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Expert opinions: Defendants aren't the only ones on trial

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Editor's note: *Somewhere, a medical expert is reviewing a case right now. Hopefully, that expert will review a well-documented chart and have a favorable opinion of the nurse's or physician's actions. At the heart of every medical malpractice case is a medical expert witness. The outcome of a medical malpractice case often depends on an expert's opinion and how well that expert conveys that opinion to a jury. Despite the important role that experts play within the medical malpractice system, until recently, there has been little oversight of expert witness actions. With the increasing number of professional and legal actions against expert witnesses, it appears that the same experts hired to review the actions of their peers are starting to be scrutinized themselves. This month's issue of the* ED Legal Letter *will address some of these issues that relate to the role of the expert witness.*

Overview

Witnesses in a court case can either be fact or opinion witnesses. **Fact witnesses** describe their direct observations to the jury. Although requirements may differ somewhat by state, in federal courts the testimony from a fact witness must be relevant to the issues being decided and may involve only matters about which the fact witnesses have personal knowledge.[1] A judge has the ability to exclude fact-witness testimony for multiple reasons, including propensities to cause unfair prejudice, confuse the issues being decided, or mislead the jury.[2]

Opinions or conclusions made by fact witnesses usually are not admissible as evidence, although there are exceptions to this rule. For example, a fact witness may be able to provide an opinion that a car was speeding without having seen the car's speedometer. The opinion would have to be based on

actual perceptions of the witness (the speed limit sign, the speed of one car in relation to the others, and previous experience with judging speed of automobiles) and would have to be relevant to some material fact in the case. Physicians may be called upon to testify solely as fact witnesses. As fact witnesses, the testimony would involve direct observations, such as a patient's blood pressure or motor deficits, but would not involve inferences relating to those observations, such as whether the motor deficits represented a stroke or whether the patient's blood pressure contributed to the stroke. Although the average juror might be able to draw conclusions from facts regarding a car accident, it is unlikely that an average juror would have sufficient knowledge to form a conclusion given medical facts. That is where medical experts come into play.

Opinion witnesses have much more latitude in their testimonies. In addition to testifying about relevant facts, expert witnesses in a medical malpractice action are called upon to provide opinion testimony regarding causation of alleged injuries and the standard of care to which the medical professional was held. Again, the admissibility of opinion witness testimony varies by state, but admissibility of expert testimony in federal courts is governed by the Federal Rules of Evidence. If specialized knowledge will assist a judge or jury in understanding evidence or in determining a fact in issue, then a witness "qualified as an expert by knowledge, skill, experience, training, or education, may testify [about the specialized knowledge] in the form of an opinion or otherwise."[3] Statutory guidelines regarding the admissibility of expert testimony in state cases often parallel the Federal Rules.

Whether an expert witness is qualified to testify based upon the above factors is a decision made by the trial court judge on a case-by-case basis.

Admissibility of Expert Witness Testimony

The United States Supreme Court decision in *Frye v. United States* controlled the admissibility of expert witness testimony for nearly 70 years. Some states still use the *Frye* standard. The more recent standard set forth in *Daubert v. Merrell Dow Pharmaceuticals* now controls admissibility of expert testimony in all federal courts and in a majority of state courts as well. The decision in *Kumho Tire Co. v. Carmichael* expands upon the *Daubert* opinion.

Frye v. United States.[4] In this case, the defendant Frye appealed a murder conviction when the trial court excluded an expert's testimony regarding scientific evidence the court deemed unreliable. Mr. Frye initially confessed to murdering a physician, then recanted. The defense expert testified about the "systolic blood pressure deception test," stating that concealing facts or attempting to hide the guilt of a crime, accompanied by fear of detection, reliably raises the systolic blood pressure in a predictable pattern. The defendant's expert administered this test to Mr. Frye, and he passed the test. Mr. Frye's attorney then attempted to have the favorable results entered into evidence, but the trial court excluded it. Mr. Frye appealed the case all the way to the U.S. Supreme Court. In its concise opinion, the Supreme Court held that for expert testimony about a scientific principle to be admitted into evidence,

> "the thing from which the deduction is made must be sufficiently established to have gained

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general acceptance in the particular field in which it belongs."

