income, physicians were forced to work harder, see more patients, and perform more procedures.¹ Even with the same care given to each patient, more patients and more procedures inevitably result in more mistakes. More mistakes beget more litigation, which leads to increased, and in some cases incapacitating, malpractice premiums. So physicians now find themselves trapped in a vicious cycle: work harder to make less and get sued more often for doing it.

What makes matters worse is that physicians are generally incapable of raising charges to cover their continually increasing costs. When malpractice premiums or legal costs increase, normal businesses merely raise prices and pass such costs on to

customers. Most doctors, however, cannot raise prices: oligopoly insurance companies and the federal government (Medicaid/Medicare) artificially regulate and suppress physician reimbursements to control patient health-care costs. Indeed, physicians cannot even form labor unions: unions of self-employed physicians are illegal under federal law. Instead, the physician's fate is to work harder to overcome the falling reimbursements and meet the increasing malpractice premiums (Fig. 1).

While reimbursements fall and premiums rise, however, medical expert witness fees remain alluringly high. Unlike regulated patient care reimbursements, medical expert fees are unregulated: the expert witness may charge whatever the attorney will pay. Payment is not only higher, it is easier. Whereas insurance-dependent physicians must continually hassle for reimbursement, many experts require upfront cash "retainers." They are paid before they even start working, and whereas negligent patient care is associated with devastating liability, liability for negligent testimony is almost nonexistent.

Adding to the cycle's viciousness, money lures some physicians to testify when otherwise they would not (negligently or recklessly); others be-

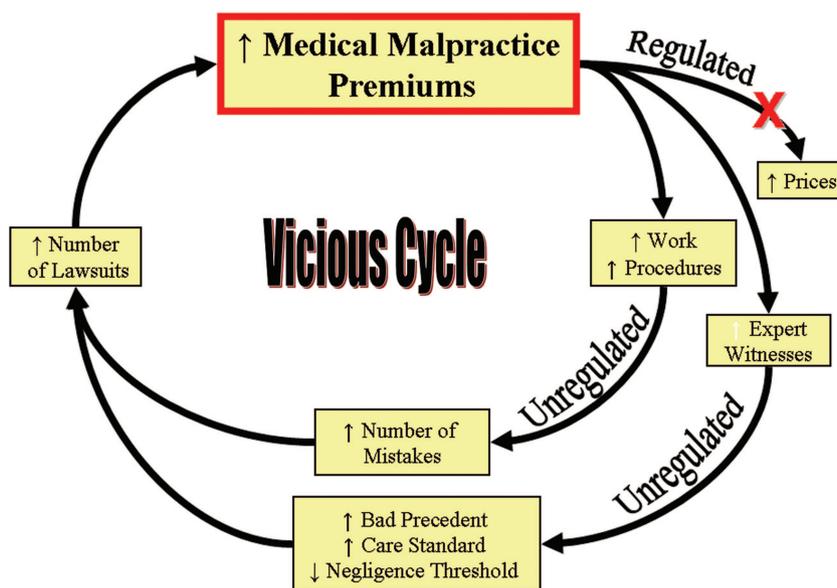


Fig. 1. The medical malpractice problem is one of a vicious cycle that spirals downward. Physicians today must work harder to make less and get sued more. This unappealing state makes being an expert witness that much more appealing, and as more physicians follow their financial incentives, more become experts. More experts stimulate more lawsuits, which continually redefine a higher standard of care. The higher standard of care in turn leads to yet more lawsuits, making it that much more difficult for the patient care physician and expert witnessing that much more alluring. Thus, adverse incentives feed the cycle, and the physicians themselves swell their own medical malpractice woes.

come “professional experts” who knowingly and wrongfully support frivolous claims. The price for negligent, reckless, or wrongful expert testimony is surreptitiously costly. Successful court testimony supporting a frivolous claim today creates precedent that redefines a higher standard of care, making that same claim meritorious tomorrow. Plaintiff attorneys use today’s jury verdicts to select tomorrow’s cases, and defendant attorneys and insurance companies use the same verdicts to settle cases.

