

Topic: Medical Malpractice Reform

General Purpose: Inform on the issue of Expert Witness Testimony

Specific Purpose: To persuade that for the purposes of malpractice litigation, a medical expert should be well defined, a "practicing" physician or professional active in his/her purported field of expertise.

Thesis: The medical malpractice crisis will continue to deteriorate as long as unqualified opinions are accepted as "expert" in order to keep a frivolous claim in the system.

Introduction:

- I. Medical malpractice liability laws were created for two purposes. They compensate for patients who suffer harm at the hands of negligent doctors, and they provide appropriate incentives for doctors to be responsible. But the laws don't always have the desired effect. Doctors often point to liability laws as one of the reasons medical costs have skyrocketed over the past decades. Liability laws drive physicians to undertake expensive diagnostic testing or treatments of dubious statistical medical value in order to protect themselves.
- II. Kessler and McClellan from Stanford asked the question of how government policy affects real economic and social outcomes and looked at a population of medicare beneficiaries with cardiovascular diseases admitted to U.S. hospitals in 1984, 1987, and 1990. Some states had enacted medical liability reforms, such as West Virginia, and California, others had not. This made for a natural experiment on the effect of liability reform based on the variation in state laws. Would medical malpractice reforms lead to lower treatment costs – but not worse outcomes - for patients? They found that if medical liability laws were relaxed doctors indeed stopped going to expensive lengths to protect themselves from lawsuits, and patients ended up just as healthy. Reducing malpractice pressure brought down hospital expenditures for elderly people with heart disease by approximately 5 percent, yet didn't leave the patients sicker.
- III. What is it about malpractice laws that frighten physicians? It is the prospect of a lawsuit that is more dreaded than the size of the award they may have to pay. Generally physicians are insured against the financial losses but there is nothing to shield them from the stress of a court case and the possibility of a ruined reputation.

The Expert Witness Issue:

- I. One of the aggravating factors about medical malpractice cases is the presence of a substantial number of what practitioners see as frivolous cases. These vary by region and medical specialty. It is the presence of "shotgun" suits naming all the doctors on a medical chart, even if the majority of the physicians have

no responsibility for the patient's outcome, and the initiation of a suit for a poor or undesired outcome, understood prior to the treatment as a possible outcome or risk of the treatment, but not reflecting negligence, that have drastically increased the number of cases. Even though a case is ultimately dismissed, it still produces large amounts of emotional trauma, and requires time, and money better spent elsewhere. The monetary costs of defending frivolous cases are one variable driving the cost of insurance. Often physicians are asked to settle frivolous suits by their insurance carrier instead of paying the high legal costs of fighting them.

- II. The primary method used to perpetuate a frivolous lawsuit is by obtaining "expert" witness testimony early-on in the proceedings to say that negligence or a breach in the standard of care was present. Without an "expert" there is no case. Juries, and even attorneys and judges have no effective way of evaluating the credentials of an "expert" except that he or she has an M.D., D.O., or PhD. To the dismay of many legitimate physicians a cottage industry has arisen within the USA of colleagues who earn the majority of their income or greatly supplement their income by offering "expert" testimony. One need only go to the internet and search on Medical Expert Witness to immediately find a plethora of sites from which to select a witness (I found four sponsored links and 1,867 matching sites on an AOL search alone, many of which are individual physicians advertising expertise). Some of the sites have physicians who are actively practicing in a specialty and offer opinion only in their field. However, there are many who begin with an opening statement that plaintiffs should be protected. While a truism, this opening statement suggests strongly that the forthcoming opinion will be based on a specific predilection toward the plaintiff.
  
- III. Physicians are not requesting that medical expert testimony be eliminated. The expert witness plays an essential role in determining medical negligence under the US system of jurisprudence. By and large, the courts rely on expert witness testimony to establish standards of care germane to the malpractice suit. Generally, the purpose of an expert witness testimony in medical malpractice is to describe standards of care relevant to a given case, identify any breaches in those standards, and if so noted, render an opinion as to whether those breaches are the most likely cause of injury. In addition, an expert may be needed to testify about the current clinical state of a patient to assist the process of determining damages. The expert in a malpractice case is not a "witness of fact" (those testifying because they have personal knowledge of the incident or people involved in the lawsuit). The expert here is given more latitude in being allowed to compare the applicable standards of care with the facts of the case and interpret whether the evidence indicates a deviation from the standard of care. The medical expert also renders an opinion (within reasonable medical certainty) as to whether or not the breach in the standard is the cause of the patient's injury.