Because the proffered test had not reached the level of "general acceptance," the Supreme Court upheld the trial court's decision to exclude the evidence.

Frye's "general acceptance" test lasted for nearly 70 years. In fact, several states still follow the guidelines set forth in the *Frye* decision. Most courts now rely upon the following, more recent, opinion regarding the admissibility of expert witnesses.

Daubert v. Merrell Dow Pharmaceuticals.[5] With the creation of the Federal Rules of Evidence, the standards for admissibility of expert opinions changed. *Daubert* set the new standard for the admissibility of expert witness testimony in all federal jurisdictions and in many state jurisdictions.

In *Daubert*, the parents of two minor children sued Merrell Dow Pharmaceuticals after their children were born with birth defects allegedly caused by Merrell Dow's prescription drug Bendectin. Eight plaintiff experts asserted that Bendectin can cause birth defects based upon animal studies and unpublished analysis of previous human studies. The trial court ultimately dismissed the plaintiffs' case based upon an expert opinion that maternal Bendectin use was not a risk factor for human birth defects. On appeal, the appellate court affirmed, holding that plaintiffs' evidence did not meet *Frye's* general acceptance standard. On *certiorari* to the Supreme Court, 22 amicus briefs were filed and many well-credentialed experts testified for both sides of the case. In overturning the lower court decisions, the Supreme Court held that the Federal Rules of Evidence supplanted *Frye's* general acceptance standard in determining what scientific expert testimony is admissible. The Federal Rules were designed to "relax the traditional barriers to opinion testimony" to resolve legal disputes rather than to create more complex opinion testimony.

When an expert gives opinion testimony, *Daubert* requires that the trial judge make a preliminary determination as to whether the evidence is relevant and reliable. The reasoning or methodology underlying an expert's opinion must be scientifically valid and must be applicable to the facts at issue. Factors the trial judge may consider in determining the scientific validity of an expert opinion include whether the theory or technique has:

- undergone empirical testing;
- been subjected to peer review or published;
- demonstrated an acceptable error rate;
- gained widespread acceptance or been shunned within the relevant scientific community.

Those inquiries are suggested and not required. None of them are dispositive, and the trial judge has wide latitude in determining what testimony is and is not admissible. Rather than excluding "shaky but admissible" testimony, the *Daubert* court suggested using cross-examination and presentation of contrary evidence as a means to challenge questionable expert opinions. The judge may exclude unproven yet important innovations as being unreliable; however, the *Daubert* court considered such exclusions a tradeoff between being able to come to a quick and final resolution of legal cases vs. achieving a "cosmic understanding" of an issue. The court held that the primary goal in the trial judge's inquiry is to determine the relevance and reliability of an expert's opinion.

Kumho Tire Co. v. Carmichael.[6] This case essentially clarified and expanded the *Daubert* ruling, requiring the courts to use a gatekeeper approach to expert testimony not only in scientific testimony, but also in testimony based on professional studies or personal experience.

The plaintiff's expert in *Kumho Tire* testified that a tire blowout was caused by a manufacturing defect despite evidence that the tire was worn bald, that punctures in the tire had been inadequately repaired, and that the tire showed signs of abuse. The expert formed his opinion using criteria he personally developed while working at a tire manufacturing plant for 10 years, stating that unless at least two signs of abuse were present on a tire, he concludes that any tire blowout was caused by a manufacturing defect and not by abuse.

When commenting on the trial court's dismissal of the case, the Supreme Court noted that the plaintiffs provided no evidence that other experts in the industry used the expert's methods to reach a conclusion about tire separation. Similarly, no articles or papers were provided that validated the expert's approach. The testimony, therefore, "fell outside the range where experts might reasonably differ," and the trial court's exclusion of their expert's opinions was reasonable.