Physicians today are easier to sue because of a ceaselessly expanding expert-driven legal care standard that constantly decreases the negligence threshold and grows the likelihood of patient care physicians committing negligence. Past expert physicians, following their financial incentives, have molded today’s excessively litigious medical malpractice environment. By their readiness to testify on marginal claims for premium fees, they have constructed the austere precedent that founds our litigation infrastructure—the same infrastructure that physicians blame for their malpractice woes and that ultimately feeds the downwardly spiraling medical malpractice cycle (Fig. 1).

THE SOLUTION: CORRECT THE ADVERSE INCENTIVES

The problem is primarily adverse incentives (i.e., physicians getting paid more with less liability to be an expert witness). The solution, in large part, is to correct the adversity: decrease the incentive to testify such that it parallels, rather than dwarfs, the incentive to practice patient care. Three provisions will advance this goal:

1. Cap expert witness fees commensurate with patient care reimbursement.
2. Cap expert witness income and enact patient care requirement.
3. Make expert witnesses liable for negligent expert witness testimony.
 - a. Tort for negligent expert witness testimony
 - b. In-state licensure requirement for board monitoring

Cap Expert Witness Fees to Be Commensurate with Patient Care Reimbursements

The medical expert’s adverse financial incentives arise primarily from an imbalance between regulated patient care reimbursements and market-driven expert witness fees, an imbalance that artificially and inappropriately elevates the need

for expert testifiers above the need for patient caregivers. To correct this imbalance, two options exist: deregulate the regulated market or regulate the unregulated market. The former is unachievable; the alternative is to regulate (cap) expert witness fees in accordance with patient care reimbursements.

The expert’s rate should compensate physicians for time away from their patient practice, not lure them away from such practice. Physicians should not be rewarded for testifying rather than caring for patients; instead, testimony against other physicians must be founded on the principled requisition to correct wrongful injuries to patients. Testimony that is predicated more on finance than on conscientious obligation to correct a wrong is morally and ethically suspect; such testimony improperly redefines a higher care standard and feeds the medical malpractice spiral.

A statutory provision capping expert witness fees will lessen this spiral. Such provision would require that hourly or daily witness fees be calculated from the physician’s average patient care reimbursements according to the last 3 years’ business tax filings. For example, \$750,000 gross annual collections divided by 250 business days caps fees at \$3000 per day or \$375 per hour. Compare these numbers to common charges of \$10,000 per day at trial or \$800 per hour and the financial incentive imbalance becomes apparent. A provision that caps expert witness fees will make such fees commensurate with patient care reimbursements, eliminating the current financial incentive imbalance. Plaintiff medical malpractice attorneys will oppose such caps, for without windfall financial incentives, they will incur trouble finding expert witnesses to support marginal medical malpractice cases, and that is the point.

To further establish this point, compare the medical expert system with the legal expert system. Unlike physicians, lawyers have no imbalance between attorney expert witness fees and attorney legal service fees: both are unregulated. That is, unlike physician experts, whose fees generally surpass their corresponding regulated medical reimbursements, attorney expert fees are usually commensurate with legal services fees. Consequently, the attorney expert fee infrastructure is designed not to lure attorneys away from their legal practices, but to compensate them for time away from such practices. Contrary to physician experts, attorney experts are not rewarded for testifying rather than servicing their clients. Lawyers face no adverse financial incentive to testify on marginal cases that inappropriately redefine higher their

care standard; rather, they predicate their testimony not on money but on a principled requisition to correct a client's wrongful injury. Unlike the physician expert system, the incentive infrastructure for the attorney expert system appropriately balances the need for legal experts against the need for legal services, and unlike physicians, attorneys confront no legal malpractice crises.

Cap Expert Witness Income and Enact Patient Care Requirement

The unethical professional expert witness poses another problem. Louise Andrew, M.D., J.D., president of the Coalition and Center for Ethical Medical Testimony, describes this problem:

“Acting as an expert witness has become a profession for some individuals. The medical-legal annals are replete with testimony by ‘hired guns’ who earn a significant portion or even the majority of their professional income from testifying in malpractice cases. Some have not practiced for years, falsify their current level of practice or past experience, or practice just enough to keep their medical licenses or be qualified in their states as expert witnesses. Some have been barred from acting as expert witnesses on this or other grounds in certain states, yet continue to testify in others. Some use past or lapsed credentials as evidence of current expertise.”²

Testifying physicians should be experts at patient care, not jury manipulation. Physician supply is limited and training is expensive; doctors should do what they are trained to do, care for patients and research better modes of care, not testify against those who do. No physician should be able to testify about the care standard unless that physician practices that same standard, yet professional expert witnesses abound, and although they are nonpracticing and unfamiliar with the care standard, they irresponsibly redefine the standard higher for practicing physicians. Effective expert witness reform must purge the system of unethical “professional experts.”

