No. 00-4028

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DR. DONALD C. AUSTIN,

Plaintiff-Appellant,

vs.

AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS,

Defendant-Appellee.

Appeal from
The United States District Court
For the Northern District of Illinois
Eastern Division
The Honorable Elaine E. Bucklo, Presiding Judge
No. 98 C 7685

BRIEF OF *AMICI CURIAE* AMERICAN MEDICAL ASSOCIATION, ILLINOIS STATE MEDICAL SOCIETY AND AMERICAN COLLEGE OF SURGEONS IN SUPPORT OF THE DEFENDANT-APPELLEE, AND SEEKING AFFIRMANCE OF THE JUDGMENT BELOW

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Oral Argument Requested

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

(formerly known as Certificate of Interest)

Appellate Court No. 00 4028

Short Caption: Dr. Donald C. Austin v. American Association of Neurological Surgeons.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Amicus American Medical Association

515 N. State Street

Chicago, IL. 60614

(2) The names of all firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Hubert, Fowler & Quinn

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any;

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: _____ Date: February 27, 2001

Attorney's Printed Name: Carolyn Quinn, Esq.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

1202\010102.B21

Statement of *Amici Curiae*

I. Introduction

This brief of *amici curiae* is filed in support of the appellee, the American Association of Neurological Surgeons and is submitted on behalf of the American Medical Association, the Illinois State Medical Society and the American College of Surgeons. *Amici* urge this Court to affirm the District Court's order granting appellee summary judgment.

This brief is submitted on motion of *amici*, seeking leave of the Court to file the brief. Fed. R. App. Proc. 29(b). A copy of the motion is filed with this brief.

II. Identities and Interest of *Amici Curiae*

Amicus Curiae the American Medical Association (AMA), an Illinois non-profit corporation, is an association of approximately 300,000 physicians who practice throughout the United States.[1] The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. Its members practice in all fields of medical specialization, including neurosurgery, and it is the largest medical society in the United States.

Amicus curiae the Illinois State Medical Society (ISMS) is a non-profit, professional organization of over 12,000 practicing physicians, medical residents and

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[1] The AMA and ISMS file this brief on behalf of the American Medical Association/State Medical Society Litigation Center ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine, in the courts.

medical students. ISMS membership encompasses practicing physicians from a broad range of specialties, geographic locations, and types of practice.

Amicus Curiae the American College of Surgeons (ACS) is a non-profit organization of over 57,000 surgeons. ACS was organized in 1913 for the purpose of improving the quality of patient care by elevating the status of surgical education and practice.

Amici file this brief to support the actions of the American Association of Neurological Surgeons (AANS) in disciplining Dr. Austin. Because the rendering of expert witness testimony constitutes the practice of medicine, *amici* believe that the testimony should be subject to the same exacting standards of professionalism expected of a physician in any other sphere of his or her practice. Additionally, expert witness testimony is subject to peer review, and any physician failing to maintain standards set by the profession should be disciplined accordingly.

Like the AANS, the primary currency of *amici* is the standards they set for the medical profession. Any erosion in those standards --- by the expression of unsupportable medical opinions at trial or otherwise --- threatens the viability of the organizations as educational and accrediting entities, and more importantly, ultimately threatens the well-being of the public that entrusts its health to the members of that profession. In the considered opinion of *amici*, the medical profession is best equipped to articulate the standards of the profession, and to recognize when those standards have been breached. This act of self-policing is essential to the continued credibility of organized medicine.

Summary of Argument

Dr. Austin argues that the district court erred in granting summary judgment to the AANS. This is not true. The AANS complied completely with all legal restrictions on its disciplinary procedures. Commensurate with Illinois law, the AANS adopted a neutral rule and adhered to it. The AANS allowed Dr. Austin generous opportunities to defend his actions and then grounded its decision to suspend Dr. Austin solely on the tenets of sound medical practice.

