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MEDICAL TESTIMONY

## M.D. WITH A MISSION

### A Physician Battles Against Colleagues He Considers Rogue Expert Witnesses

BY TERRY CARTER

Dr. a. Bernard Ackerman saw his professional world turned upside down the first time he testified as a medical expert witness. It was 1981 and the national spotlight was on the murder trial of Jean Harris, headmistress of the prestigious Madeira School for girls in McLean, Va., just across the Potomac River from Washington, D.C. On the weight of expert testimony for the prosecution that pathologist Ackerman considered dishonest, Harris was convicted of murdering her longtime paramour, Dr. Herman Tarnower. The cardiologist was famous for his book and weight-loss regimen called *The Complete Scarsdale Medical Diet*.

The greater pathology, in Ackerman's estimation, was what took place in the courtroom. He came to believe that a physician's testimony might sometimes be tailored to a desired outcome rather than to the demands of cold, hard science. Harris' conviction stemmed in large part from testimony about flecks of skin and other tissue on bullet fragments. It turned on the question of whether Tarnower held his hand up in a defensive posture at the time he was shot or whether he was killed accidentally while trying to stop Harris from committing suicide.

This first venture into the courtroom, Ackerman wrote in the journal *Medical Heritage* in 1985, had a profoundly disillusioning impact on me. I am told by colleagues who have also appeared in court that my disillusioning experience is not unique. What is needed, he suggested, is peer review in the courtroom—a way for an expert witness's testimony to be scrutinized by other experts, as is done with their professional practice, writing and teaching.

My mantra is: You can't do in the courtroom what you wouldn't do in the classroom, Ackerman says nearly 25 years after the Harris trial. He has taken that to the court of public opinion. Ackerman is a leader in the fast-growing, increasingly organized movement to police medical expert witnesses.

Last summer, he co-founded the Coalition and Center for Ethical Medical Testimony, an online community of doctors and lawyers sharing information on cases and experts at [www.ccemt.org](http://www.ccemt.org). Shortly thereafter, the CCEMT forged a relationship for reduced membership fees and information sharing with Medical Justice,



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which offers a prepaid legal plan to augment medical malpractice insurance and go aggressively after plaintiffs lawyers and expert witnesses who might have stepped over the line. It is online at [www.medicaljustice.com](http://www.medicaljustice.com).

Both groups plan to develop archives of depositions and trial transcripts of expert witness testimony. Medical Justice, launched in 2002, lists members' names on its Web site to let one and all know who they are and what might happen if they are subjected to frivolous litigation or dishonest testimony. When a member is sued, a Medical Justice lawyer sends a letter to the plaintiff's lawyer with a warning: The group will be monitoring the case and any expert witnesses.

Critics say the movement is rolling down a one-way street, aiming to intimidate plaintiffs' witnesses. But Ackerman says he's going after any and all errant testimony.

It's all gotten out of control, Ackerman says of what he believes is the increase in hired-gun witnesses looking for money rather than truth. I have witnessed the plummet of medicine in America. It was spectacular in the old days and it has come to a terrible pass.

Ackerman is a well-known researcher and teacher in a little-known specialty dermatopathology, the study of skin diseases. He has completed residencies in several major university hospitals, as well as a fellowship in dermatopathology at Harvard. He has served as director of dermatopathology at several medical schools and, in 1999, launched his own Ackerman Academy in New York City.

Since that initial appearance in the Harris trial, Ackerman has testified in about 250 cases. Through 1999, his crusade to bring peer review to the courtroom was largely academic. Then it became personal.

## **FEELING THE HEAT**

In Ackerman's own medical malpractice trial in 2000, three prominent physician-researchers testified against him. The plaintiff died from melanoma during trial, and the defense decided to settle for \$2.7 million before the jury reached a verdict. It came out later that the Philadelphia jury intended to award the plaintiff \$20 million.

Ackerman subsequently became a more prolific writer on the ethics of medical expert testimony, with much of it aimed at the experts who lined up against him in court. A document-filled section of the CCMT Web site titled "A Trial in Philadelphia" catalogs and illustrates his relentless effort to prove to the world that they lied.

He and his lawyers have sent letters of complaint to medical licensing boards, medical-specialty and other professional societies, the American Medical Association and various professional journals. Included are excerpts from trial transcripts and examples of the witnesses' own research and writings that he says are contrary to their testimony. In his own online professional publication, *Dermatopathology: Practical and Conceptual*, Ackerman has laid out his case against those expert witnesses and written to them repeatedly, trying to get them to respond to his detailed indictment of them.