A 70 percent patient care statute can accomplish this purge: require medical malpractice experts to practice more than 70 percent patient care and derive more than 70 percent of their income from such care. This would effectively cap malpractice physician expert testimony and income at 30 percent. In addition, every state medical board should adopt a written policy with the purpose of eliminating unethical medical malpractice expert witnesses. Such a policy should state that more than 30 percent of practice or

income from medical malpractice expert testimony is morally questionable and that the board will vigilantly pursue such physicians for potential ethical misconduct. Defendant counsel can also introduce such board policy in court to impeach the unethical professional expert physician.

Liability for Negligent Medical Expert Witness Testimony

Although the above-proposed statutes mitigate against adverse financial incentives, they do nothing to create accountability for negligent, substandard, or reckless expert testimony. Currently, statutory law protects patients from negligent physicians, but no law protects physicians from negligent experts. Contrarily, current law fosters expert testimony: it protects the expert by presuming expert testimony truthful and in the public interest (qualified immunity). Overcoming this presumption is difficult²: defendant physician victims of substandard expert testimony must rely on onerous legal concepts such as criminal fraud and perjury (“beyond a reasonable doubt”). Moreover, physicians filing such lawsuits open themselves to “abuse of process” countersuits from opposing experts. Consequently, current law offers defendant physicians little protection against negligent expert testimony.

Tort for Negligent Expert Testimony

An ostensibly straightforward means of making experts accountable is creating a cause of action to make negligent medical malpractice testimony a tort. A tort is a wrongful act resulting in injury to another's person, property, or reputation, for which the injured party is entitled to seek compensation. A negligent medical malpractice testimony tort would allow physicians to recover losses due to testimony that falls below the expert industry care standard. Recoverable damages would include actual and proximal damages, attorneys' fees and litigation costs, litigation-related emotional distress, and damage to the physician's name and reputation.

Unfortunately, tortious causes of action will not adequately deter negligent expert testimony for three reasons. First, tortious negligent testimony statutes would likely only apply to victorious defendant physicians; defendants who lose their lawsuits will have difficulty suing opposing expert witnesses, as their juries' findings are final and become law (new precedent for future cases). Second, tort lawsuits are expensive and time-consuming. After an extremely costly and exhausting trial, the victorious physician will probably desire to

return to patient care rather than commence another tiring lawsuit at great personal time and expense that will ultimately take away from the physician's patient care practice. Third, negligent expert testimony torts would require state constitutional amendments; otherwise, a state's Supreme Court could strike the provision as unconstitutional (i.e., contrary to the state court's policy of encouraging expert testimony). Consequently, a tortious negligent testimony statute, by itself, will not adequately deter negligent expert testimony.

In-State Licensure Requirement for Board Monitoring

To accomplish adequate deterrence, state boards must play an active role by monitoring experts testifying within their borders. To monitor experts, each state needs a statute that requires in-state licensing (or regional licensing in smaller states) for an expert to testify within that state. In-state licensing requirements allow state boards to regulate expert witness testimony quality within their states' domain. If the physician is licensed by a state board, then that board can reprimand (suspend or disbar) the negligent expert testifier (including the unqualified expert). If the physician is not so licensed (from out of state), however, the board cannot; it has no authority over the expert. An in-state licensing provision gives boards power to impose consequences for negligent expert testimony.

Unlike a negligent expert testimony tort, which requires that the physician file another tiring and expensive lawsuit, the in-state provision allows the physician to merely file an ethical complaint with the board. That physician, whether victorious or not, should be able to file such a complaint with legal immunity (no "abuse of process" countersuit), as the physician has a professional duty to report another physician's ethical violations, including unethical or knowingly wrongful testimony.