Amici urge the Court to affirm the District Court's judgment for the AANS. The disciplinary action taken by the AANS against Dr. Austin was entirely consistent with the standards advocated by *amici* for the rendering of expert opinions by a physician. Courts should exercise restraint in interfering with disciplinary action by a voluntary medical society against one of its members, when that discipline was prompted by actions that the society has deemed contrary to the standards of the profession. Failure to do so not only threatens to dilute the effectiveness of peer review as a means to ensure high professional standards, but also impermissably infringes on the right of private, voluntary associations, like *amici* and the AANS, to free expression.

ARGUMENT

I. Expert Witness Testimony Constitutes the Practice of Medicine

Amici encourage physicians to serve as impartial expert witnesses. See AMA Policy H-264.994(1) and Ethics Opinion 9.07, American Medical Ass'n, *Policy*

Compendium 126, 416 (1999) (*"AMA Policies")*. [2] *Amici* recognize that by acting as a witness in litigation, a physician may fulfill an important civic obligation. American Medical Ass'n, *Proceedings of the House of Delegates*, Bd. Of Tr. Report 18, "Expert Witness Testimony" (Interim Meeting, 1998) ("*Expert Witness Testimony"*). Nonetheless, rendering expert medical testimony constitutes the practice of medicine (AMA Policy H-265.993, *AMA Policies* at 416), since the testimony requires a statement from the physician as to the proper standard of care in treating a certain condition, and the physician must rely on his/her special skill, training and expertise in order to state that opinion. See *Expert Witness Testimony* ("According to an AMA survey of medical practice acts, 29 states define the practice of medicine with language such as 'holding oneself out to the public as able to diagnose, treat and cure disease.'")

Further, because the expert testimony constitutes the practice of medicine, it should comply with the standards of good medical practice as articulated by the medical

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[2] There are four main categories of AMA policies, including two categories that are pertinent to the instant appeal. Policies of the AMA House of Delegates (designated "H-. . . ."):

> "are the main health policies of the AMA that are determined by the House of Delegates. These policies are statements of . . . professional principles and scientific standards. They are the cornerstone of the AMA and define what the Association stands for as an organization. . . . Health policies provide the information and guidance that physicians seek from the AMA." See "About AMA Policy" at http://www.ama-assn.org/apps/pf_online/pf_online?aboutY&assn=AMA&s_t=&st_p=nth=1&

The Ethical Opinions of the Council on Ethical and Judicial Affairs reflect the application of the AMA's Principles of Medical Ethics to a number of ethical issues in medicine. Id.

profession, and physicians who fail to meet these standards should be subject to discipline. To do otherwise would implicitly sanction poor medical practice, and violate the trust the public places in the medical profession to monitor physicians and promote only the best medical practices. Moreover, failure to discipline poor medical practice -- even in the form of expert testimony --- erodes professional standards, ultimately placing the public health at risk. Id . ("Fraudulent testimony constitutes a threat to the quality of health care by possibly affecting the standard of care".)

To this end, *amici* have adopted policies directed to maintaining high standards of professionalism in expert witness testimony.

> **H-265.992: Expert Witness Testimony:** [The] AMA: (1) encourages each state medical society to work with its state licensing board toward the development of effective disciplinary measures for physicians who provide fraudulent testimony; (2) provides legal and advocacy support to those medical and specialty organizations who seek to devise programs designed to discipline physicians for unprofessional conduct relative to expert witness testimony; . . . (4) continues to educate physicians about ethical guidelines and professional responsibility regarding the provision of expert witness testimony. . . ." *AMA Policies* at 415.

> **H-265.994: Expert Witness Testimony:** ....(2) [The] AMA is on record that it will not tolerate false testimony by physicians and will assist state, county and specialty medical societies to discipline physicians who testify falsely by reporting its findings to the appropriate licensing authority....." Id. at 416.

