Letters to the Editor

Discussion of "The Use of Microphotometry to Characterize Microscopic Amounts of Blood"

Dear Sir:

I have read with interest the paper by Kotowski and Grieve, "The Use of Microphotometry to Characterize Microscopic Amounts of Blood" (Vol. 31, No. 3, July 1986, pp. 1079-1085).

In our laboratory we have been using this technique for four years and it was published in France in 1983 (*J. de Mede. Lég. Droit Medical,* Vol. 26, No. 5, 1983, pp. 555-559). I have also presented this work at the last International Association of Forensic Science Meeting (Oxford, 1984) and Mr. Grieve was attending this meeting. Furthermore, this paper will soon be published in the *Acta Medicinal Legalis et Socialis Review* (Liege, Belgium).

So I am quite surprised to read in the references that Kotowski and Grieve have never heard anything about our work.

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Authors' Response

Dear Sir:

The library section of most forensic science laboratories is limited by financial considerations as to the number of journals to which it may subscribe. We do not receive copies of any journals published in France.

Mr. Grieve's connection with the published work related to the use of the microspectrophotometer and his attendance at the IAFS Meeting in Oxford was concerned with the sessions on hair and fiber examinations, which are his primary area of expertise. The presentation by J. L. Clement and P. F. Ceccaldi at Oxford was apparently a late entry as it is not listed in The Program and is not published in The Abstracts (*Journal of the Forensic Science Society,* Vol. 24, No. 4, July/Aug. 1984).

The work in our laboratory was initiated, as stated, by an accidental observation. We regret that the work of Clement and Ceccaldi was unknown.

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Discussion of "Peer Review in the Courtroom"

Sir:

The medical examiner staff in our office shares in Dr. Davis' concern about the need for peer review in the courtroom [1]. As Dr. Davis points out, providing a mechanism for such review is difficult for reasons which this author feels are related primarily to jurisdictional overlap and lack of an agency with broad based concern and no jurisdictional limitations.

Although the Florida statute (which provides for appropriate discipline for physicians who render substandard or unprofessional testimony) is admirable, its effectiveness may be limited for a number of reasons. First, medical expert testimony is often unopposed and would therefore frequently go unnoticed and unreviewed by anyone with adequate training and experience to evaluate such evidence. Second, peer review would probably occur only if an interested party in a specific case had knowledge of specific testimony and chose to take issue with the testimony of another witness, creating a one-on-one situation which could be construed as a personal vendetta rather than an attempt to arrive at the truth. Third, expert testimony, for some, is "big business" which involves interstate travel and testimony. An expert witness who testifies in a state where he is not licensed to practice medicine may not be subject to disciplinary action by the state where testimony was rendered (that is, "no jurisdiction"). Finally, such a system does not provide a mechanism for monitoring the frequency or whereabouts of repetitive testimony by specific individuals whose activities may warrant scrutiny by peers. Presently, it would be a considerable undertaking to acquire and review transcripts of testimony rendered by a given individual because it would require nothing short of a private investigation just to determine where and when the testimony occurred.

The author proposes the following to help with providing a mechanism for peer review of medical testimony in any form.

- All states should pass legislation similar to that in Florida to create the ability to discipline physicians who give false, substandard, or unprofessional testimony.
- Not only as a matter of courtesy and ethics, but as a matter of principle and pursuit of justice, any physician who plans to offer testimony in a case where another physician is also a witness should discuss the medical aspects of the case with that physician witness, as well as respective opinions about medical issues in the case. Such dialogue may expand each witnesses' knowledge concerning fact and opinion in a given case, and may avert testimony which is targeted at specific, perhaps irrelevant, issues when placed in the context of a complete case scenario. It is likely that each potential witness would learn something from such conversation, either about the specific case in question, the other witness, or his own area of expertise, all of which may be beneficial to justice in a given case. Further, such dialogue could only help a medical expert witness in altering, reversing, modifying, maintaining, or reinforcing his own opinion about specific facts, observations, or hypothetical situations of a case before trial. Thus, truth and justice would ultimately be served. Discussions between potential medical witnesses do not violate the principles of our adversary legal system; two or more physicians who are well trained, honest, objective, altruistic, and even good friends may well maintain a difference of opinion after thorough and honest discussion of a case. Discussion of a case could only serve to discover those experts whose motives are something other than to help the trier of fact determine the truth.
- All states should pass legislation that requires the following to occur.