Also unlike the negligent expert testimony tort, an in-state licensing requirement is more likely to pass constitutional muster. Opponents will argue that in-state licensing is unconstitutional because it violates the commerce clause, which protects the public against individual states that improperly restrict interstate commerce, including expert testimony commerce. However, if a state board can constitutionally require in-state licensing to practice patient care, it should also be able to require in-state licensing to testify about such care. If a board's responsibility is to investigate physicians who practice beneath the care standard, it should also be responsible for investigating expert testifiers who testify ineptly about,

and wrongly redefine, that same standard. Ultimately, a board's duty is to monitor the care standard within its borders; such duty requires authority over physicians practicing or testifying within its domain. Consequently, as compared with a negligent testimony tort, an in-state licensing requirement is more likely to pass a constitutional challenge.

A bill proposed (unsuccessfully) by the Florida Medical Association exemplifies yet another, albeit less appealing, option.³ This bill required that an out-of-state physician obtain an expert witness certificate from Florida's state board. In theory, that board could then hold out-of-state experts accountable for providing negligent or substandard expert witness testimony. Unfortunately, such accountability is likely limited to revocation of the expert witness's certificate, making it a weaker deterrent than the full in-state licensure requirement.

Regardless of the type of in-state requirement, the onus of protecting practicing physicians from negligent or unqualified testifiers is on the state board, for the legal system will not do it. State boards thus far have *not* protected their constituents from substandard expert testimony. They are underfunded and overworked and fear liability. For veritable expert witness reform, however, state boards must play an active and powerful role; they must hold physicians accountable for unethical, substandard, or wrongful testimony; and physicians themselves must empower their board's to make expert physicians accountable.

CONCLUSIONS

Adverse financial incentives are not the only reasons for the malpractice crises, but they are a primary driving force, especially for reimbursement-dependent physicians, more and more of whom are testifying against plastic surgeons. Regardless of the reasons driving expert testimony, physicians who testify against other physicians are largely unaware of their testimony's full ramifications. This article hopes to inform physicians of these consequences and the vicious cycle that negligent and substandard testimony creates. It does not purport to solve the expert witness problem, but rather hopes to stir discussion on ways to accomplish expert witness reform and to move physicians toward this goal.

Unfortunately, this article does not discuss other medical malpractice reform measures, such as the tort reform passed in Texas (2003) or insurance reform passed in California (1988). Physicians should pursue all reform methods, including legal,

insurance, and expert witness. Furthermore, they must pursue such reform with tremendous unity and resolve, for any statutory reform is difficult to achieve, taking much time and effort, with success varying by state. Of the different types of reform, however, expert witness reform, especially the expert fee cap, may be the most efficacious for two reasons: ease and effectiveness.

Expert witness reform is probably easier to achieve than other types of medical malpractice reform because most personal injury lawyers stand to benefit from falling expert witness fees. Non-medical malpractice personal injury attorneys [98 percent of the bar (automobile accidents, product liability, civil rights, construction defects, slip-and-falls, and so on)] may not oppose a cap on physician expert witness fees, and may even support it. These attorneys, who use expert physicians to prosecute and defend their claims, must pay exorbitant expert witness fees, which are inflated by plaintiff medical malpractice attorneys, without accruing the benefits of large medical malpractice awards. Although plaintiff medical malpractice attorneys (2 percent of the bar) will certainly oppose the caps, they will lose against the allied efforts of physicians, insurance companies, and a majority of their attorney peers.

Second, expert witness reform is the most effective solution. Tort (legal) reform and insurance reform are Band-Aid approaches that merely cover the problem's symptoms rather than attack its source. The source is not outrageous jury awards for pain and suffering but the experts butressing them. It is not frivolous lawsuits but the experts bolstering them. It is not the gouging of physicians by insurance companies but the gouging of their physician insureds by experts. To eliminate the problem, we must attack its roots: ourselves.

Attacking the roots means, at minimum, correcting the adverse incentives that influence us.

Some physicians have petitioned the expert physician to adhere to truth, honor, and justice. Much more effective than relying on the individual physician's virtue is an incentive infrastructure that appropriately balances the need for testimony versus patient care. The key to veritable tort reform is to correct the adverse financial incentives that lure physicians away from needed patient care and into unnecessary expert witnessing. It is to implement simple provisions that cap expert fees to be commensurate with patient care reimbursements and make the consequences for negligent testimony appropriate rather than nonexistent. In the end, however, it is the physician who must fix the problem, for the problem is the expert witness physician.

Do unto others as you would have them do unto you.

—Confucius, sixth century B.C.

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