The AANS's ethical guidelines for expert witness testimony are consistent with *amici*'s policies. The AANS policy promotes good medical practice and professionalism by requiring that the expert ground his opinion on the "relative facts" of the case, and that the opinion be fortified by accuracy and "document[s]." (Defendant's Statement, par. 34)

Dr. Austin's argument that the AANS wields its Code of Ethics to stifle minority opinion among neurosurgeons lacks merit. Unlike the policy at issue in Bernstein v. Alameda-Contra Costa Medical Association, 293 P.2d 862 (Cal. App. 1956), cited by Dr. Austin, the AANS ethics code does not encourage punishment of AANS members who testify against other members of the society. The expert witness guidelines of the Code of Ethics relate only to the content of the testimony, demanding that expert opinion stated by a member be informed, accurate and documented. (Defendant's Statement, par. 34) These provisions thus apply to the expert testimony of any member, whether the opinion is rendered on behalf of a plaintiff or a defendant.

Moreover, nothing in the AANS's ethics code prevents a member from claiming violation of the section by a neurosurgeon testifying on behalf of a defendant. Again, the provision is broadly phrased and takes no sides in the litigation process. The fact that more complaints may have been lodged against physicians testifying as plaintiff is irrelevant to this Court's inquiry. Whether the AANS acted in bad faith in suspending Dr. Austin is determined solely by the AANS's own rules governing member behavior and whether there was any evidence presented to the AANS to suggest violation of the rule. If proof presented to the AANS indicates that the rule was violated, the AANS cannot be found to have acted in bad faith. Austin v. American Association of Neurological Surgeons, No. 98 C 7685, slip op. at 6 (N.D. Ill. October 20, 2000). The relevant guideline in the case --- the AANS's Code of Ethics--- looks solely to the substance of the testimony, and not on whose behalf it is offered.

The nub of the issue, then, is whether any evidentiary basis existed for the

AANS to decide that Dr. Austin gave inaccurate testimony, or whether the disciplinary process was simply "a kangaroo court run with the cynical purpose of harming [Dr. Austin] while pretending to be fair. . . ." Id. Counsel for the AANS thoroughly and convincingly demonstrates that the AANS did not act in bad faith or with prejudice or bias against Dr. Austin. *Amici* will not repeat those arguments here. *Amici* add only this observation: the literature cited by Dr. Austin as support for his testimony in Ayres v. Ditmore does not, on its face, justify his expert opinion. According to Dr. Austin's brief, he testified that, absent an anatomical variation, the damage to the plaintiff's recurrent laryngeal nerve must be the result of Dr. Ditmore's negligence. (Aplnt. Brf., p. 23) One authority cited by Dr. Austin states only that "serious complications" may follow a rough retraction of the nerve, but the portion quoted does not identify what these "serious complications" are. See Cloward, Ralph B., Complications of anterior cervical disc operation and their treatment, Surgery, Feb. 1971, p.175, at Aplnt. Brf., p. 24. Also, Cervical, Thoracic and Lumbar Complications -- Anterior Approach, states that damage to the recurrent laryngeal nerve "usually" follows vigorous retraction or dissection. Aplnt. Brf., p.24. The qualifier "usually" leaves open the possibility that an inartful retraction of the nerve will not result in damage to the nerve. Stated differently, Dr. Ditmore could have retracted the nerve too aggressively, yet not caused any harm to it. Therefore, neither of these articles quoted by Dr. Austin supports Dr. Austin's emphatic conclusion that the *only* possible cause of the injury was vigorous retraction of the nerve. Dr. Austin's testimony did not accurately represent the literature on which he relied. The AANS acted in good faith when it concluded that Dr. Austin violated its

Code of Ethics.

II. Any Questions Concerning the AANS's Determination That Dr. Austin Violated the AANS's Code of Ethics Should Be Resolved in the AANS's Favor.

Amici do not dispute that, in limited situations, voluntary medical societies must submit to judicial review. However, *amici* respectfully request that the Court exercise restraint in its inspection of AANS discipline activities. As stated previously, the rendering of expert testimony constitutes the practice of medicine and, as such, is subject to peer review, the process of physicians evaluating the competence of other physicians. Courts have traditionally refrained from interfering in the medical profession's enforcement of sound medical practice. Judicial restraint is also consistent with the state law that determines the outcome of this case.

