

Citation

Caplan RA, Posner KL: The expert witness: Insights from the Closed Claims Project. *ASA Newsletter* 61(6):9-10, 1997.

Full Text

The "expert witness problem" is a recurrent concern for members of ASA. Anesthesiologists who have been sued for malpractice are frequently bewildered and sometimes emotionally devastated by plaintiff's experts, who render testimony that seems inconsistent with the clinical events or prevailing standards of care. Many practitioners worry that the ready availability of "experts" whose primary motivation is financial gain creates an environment in which plaintiffs' attorneys can pursue and win malpractice lawsuits that have little or no merit.

Long-standing Concerns

Over the past decade, the Committee on Professional Liability has actively explored the expert witness problem. An early attempt involved the Expert Witness Subcommittee, which solicited examples of expert testimony that defendant anesthesiologists and their lawyers considered "outrageous." This approach faltered in several ways. First, the subcommittee was not often convinced that the submitted examples were outrageous or entirely lacking in merit.

In a related attempt, the Committee on Professional Liability sponsored a presentation and open discussion of purportedly outrageous testimony at an ASA Annual Meeting. This event left many participants with the sense that after-the-fact criticism of expert testimony was highly subjective and dependent on factors that were difficult to assess simply on the basis of recorded testimony.

Finally, a preliminary plan to publish examples of outrageous testimony in the *ASA NEWSLETTER* was put aside after legal counsel pointed out that this effort might be very time-consuming, expensive and a potential source of liability for ASA.

Fresh Insights From Closed Claims

In view of these difficulties, the Committee on Professional Liability took a fresh approach to the study of expert testimony by turning to the resources of its Closed Claims Project. The Closed Claims Project (one of the principal activities of the Committee on Professional Liability) consists of a standardized collection of detailed case summaries of closed malpractice claims, retrieved from the files of more than 35 U.S. insurance carriers. In aggregate, these carriers provide malpractice insurance for approximately half of the country's practicing anesthesiologists. More than 4,000 claims have been collected since 1985, creating a large and unique database for the study of professional liability.

In 1991, the Closed Claims Project database was used to explore the possibility that the opinions of experts may be influenced by the severity of patient injury. The specific goal was to determine whether severe injuries were more likely than minor injuries to predispose medical experts toward harsh judgments about the appropriateness of anesthesia care.

To study this question in a rigorous manner, 112 practicing anesthesiologists were recruited

to judge the appropriateness of anesthesia care using 21 case summaries selected from the Closed Claims Project database. About one-half of the cases had temporary injuries and one-half had permanent injuries or death. For each case, a matching but "fictitious" version was created that was identical in every detail to the original case except that a plausible outcome of opposite severity was substituted. The original and fictitious cases were divided randomly into two sets and assigned to the volunteer reviewers, who were unaware of the intent of the study. The reviewers were asked to independently rate the appropriateness of anesthesia care in each case, based upon the conventional yardstick of reasonable and prudent practice applicable to the year the event occurred.

How did the ratings of appropriateness of care differ between the original and fictitious cases, which differed only in the severity of injury? The proportion of ratings for appropriate care decreased by 31 percentage points (from 67 percent to 36 percent) when the case outcome was changed from a temporary injury to a permanent injury. Conversely, the proportion of ratings for less-than-appropriate care increased by 28 percentage points (from 28 percent to 56 percent) when the case outcome was changed from temporary to permanent injury. These findings indicate that the severity of injury can have a substantial impact on a reviewer's assessment of the appropriateness of care.

Sincere and Well-Intentioned Experts

This is a worrisome observation, because the tendency to associate severe injury with less-than-appropriate care suggests that the objectivity of a well-intentioned expert witness can be affected by the outcome of the case. These findings also suggest that the presence of a severe injury, *by itself*, increases the likelihood that a plaintiff will be able to find support from an expert witness.

A subsequent study from the Closed Claims Project provided additional insight into sources of divergent opinions among medical experts. Using actual case files and records from medical malpractice proceedings, pairs of Closed Claims Project anesthesiologist-reviewers were asked to independently evaluate sets of randomly selected claims during their data collection visits to insurance companies. Again, the reviewers in this study used the criteria of "a reasonable and prudent practitioner" to assess the appropriateness of anesthesia care.

Overall, the reviewer-pairs examined 103 claim files. They agreed on appropriateness of care in 62 percent of cases and disagreed in 38 percent of cases. This finding must be tempered by the statistical expectation that the reviewers would be expected to agree in 40 percent of the cases *simply by chance*. Although the reviewers agreed more often than would be expected if they had simply flipped a coin, the level of agreement was only in the poor-to-good range when chance agreement was taken into account.

These observations indicate that neutral experts (the reviews were conducted in a setting that did not involve advocacy or financial compensation) commonly disagree in their assessments when using the accepted standard of reasonable and prudent care. From a practical standpoint, this study suggests that opposing opinions may be easy to find by consulting multiple experts. Although attorneys may sometimes resort to the services of "liars-for-hire," the results of this study suggest that supportive experts can often be found simply by "witness-shopping" within a pool of physicians whose behaviors are usually regarded as sincere and well-intentioned.

What Can Be Done?

Case review is such a complex activity that we are unlikely to find any rapid or dramatic remedies for the variability of expert opinion. A simple and practical counterbalance to the biasing effect of severity of injury might be achieved if each reviewer considered how his or her opinions in a given case might differ if no injury occurred, or if the patient sustained a very severe outcome. This mental exercise might lead to more objective assessments of care.

Another potential remedy is the pursuit of *explicit* rather than *implicit criteria* for case review. Implicit criteria are based upon personal, subjective and unstated tests or measures that are applied by the individual reviewer. In contrast, explicit criteria are predefined tests or measures that are agreed upon and specified before the process of review begins. Implicit criteria are generally associated with much poorer agreement than explicit criteria. Unfortunately, explicit criteria are often difficult to create, especially for complex activities such as the delivery of anesthesia care. A workable approximation of explicit criteria may be achieved by using a well-defined process for expert review. If experts utilized a logical and structured sequence of steps in the course of case review, variation in expert opinion might be reduced.

The Committee on Professional Liability maintains a keen and ongoing interest in the problems of expert testimony. At the present time, the committee is reviewing the existing ASA "Guidelines for Expert Witness Qualifications and Testimony" to determine whether modifications are needed. Comments, ideas and suggestions from the membership of ASA are always welcome.

References are available on request from the authors.

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