The Supreme Court also added that the objective of the circuit court gatekeeping requirement is to ensure that an expert uses the same level of "intellectual rigor" in the courtroom that is used when practicing in the expert's relevant field.

Courts have much latitude for determining

admissibility of expert witness testimony.[7] State courts are not required to follow the federal court holdings in *Frye* or *Daubert*. Some states do not. Colorado, New Mexico, and Wisconsin are among those that have chosen their own criteria for the admissibility of expert testimony. Although a few states still use the "general acceptance" standard from *Frye*, a majority of states have adopted requirements similar to *Daubert* to be used in determining the admissibility of expert testimony. Use of the *Daubert* criteria has become so widespread that arguments disputing the admissibility of expert testimony are sometimes termed "*Daubert* challenges." The gravity of this potential impact has created a niche industry tracking the outcome of cases involving *Daubert* challenges.[8] Presented are some examples of *Daubert* challenges of expert physician testimony.

Sosna v. Binnington.[9] The plaintiff had an exploratory laparotomy to relieve a small bowel obstruction. A postoperative wound infection developed, which subsequently led to sepsis and the patient's death. Two issues were raised regarding expert witness testimony. First, the plaintiff wished to cross-examine a defense expert about his personal practice for operative and postoperative patient management. The trial court did not allow such questions. On appeal, the Appellate Court agreed, stating that personal opinions were irrelevant to determinations of the standard of care. Second, the plaintiff made a *Daubert* challenge regarding the competency of a second defense expert, an internist, to testify about the standard of care for the defendant, a surgeon. In essence, the plaintiff argued that the defendant's expert was testifying outside of his area of expertise. The Court of Appeals allowed the testimony because the expert did not render an opinion regarding the technical aspects of the surgery, only about the proper pre- and post-surgical treatment of patients. Because the expert had performed research on the subject of the small bowel and had regularly treated patients with small bowel obstructions, his experience made him competent to testify about those aspects of the patient's care.

Sommer v. Davis.[10] The plaintiff in this case underwent several spinal surgeries. After the last surgery, his condition deteriorated, and a consultant physician apparently convinced the plaintiff that his previous treating physicians caused his problems. When being questioned by the defense attorney, the plaintiff's expert admitted that he was neither familiar with the standard of care for the community in which the alleged malpractice took place nor did he know the characteristics of the community in which the malpractice allegedly took place. Because Tennessee law requires that a plaintiff prove the defendant physician violated the standard of care for a community similar to one in which the defendant practices, the trial court barred the plaintiff's testimony. The Court of Appeals upheld the trial court's decision.

Note that the *Daubert* opinion creates several layers of checks for expert witness testimony. First, the trial court judge determines whether the expert's opinions are reliable and relevant. If those criteria are met, the expert is allowed to testify. Once the expert opinions have been deemed admissible, the opposing attorney may cross-examine the expert on his opinions both in deposition and in front of a jury. An appellate court then has the ability to review, and to possibly reject, any questionable testimony.

Although some may argue that these checks are sufficient to ensure that expert testimony is reliable and substantiated, neither judges nor juries may have the ability to understand highly scientific material. Given the technical nature of much medical testimony, medical organizations have created their own guidelines for medical expert testimony.

Expert Witness Guidelines

In addition to the court designations regarding expert witnesses, most medical societies have some type of policy statement regarding expert witness testimony.

The American Medical Association (AMA). The AMA has several policies regarding expert medical testimony:[11]

• **Policy H-265.992** encourages peer review and discipline of unprofessional or fraudulent conduct from physician expert witnesses.

• **Policy H-265.993** is an AMA declaration that providing medico-legal expert witness testimony is considered as the practice of medicine and should be subject to peer review.

• **Policy H-265.994** encourages members to act as impartial experts and warns that it will assist medical societies in disciplining physicians who provide false testimony. This policy also seeks to ban expert contingency fees in personal injury legislation

because such fees "threaten the integrity and the compensation goals of the civil justice system." Finally, this policy sets forth the AMA's minimum recommended requirements for qualification as an expert witness, which include that:

— the witness must have comparable education, training, and occupational experience in the same field as the defendant;

— the witness' occupational experience must include active medical practice or teaching in the same field as the defendant;

— the occupational experience must have been within five years of the date of the occurrence that gives rise to the claim.