Peer review contributes to the:

> "enhancement of quality of patient care through effective supervision of health care professionals, elimination from the health care system of those who should not practice, and treatment of those whose abilities are impaired and in need of rehabilitation." American Hospital Association, *Immunity for Peer Review Participants in Hospitals* 9 (1989).

Legislative and other deliberative bodies recognize the importance of peer review to public safety by codifying the concept in statutes and industry standards. For example, a hospital will not receive Medicare or Medicaid reimbursements unless the hospital incorporates an effective peer review procedure into its practices. 42 U.S.C. sec. 1395x (e), (k); 42 U.S.C. sec. 1396a (a)(9)(A), (19), (26). The Health Care Quality Improvement Act of 1986, 42 U.S.C. sec. 11101 et seq. (1986) ("HCQIA"), was

designed in large part to encourage physicians to identify and discipline fellow physicians who may be or are incompetent or who engage in potentially dangerous or unprofessional behavior. HCQIA immunizes peer review participants from federal or state lawsuits, provided their actions are taken (1) in the reasonable belief that the action would further the quality of health care; (2) after reasonable efforts to obtain the facts; (3) in compliance with adequate due process requirements of notice and an impartial, fair hearing; and (4) with the reasonable belief the facts warranted the action. See 42 U.S. C. sec. 11112(a)(1)-(4). In Illinois, peer review deliberations by medical staff members enjoy a statutory immunity from civil damages so that physicians will be encouraged to frankly discuss performance of fellow physicians without fear of retribution. 210 ILCS 85/10.2 (1998). The Joint Commission on Accreditation of Healthcare Organizations (JCAHO), which sets quality standards for hospitals and other health care entities across the nation, refuses to accredit any hospital that lacks peer review procedures specified by JCAHO. Joint Comm'n on Accreditation of Health Care Org., *2000 Hospital Accreditation Standards* 303 (2000). Thus, authoritative entities outside the medical profession affirm organized medicine's belief in the importance of vigorous self-examination by the medical profession.

Critically, physicians bear sole responsibility for peer review. The duty cannot be delegated to non-physicians. American Medical Ass'n, *Proceedings of the House of Delegates,* Council on Medical Service Report, "Principles for Voluntary Medical Peer Review" (Interim Meeting, 1981). The non-delegable duty stems from the highly specialized nature of the profession. Those individuals with comparable education,

training and experience are qualified to articulate acceptable standards of medical practice and professionalism. The many years of preparation needed to practice medicine necessarily limits the number of individuals able to understand the scientific, technical and ethical considerations that coalesce in the treatment of a single patient. Even the best-educated layperson, moreover, cannot fully grasp a physician's art; that privilege, and its concomitant obligations, is reserved to the practitioner.

For these reasons, courts have traditionally tread carefully when reviewing decisions of physicians that rely on their substantive medical knowledge. In Sosa v. Val Verde Memorial Hospital, 437 F.2d 173 (4th Cir. 1977), the Fifth Circuit Court of Appeals reviewed a hospital's refusal to grant privileges to the plaintiff doctor. The Sosa court noted the judiciary's right to enforce certain procedural protections guaranteed a hospital staff applicant, such as the requirement that refusal be grounded in matters reasonably related to operation of the hospital. Sosa, 437 F.2d at 176. However, the Fifth Circuit stated that "no court" should substitute its evaluation of matters of professional ethics and competency for that of the hospital board ruling on Dr. Sosa's application.

> "The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff actions are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, the court should not interfere. Courts must not attempt to take on the escutcheon of Caduceus." Sosa, 437 F.2d at 177.

