

Witnesses for Petitioners Are Often Tough to Find

Few medical experts are willing to testify in vaccine court that shots can cause harm.

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The vaccine court can be a hostile place not only for petitioners but for their expert witnesses too.

Take the case of Dr. Derek Smith. A neurologist and assistant professor at Harvard Medical School, Smith had been retained to testify for people with transverse myelitis, a potentially paralyzing neurological disorder.

Smith said he was "highly confident" that the tetanus vaccine could trigger the ailment in certain vulnerable individuals. Officials with the Vaccine Injury Compensation Program strongly disagreed.

Petitioners in vaccine court can have a tough time finding top experts, in part because many doctors are reluctant to say vaccines can cause harm. But Smith had no such qualms.

"He was so smart," said Sylvia Chin-Caplan, a lawyer for dozens of victims of the neurological ailment. "I had somebody who had academic credentials, who did research and had a clinical practice," she said. "Those are the best people you can get."

Then Smith quit.

According to court papers and interviews, Smith decided to bail out after complaints were lodged with his superiors by three other experts with a long history of testifying for the government in vaccine court.

Smith had raised the ire of one of these men — Dr. Roland Martin, a prominent researcher at the National Institutes of Health. The two had gone head-to-head as opposing witnesses, and Martin claimed that Smith had mischaracterized some of his research.

Early in 2002, Smith was informed by his supervisors, Dr. David Hafler at Harvard and Dr. Howard L. Weiner of Brigham and Women's Hospital in Boston, where Smith had

his clinical practice, that people they respected told them Smith "was ruining his reputation by his testimony in the vaccine program," according to a document filed in vaccine court.

Wary of antagonizing people who could affect his career, Smith decided to drop out after testifying in one last case, according to Chin-Caplan and other sources.

Although there were no explicit threats, Chin-Caplan said Smith was told in so many words that he was jeopardizing his access to research funding.

His loss "was really heartbreaking," Chin-Caplan said. She also considered it a case of witness tampering.

Smith declined to be interviewed. None of the five other doctors — his supervisors and the three government witnesses — would comment.

Nor would program officials discuss the propriety of their witnesses contacting Smith's bosses. They said in a written statement that they were "not privy to and cannot control professional interactions on the part of VICP medical experts."

It was not the first time a key witness for petitioners was lost to hard-nosed tactics. Another time, Justice Department lawyers persuaded an expert to switch sides, helping them defeat a string of claims.

The cases involved children who suffered seizures and brain damage after diphtheria-pertussis-tetanus, or DPT, vaccinations. But the children also had a congenital condition — tuberous sclerosis, or TS — that could trigger seizures by itself. The issue was whether the shot or only TS was to blame.

Petitioners won a couple of these cases in the early 1990s, thanks to testimony by Dr. Manuel Gomez of the Mayo Clinic, described in court rulings as "the world's expert in TS."

Facing at least two dozen similar claims, the government mounted an aggressive counterattack. It retained three experts who then published three medical journal articles that supported the government's stand, according to program records.

And without the knowledge of petitioners, government attorneys also contacted Gomez, briefed him on the work of their other experts and retained him as a defense expert.

Gomez was "the guru of tuberous sclerosis," said Robert Moxley, a Wyoming lawyer for petitioners. His defection "was completely pivotal." Like Chin-Caplan, Moxley described the government's actions as witness tampering.

In September 1997, Special Master Laura Millman issued a lengthy ruling in the government's favor — basically finding that TS, not the vaccine, is usually responsible

when TS infants suffer seizures. Gomez, Millman noted, had believed otherwise, "but in light of his more thorough education in the literature (courtesy of respondent) he has changed his mind."

Her ruling led to the defeat of most TS claims.

Contacted recently, Gomez said he had altered his opinion "mainly from accumulated evidence." Otherwise, he said, "I don't think I have much to tell you."

Millman's ruling was affirmed in 2001 by the U.S. Court of Appeals for the federal circuit, which also found no proof of improper conduct in the government's hiring of Gomez.