I decided that this was a watershed for me, Ackerman says.

This was so incontrovertible, open and brazen lying, so open-and-shut, it's embarrassing. Mine is not a tunnel vision focused on the trial in Philadelphia. That's just a springboard for an attempt to change the culture of the system, which is flawed.

Anyone who spends a few minutes clicking through documents on the CCEMT Web site will know they do not ever want A. Bernard Ackerman coming after them.

He's brilliant and he's ruthless in the sense of ruthlessly trying to go after the truth of the case, says Dr. Mark Hurt, a dermatopathologist at the Washington University in St. Louis School of Medicine. He's your best friend if you're telling the truth. But liars need to beware because their numbers are up. As long as he's alive and kicking, he'll be championing this.

After several years of trying unsuccessfully to get medical societies and licensing boards in three states to investigate the plaintiff's witnesses in the Philadelphia case, Ackerman finally got some movement on one of them. His lawyers convinced the Pennsylvania Department of State to agree that the State Board of Medicine should reopen its investigation of a prominent physician who testified against Ackerman. The lawyers were persuasive in their argument that the amendments to the state Medical Practice Act had expanded the definition of "unprofessional conduct" such that it could be applied to expert testimony.

The detailed correspondence on the CCEMT Web site indicates that the licensing board brought in an oncologist to investigate the testimony of Dr. DuPont Guerry, a world-renowned oncologist and director of the hematologyoncology program at the University of Pennsylvania Health System, which includes the School of Medicine. Guerry did not respond to a request for an interview.

I understand the report is in and we are waiting for the decision, says Russell M. Pelton, a Chicago lawyer who represents Ackerman.

## **GAINING GROUND**

Perhaps prompted by the investigation in Pennsylvania, the Federation of State Medical Boards adopted a resolution at its annual meeting in May to define "false, fraudulent or deceptive testimony by a physician as unprofessional conduct." The resolution was introduced by the Pennsylvania State Board of Medicine, which had balked at first when Ackerman asked it to consider medical expert testimony as the practice of medicine and thus subject to scrutiny under guidelines for professional conduct.

Ackerman's tactical victory was another in a line of big ones for his lawyer, too. Pelton's law practice has focused for more than two decades on the problems of medical expert testimony, which is what brought Ackerman to him. As general counsel to the American Association of Neurological Surgeons since 1983, Pelton has been a leader in getting medical societies to develop guidelines for expert witnesses. The AANS was the first to do so, in 1983. The guidelines were written by Pelton and later amended to include sanctions. The AANS has handled roughly 50 complaints over the years, leading to 10 suspensions and one expulsion.

The movement got a huge boost from a 2001 decision by the 7th U.S. Circuit Court of Appeals at Chicago in a suit against the AANS by a suspended member who claimed the sanction caused a catastrophic loss in income. One of the plaintiff's arguments was that it is against public policy for an association to sanction a member because it deters experts from testifying.

But Chief Judge Richard Posner concluded the neurosurgeon's drop in moonlighting income as an expert witness from \$220,000 to \$77,000 a year is not the professional body blow that the cases have in mind.

Further, Posner said professional self-regulation furthers rather than impedes justice. The AANS has an interest in preventing experts from using their membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves, he wrote. Judges, who are experts in no field but law, need the help of professional associations in screening experts. *Austin v. American Association of Neurological Surgeons*, 253 F.3d 967.

## GROUPS SIGNING ON

In recent years, several other specialty groups have consulted with Pelton in developing similar programs, including the North American Spine Society and the American College of Obstetrics and Gynecology, he says. More are beginning to do so.

The Florida Medical Association adopted procedures, based on the AANS guidelines, for peer review of complaints and a formal process for forwarding successful complaints to the state licensing authority.

FMA President-elect Dennis S. Agliano, the prime mover behind the initiative, says the first complaints, comprising eight cases, are now under review. And he helped convince the American Medical Association to adopt policy in 1997 that defines a physician's medical expert testimony as the practice of medicine and calls for it to be subject to peer review.

The Medical Society of New Jersey recently adopted a program similar to Florida's and is now putting together review panels for various specialty areas. Last year, the Ohio State Medical Association created a Frivolous Lawsuit Committee. It is funding motions for sanctions in cases where it believes its members were added frivolously as defendants in medical malpractice cases.

While the AMA encourages peer review of witnesses, it only recently adopted a mechanism for doing so itself and only in tobacco litigation. At the association's 2003 annual meeting, its House of Delegates called for a system to review questionable testimony in tobacco cases. Complaints that are upheld through the AMA's due process can lead to sanctions up to expulsion, and they will be forwarded to any state, county or specialty societies to which the errant witness belongs.

