

LAW & MEDICINE

Expert Witnesses Under Fire

Peer review, which plays an important role in reviewing medical care in hospital settings, sometimes is abused and warped to a degree never envisioned by legislators.

Two examples now moving through state legal systems warrant attention. They are *Joseph Kamelgard, M.D. v. the American College of Surgeons* (Circuit Court of Cook County, Ill.), and *Charles Yancey, M.D. v. American Academy of Ophthalmology, et al.* (4th Judicial District, Hennepin County, Minn.).

In the Kamelgard case, Dr. Kamelgard, a well-regarded bariatric surgeon from New Jersey, testified for the first time as a medical expert in a malpractice lawsuit in federal court in Brooklyn, N.Y. The plaintiff, a New York resident, was cared for at a Staten Island hospital. The defendant was a physician who, according to court records, had been named previously in professional liability cases. The jury decided in favor of the defendant physician.

The defendant physician never challenged Dr. Kamelgard's testimony. But the defendant later filed a complaint with the American College of Surgeons (ACS), accusing Dr. Kamelgard of allegedly testifying falsely regarding relevant standards of care. The ACS decided to charge Dr. Kamelgard with violating its rules, but shortly before a scheduled hearing, lawyers intervened on Dr. Kamelgard's behalf. The ACS later dropped the case; no explanation was ever given.

Despite Dr. Kamelgard's requests, the

ACS refused to provide him with a copy of the complaint against him, the identity of his accuser, or even the names of the three members of the ACS deemed qualified as bariatric surgeons to review the complaint for the college.

Dr. Kamelgard filed a petition seeking the identities of these three members. The ACS asserted that what was being sought was protected by the state's Medical Studies Act (MSA), its peer review statute.

According to court filings, the ACS admitted that no practice of medicine occurred in Illinois, that testifying equates to the practice of medicine, and that by testifying there Dr. Kamelgard practiced medicine in New York (though New York's statute defining medical practice does not include testifying). But even though he was not licensed

in Illinois and had no connection to the state except belonging to the ACS headquartered there, the ACS wrote that any physician who becomes a member agrees to be bound by Illinois law. The ACS, which has over 74,000 members worldwide, suggests by this case that Illinois law governs its conduct.

In the Minnesota case, Dr. Yancey sued a Dr. Weis, and his expert, a Dr. Hardten, for defamation as a result of their filing an ethics complaint against him with the American Academy of Ophthalmology (AAO). At the time the ethics charge was filed, Dr. Yancey was the expert medical witness for the plaintiff in a malpractice case in which Dr. Weis was a defendant.

(As with Dr. Kamelgard, this was the first time that Dr. Yancey had ever testified as a medical expert.) Dr. Yancey also asserted that the AAO violated its own rules when it handled the complaint against him, including not keeping the matter confidential.

After a jury returned a verdict for \$3 million in favor of the plaintiff, the case was going to be retried on damages with Dr. Yancey again offering testimony. But a day before this was to occur, the AAO served on him the ethics charge Dr. Weis and Dr. Hardten had filed.

According to his lawyer, Dr. Yancey claimed the ethics charge was an attempt to force him to alter his testimony, and to chill his ability to testify in other, subsequent cases that may have come his way. The defendants moved to dismiss Dr. Yancey's complaint and, in the alternative, for the summary judgment.

In the Kamelgard case, which is pending in Illinois but now on appeal, it remains to be seen whether an Illinois court will opine on how the ACS believes the Illinois statute should be used. The Yancey case is also still pending.

State peer review statutes were enacted to maintain and improve health care by keeping the products of a peer review committee privileged from discovery. (The exception to this is when certain cases are litigated in federal court—see my column "A Matter of Privilege," Jan. 15, 2008, p. 34.)

The Yancey and Kamelgard cases highlight attempts to redefine peer review statutes to include judging expert testimony within the practice of medicine. Such statutes were also not intended to apply solely because an organization is headquartered in a particular state without

any health care rendered there, or to chill an expert from further testifying during the course of a legal proceeding.

These cases also show that professional medical organizations sometimes seek to muzzle health care providers when their testimony is inappropriate in the eyes of such organizations. This trend may be influenced in part by a resolution adopted years ago by the American Medical Association declaring that testifying is considered the practice of medicine.

Granted, some physicians don't belong in a courtroom offering expert testimony. However, the Kamelgard and Yancey cases illustrate the Damoclean swords that professional societies may think they can wield in order to prevent physicians from offering legitimate expert medical testimony. After all, giving expert opinion is not rendering patient care, and thus is not generally considered the practice of medicine under state law.