Each time evidence such as testimony, affidavit, or deposition of a medical doctor is introduced as expert evidence in any court of law, the court recorder should complete an information card and submit it to the AAFS or similar society (such as The National Association of Medical Examiners) whose ethics committee is not restricted by jurisdictional boundaries. Such a standardized information card should contain the following information:

(a) the medical expert's first and last names;
(b) the medical expert's hometown and home state;
(c) the court involved in the case;
(d) the court case number;
(e) the city and state where the court is located;
(f) the date that expert medical evidence is introduced;
(g) the case name (that is, *State v. Jones*);
(h) whether the case is criminal or civil;
(i) whether the evidence is testimony, deposition, or affidavit;
(j) whether the expert is a witness for the prosecution, plaintiff, or defense;
(k) the court recorder's name; and
(l) the type of case (that is, murder, product liability, and so forth).

Such information, if computer stored, could be made available to any party with legitimate interest and would, at least, facilitate the following.

1. Any physician could obtain a "log" of his own testimony, depositions, or affidavits to use how he wished.
2. The data could provide a list of locations, dates, and general type of evidence rendered by given individuals so that transcripts could be located for medical review of accuracy, frequency, and ethics.
3. Prosecution, plaintiff, and defense attorneys who wish to run background checks of potential witnesses would have an accessible data source for whatever investigation is warranted.
4. Statistical analyses of within jurisdiction and cross-jurisdictional testimony could be done by appropriate legal, medical, and forensic science agencies.
5. Retrospective studies of specific cases or series of cases could be performed to determine the impact of testimony on trial outcome and prosecution, plaintiff, or defense strategies.
6. A central data source would be available to any state agency (such as medical license boards) or any professional society (such as medical specialty boards) to facilitate investigations made by those agencies.
7. The data base would enable response to specific inquiries, and would also facilitate random, periodic review of testimony.
8. Periodic publications could be produced which tabulate the testimony log of individuals belonging to specific professional societies.
9. Retrospective analysis of a given individual's response to the same question in different settings would be facilitated.
10. Analysis of the responses of different individuals to the same questions would be facilitated.
11. Regional differences in the frequency, approach, quality, and nature of testimony could be evaluated.

It would also be of interest and value to explore initially the motives and reasons of those who are in support of such a "monitoring system" as well as those who oppose such a plan.

It is the author's opinion that the American Academy of Forensic Sciences is dedicated to serving justice through the application of science and medicine, and its concern for quality and ethics should not be limited only to its membership. The cost of collecting data as described above would be relatively small, and by charging a nominal fee for the distribution of data, such a program could be self-supporting. Data would be immediately available to the AAFS for peer review by and of its medical members, and could be supplied to any other agency involved in peer review or disciplinary action of their respective members. Ethics committees of professional societies such as the AAFS are not bound by membership or

jurisdictional restraints; their candid support or disapproval of any professional engaged in the same professional field should occur regardless of membership status.

It is understood that "professional overlap" also creates potential problems. For example, a medical doctor may testify about the absorption of alcohol, and the adversary witness may be a pharmacologist who testifies about the same issue. It is the author's opinion that we should live with that overlap for now, clean up our own act first, and hope that other professions will follow suit.

This correspondence is intended to provoke the thoughts of its readers, in hopes that members of The Academy will initiate some plan of action which will ultimately provide for a formal, regular mechanism for peer review of medical courtroom testimony, both randomly and when called for. This letter will have accomplished its purpose if any formal discussion ensues.

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Reference

[1] Davis, J. H., "Peer Review in the Courtroom," *Journal of Forensic Sciences*, Vol. 31, No. 3, July 1986, pp. 803-804.

Author's Response

Sir:

Dr. Hanzlick has presented a complex program for a complex subject. There are a number of factors that mitigate against a structured peer review of testimony by a private membership organization.

The first is the inordinate time it takes to analyze a record. The full testimony, direct and cross, of the witness should be studied including copies of supporting documents furnished to that witness. The review analysis should determine if the testimony arose from errors of interpretation of basic knowledge, from witness excursion into a field of science beyond his ken, or from inadequate witness examination by the involved attorneys. The costs of transcripts plus the limited number of experienced reviewers with time to devote are significant.

There are problems of initiation of review. To limit frivolity, guidelines for initiation of review are essential. The gating mechanism is not yet clear to me.

We have the problem of due process compounded by the ease with which a shady professional may file nuisance suits against reviewers. The legal expenses to a private organization are a major concern.

Last is the operating cost to create and maintain such a system within a voluntary scientific organization. It would appear that the primary educational mission of the organization could be vitiated by adversary forces arising from the disciplinary process associated with testimony review.

It is for these reasons that I felt it wise to test the concept of testimony review within the licensing board functions of government on an ad hoc basis. Perhaps it is better at this time to wait for the state to hammer out precedent based upon a few cases than for the private

sector to assume a burden of overall courtroom peer review in procedurally and legally uncharted waters.

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