At that same AMA meeting, Ackerman was invited to speak at an open forum with the group's Council on Ethical and Judicial Affairs.

This is a widespread problem, he told the audience, discussing

unethical medical expert witnesses. Do you think doctors who lie in court do that only in court? They lie to patients.

Part of the reason the movement resonates so powerfully is that physicians have begun looking for tort reform by other means. And while part of the equation is that they take malpractice suits personally, the crush of ever-increasing insurance premiums is the driving force.

## SEEKING A REMEDY

The reasons for the rise in insurance rates in recent years are debatable. The Wall Street Journal reported in-depth in 2001 that price wars and accounting practices in the early '90s made the business look more profitable than it actually was.

When that proved wrong, premiums could not keep up with claims even though claims didn't increase much. But whatever the reasons, physicians seek remedy anywhere they can get it.

We don't look at ourselves as a tort reform organization, says Dr. Louise Andrew, a physician with a law degree who co-founded the CCEMT with Ackerman. We're not trying to escape lawsuits. We clearly know and acknowledge that there are a lot of lawsuits out there that ought to be happening, as long as the people supporting them and making them go forward are honest.

But some others haven't made that distinction. Late last year, for example, a Texas radiologist put up a Web site listing names of patients who have sued physicians. The site, [www.doctorsknow.us](http://www.doctorsknow.us), announced on its home page: They can sue, but they can't hide. Malpractice plaintiffs must now permanently bear the burden of their public claims. The site was taken down in March, following cries of blacklisting and threats of lawsuits.

While the CCEMT and Medical Justice condemn that sort of tactic, plaintiffs lawyers tend to see the entire movement as part and parcel of witness intimidation. It is no secret that it is harder to find an expert witness for the plaintiff than it is for the defense. Many physicians do not look kindly on colleagues who help bring down other colleagues.

I think this is all a concerted plan by certain groups in organized medicine in which they tell you one thing but they're really doing something else, says Neal A. Roth, a Miami plaintiffs lawyer. He is a former president of the Academy of Florida Trial Lawyers and has chaired the group's medical malpractice committee.

They're saying physicians are giving irresponsible medical expert testimony, but what they're really trying to accomplish is witness tampering, Roth says. Actually, it forces plaintiffs lawyers to go to witnesses who are much more flexible in their analysis of cases as opposed to being able to go to good, objective witnesses.

Roth dares the medical profession to come up with what he calls the perfect world solution: Groups of physicians from both private practice and academia who take an oath to review cases objectively without knowing whom they involve.

Rather than chase witnesses away, it would be better to find a way to get people to take an objective look at any case, Roth says.

## SCRUTINIZING THE DEFENSE SIDE

Dr. Milton Okun, a critic of both Ackerman's published research and his crusade to rein in errant medical expert testimony, says abuses by defense witnesses are rampant.

Defense witnesses will distort the truth terribly often, says Okun, a dermatopathologist and clinical professor of pathology and laboratory medicine at the Boston University School of Medicine.

Much of this is a one-sided attempt by the medical profession and insurance industry to take away rights of patients.

Yet defense witnesses aren't being targeted by medical associations, says John Vail, a senior attorney with the Center for Constitutional Litigation in Washington, D.C., an arm of the Association of Trial Lawyers of America.

From what we know of the specialty societies, there has never been a review of someone who testified for the defense, Vail says. That's pretty telling.

Vail, on behalf of ATLA, represented a Florida neurosurgeon in a lawsuit against the AANS that was similar to the one decided by the 7th Circuit. That decision prompted them to drop the suit.

The neurosurgeon's testimony at issue in the case prompted the North Carolina Medical Board last fall to suspend the neurosurgeon's license to practice in that state for one year. It is one of only a handful of known cases in which a physician's license has been suspended or revoked on the basis of medical expert witness testimony.

The North Carolina Medical Board brought in both Ackerman and Andrew for consultation on the case.

Andrew, the CCEMT's co-founder and president, stopped practicing medicine two years ago. She is a consultant on risk management, litigation stress management and witness preparation. Andrew hopes to change the perception that the call for peer review of testimony is a disguised attack on plaintiffs.

The CCEMT is geared toward both sides of the courtroom, she says. In speaking engagements, she not only talks about the need for ethical testimony but also encourages physicians to work as expert witnesses.

Ackerman characterizes the group's goal as positive for both doctors and lawyers. We're out to save two professions: medicine and law.

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