If you are a physician wishing to consult or testify, don't be dissuaded from doing so—provided that you review all medical records properly and thoroughly, you are well credentialed, and you are familiar with all applicable medical standards by way of background, experience, and training. In addition, consult not only with your own organizations as to their standards and policies on testifying, but also ask the lawyer who retains you what your state law requires of experts who testify in legal cases. ■

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BY MILES J. ZAREMSKI, J.D.

INDICATIONS

'I Play One on TV'

Have you seen those Lipitor commercials with Dr. Robert Jarvik? Did you know that Pfizer paid him at least \$1.35 million to do those ads, even though he's not a cardiologist? Are you surprised to learn that he's not even licensed to practice medicine, although he does have a medical degree? What would you say if we told you that some of his former colleagues wrote to Pfizer in 2006 to complain that Dr. Jarvik was somewhat misidentified as "the inventor of the artificial heart"? How about that House Energy and Commerce Committee, which is examining the commercials as part of its investigation of consumer drug advertising? Who was that body double rowing across the lake in one of the ads, since Dr. Jarvik does not appear to row himself? Are we the first to tell you that Pfizer has agreed to pull those ads? Is anyone besides us expecting the next Lipitor campaign to include Dr Pepper, Dr. House, and Julius Erving? Who thinks we should stop trying to write while "Jeopardy" is on?

Yippee!

How's your golf game? Specifically, how's your putting? Are you a little shaky on those

3- and 4-footers? (We're changing the channel now.) Rich Lundahl is, and after he missed a 6-inch putt in the final round of the 2005 Fairbanks Open, he sought professional help from Dr. Charles Adler of the Mayo Clinic in Scottsdale, Ariz., who was studying the causes of putters' cramp, better known as the yips. While 25 yippers and 25 nonyippers putted, he measured muscle activity in the right hand and forearm with a virtual-reality glove so special even Tiger Woods doesn't have one—the \$14,000 CyberGlove. The results aren't in yet, but here's a clue to Dr. Adler's recommended treatment for the yips: The study was sponsored by Allergan Inc., whose biggest seller happens to be Botox. Stay tuned.

Two Great Tastes

Have you ever held a piece of pork fat and wondered, "How can I make this taste even better?" (Okay, we're turning the TV off. Really.) Wonder no more. Great culinary minds in Ukraine—where people have been eating pork fat, or "salo," for years—have taken the next great leap for all pork-kind: They are dipping salo in chocolate. Death rates from heart disease in Ukraine already are among the highest in Europe,

so physicians there are not exactly embracing the "super" salo. "People should steer clear of the Ukrainian Snickers," Dr. Svetlana Fus of the Kiev Medical Research Center told the Bureau of Indications' London office (you may know it better as the BBC). Pfizer's Ukrainian division is now working on chocolate-covered Lipitor.

Not-So-Lean Fighting Machine

The Ukrainians may say that they love chocolate-covered pork fat, but we think we know where the super salo is really going. In Germany, soldiers think that the army's motto is "Eat all you can eat." A report written for the Defense Ministry, which drew from a study conducted at the University of Cologne, showed that 40% of all German soldiers aged 18-29 years are overweight, compared with 35% of civilians in the same age group. It also noted that 70% of Germany's 250,000 soldiers are regular smokers. Reinhold Robbe, parliamentary commissioner for the military and the report's author, wrote, "Soldiers are too fat, don't do enough sports, and don't pay attention to what they eat." Maybe they're paying too much attention to what they eat.

Man's Best Friend

Living with pets helps elderly people

avoid loneliness, and animal-assisted therapy using dogs has become an accepted part of care in nursing homes. So why not try using a robot dog? Enter AIBO. Residents at three nursing homes in St. Louis received weekly visits from AIBO the robotic dog, a live dog, or no dog at all. Surprisingly, the AIBO and live-dog groups enjoyed the same drops in loneliness, which leads the Bureau of Indications to ask: What else can be replaced by a robot dog? Here are some suggestions: Mickey Mouse, Congress, global warming, the Burger King (you know, the guy in the commercials with the huge plastic head), Barry Bonds (another guy with a really big head), synchronized swimming, Howard Dean (has anyone ever measured his head?), Heathrow airport, the infield fly rule, lima beans, Mitt Romney (normal-size head, big hair), the subprime mortgage market, Britney Spears, Comcast, Hugo Chavez (big head, even bigger ego), Guitar Hero, the George Foreman grill, George Foreman. ... You get the idea. If you know of someone, or something, that could be replaced by AIBO the robot dog, send your idea to us at imnews@elsevier.com with "robot dog" in the subject field.

—Richard Franki