- IV. Physicians are asking that the "expert" be clearly defined and adhere to reasonable criteria. Expert witnesses should be unbiased conveyers of information. The pivotal factor in the medical liability process is the integrity of the expert witness testimony. It should be reliable, objective, and accurate and provide a truthful analysis of the standard of care. The medical community and the public are aware that not all experts testify within scientific standards and ethical guidelines. Medical societies have implemented strategies to regulate expert witness testimony through prevention, peer review, and sanctioning programs. However, medical societies have to approach such methods with caution. Aggressive expert witness disciplinary programs may be seen as organized medicine preventing physicians from testifying to the truth. The medical community has to be committed to reviewing and sanctioning false statements by medical experts for the defense as for the plaintiff.

**House Bill NO.64;** introduced by R. Brown; "An act providing for qualifications for medical malpractice expert witnesses; and providing an applicability date".

#### Summary

- a. Must hold a current, valid, and unrestricted medical license in at least one state;
- b. Physician expert witness must be actively engaged in clinical practice in the medical specialty or area of medicine about which they testify including knowledge of or experience in performing the skills and practices at issue to the lawsuit, or be an instructor of students in an accredited health professional school, accredited residency program, or clinical research program relating to the diagnosis or condition or the type of treatment that is the subject matter of the malpractice claim.
- c. The expert witness must show by competent evidence that they are thoroughly familiar with the standards of care and practice in the same or a similar community as they related to the act of omission that is the subject of the malpractice claim on the date of the incident upon which the claim is based
- d. If the treatment is recommended by a physician the expert must be a physician
- e. An expert in one specialty or subspecialty is not qualified to testify in a different specialty or subspecialty unless there is knowledge of the standards of care for the other specialty or subspecialty and significant similarities exist in the standards of care between the specialties or subspecialties.

**The physicians of the Rocky Mountain Health Network strongly support the passage and implementation of House Bill No. 64. It is a major step forward in helping to control runaway malpractice claims by defining the medical expert witness in Montana.**

Additional Information regarding the expert medical witness:

- I. **Expert witness testimony should be unbiased and complete:**
  - a. Regardless of the source of the request for testimony (plaintiff or defendant), expert witnesses should lend their knowledge, experience, and best judgment to all relevant facts of the case.
  - b. Expert witnesses should take necessary steps to ensure that they have access to all documents used to establish the facts of the case and the circumstances surrounding the occurrence.
  - c. Relevant information should not be excluded for any reason and certainly not to create a perspective favoring the plaintiff or the defendant.
  - d. The expert witness's opinion should be fair and objective. The expert witness should be comfortable with his or her testimony regardless of whether it is to be used by the plaintiff or the defendant.
  
- IV. **The Standard of Care:**
  - a. The physician expert witness should be familiar with the medical standards at issue before accepting a case.
  - b. When a variety of acceptable treatment modalities exist, this should be stated candidly and clearly.
  - c. Expert testimony should not condemn performance that clearly falls within generally accepted practice standards or condone performance that clearly falls outside accepted practice standards.
  
- V. **Assessing Breach of Care and Proximate Cause:**
  - a. Experts should base distinctions made between medical malpractice and medical maloccurrence (poor outcome, known and explained complications), on science not on unique theories of causation;
  - b. Know that transcripts of depositions and courtroom testimony are public records and may be reviewed by audiences outside the courtroom;
  - c. Be willing to submit transcripts of depositions and courtroom testimony for peer review.
  
- VI. **Ethical Business Practices:**
  - a. Contractual agreements should promote fairness, accuracy, completeness, and objectivity.
  - b. Compensation should be reasonable and commensurate with the time and effort involved.
  - c. Physicians should not enter into contracts in which the compensation for expert witness testimony is contingent on the outcome of the case.

Useful Web resources:

[www.hcla.org](http://www.hcla.org) – Health Coalition on Liability and Access >50 organizations.

[www.atra.org](http://www.atra.org) – American Tort Reform Association

<http://aspe.hhs.gov> – Medical Liability updates from HHS

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