Illinois courts have long displayed the same reluctance to substitute their

judgment for that of physicians in matters of professional performance. In Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 487, 506-07, 544 N.E.2d 733 (1989), the Illinois Supreme Court explained why Illinois courts exercise only limited review over decisions to revoke, suspend or reduce hospital staff privileges.

> "The judicial reluctance to review these internal staff decisions reflects the unwillingness of courts to substitute their judgment for the professional judgment of hospital officials with superior qualifications to consider and decide such issues." Adkins, 129 Ill. 2d at 507.

See also Claydon v. Sisters of the Third Order, 180 Ill. App. 3d 641, 536 N. E.2d 209 (4th Dist. 1989); Rao v. St. Elizabeth's Hospital, 140 Ill. App. 3d 442, 488 N.E.2d 685 (5th Dist. 1986).

Illinois case law cautioning against interference with the merits of hospital medical staffing decisions is applicable to the case at bar. The AANS's stated purpose is to articulate and maintain the highest possible standards of nuerosurgical practice. Membership in the AANS implies to the public that a member satisfies those standards, just as admission to a hospital staff indicates that a physician satisfies the professional and ethical criteria established by the hospital. Therefore, a court should not second-guess a professional association's findings of unprofessional conduct by one of its members, just as the court would not second-guess a similar decision made by a hospital medical staff.

Amici firmly believe that the AANS acted in good faith and the record shows that, as an expert witness, Dr. Austin did not accurately present the opinion of the neurosurgical community. Rather, because the AANS engaged in peer review to ensure

the highest standard of medical practice, this Court should exercise restraint in its review and, in any instance of doubt, defer to the educated deliberations of the AANS.

III. Professional Societies, Like *Amici* and the AANS, Possess a Constitutionally Protected Right Not to Associate With Professionals That Do Not Meet The Societies' Standards

No less important than Dr. Austin's constitutional right to due process in this case is the right of the AANS, *amici*, and similarly situated professional societies to free expression, through freedom of association. Affirming the District Court's decision in this case is necessary to protect the interests of individuals who wish to express their aspiration for the best in medical professionalism by, at least in part, their membership in medical professional societies.

The right to free assembly is a natural, and protected, extension of the right to free speech. See Consumer Party v. Davis, 633 F.Supp. 877, 885 (E.D. Pa. 1986); Good v. Associated Students, 86 Wash. 2d 94, 542 P.2d 762, 766 (1975); U.S. Const. amend. I; Ill. Const., art. I, sec. 5. [3] The right of association "includes the right to express one's attitudes or philosophies by membership in a group or by association with it. . . ." Good, 542 P.2d at 766. "Freedom to associate carries with it a corresponding right not to associate." Id ; In re C.S.M., 570 P.2d 229, 230 (Colo. 1977) ("One's right of free

[3] "The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty." Alexis DeTocqueville, Democracy in America 193 (J.P. Mayer ed. Harper Perennial 1969) (1831).

association does not extend so far as to force another to associate with one against the other person's will."). "[A] group's associative rights depend on having as members only those who share a particular vision and collective purpose." Consumer Party, 633 F. Supp. at 890.

Amici have previously explained the careful, deliberative process that culminates in the expression of formal policy by a medical society like the AMA, ISMS, ACS or the AANS. This process illustrates the high standards that these organizations set for themselves and their members. They subject proposed policies to the same exacting scrutiny that they turn on their own practice of medicine. These standards are as much an expression of principle as they are a measure of quality. It is the right of professional societies to welcome among their ranks only those individuals, otherwise qualified, who meet their standards. *Amici* believe that the actions of the AANS in disciplining Dr. Austin fall well within any professional society's right of free expression.

Conclusion

For the reasons stated above, *amici curiae* the American Medical Association, the Illinois State Medical Association, and the American College of Surgeons urge the Court to affirm the entry of judgment for the AANS. The actions of the AANS in disciplining Dr. Austin are entirely consistent with the ethical standards approved by organized medicine and serve the public's interest in having physicians meet those standards in all areas of practice.

Respectfully Submitted,

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