Although these policies are not necessarily legally binding on physicians or on AMA members, they conceivably could be used as evidence against physicians deemed to have testified unprofessionally.

The American College of Emergency Physicians (ACEP). ACEP has similar guidelines for testimony by emergency physicians.[12] These policies require that the emergency medicine expert witness:

• Be certified by a recognized certification body in emergency medicine.

• Actively practice clinical emergency medicine for three years prior to the alleged malpractice.

• Possess a current license to practice medicine in the United States.

ACEP's policies state that because medical expert witness testimony may set standards of medical care, ACEP considers such testimony the practice of emergency medicine. In addition, ACEP policies do not allow current officers or board members to participate as expert witnesses in medical malpractice cases unless approved by ACEP's Board of Directors. ACEP also has an ethics review process and recently implemented a Standard of Care Committee, the latter of which reviews cases submitted by members and comments on the appropriate standard of care.

One unique step ACEP has taken to combat unethical expert testimony is the creation of an expert witness reaffirmation.[13] ACEP encourages members to sign the reaffirmation and enter it into evidence in medical malpractice cases. Expert witnesses who fail to sign the reaffirmation could then be cross-examined about why they are unwilling to do so. Among the representations that the ACEP reaffirmation makes are that the witness shall:

• Conduct a thorough, fair, and impartial review of the facts and the medical care provided.

• Testify only about matters in which the expert has recent clinical experience:

• Create an opinion applying generally accepted clinical standards.

• Make a clear distinction between medical malpractice and an untoward outcome.

• Agree to submit any testimony to peer review.

The American Academy of Emergency Medicine (AAEM). The AAEM has no official policy regarding expert testimony by its members. The only policy relating to expert testimony is that members of the board of directors may not provide testimony against another AAEM member while serving on the AAEM board.[14]

The AAEM web site does, however, have a link devoted to publicizing cases of "remarkable" expert physician testimony.[15] AAEM seeks to publish both cases of farfetched or unbelievable testimony as well as testimony having a significantly positive effect on physicians.

The problem with expert witness policies created by any professional society is the difficulty in enforcing them. If an expert testifies unprofessionally yet does not belong to a medical organization, the organization would have little standing to discipline the expert. For example, in one anecdotal case, a testifying expert claimed to be a member of the American Medical Association and a fellow of the American College of Emergency Physicians. Neither was true. After learning those facts, the understandably upset defendant physician contacted several professional societies and agencies to have the expert disciplined; yet none apparently felt they had the standing to become involved.[16]

When experts provide unsubstantiated opinions using their memberships in professional organizations to bolster their credibility, professional organizations have significantly more recourse.

Censure for Unprofessional Testimony

Professional organizations and licensing boards have demonstrated a willingness to censure unethical expert testimony. As these opinions show, courts also are quite willing to allow such censure.

Joseph v. District of Columbia Board of Medicine.[17] Dr. Joseph was a physician specializing in emergency medicine who provided testimony on

behalf of a plaintiff who died during surgery. He provided a curriculum vitae to attorneys that contained multiple false statements, including claims that he was board-certified in thoracic surgery and that he graduated first in his medical school class. His false statements were presented to the Maryland Commission on Medical Discipline. Dr. Joseph agreed to an order of reprimand from the Commission without admitting any wrongdoing. After entry of the order, the American Medical Association informed the District of Columbia (DC) Board of Medicine about the Maryland Commission's finding. The DC Board of Medicine then instituted proceedings against Dr. Joseph for willfully filing a false report in the practice of a health occupation. Dr. Joseph admitted that several of the statements he made on his curriculum vitae and in court were false, but justified his statements by stating that he was "so concerned about the care of this child" that he "rose to any lengths to prove [his] point."

After a hearing on the matter, the board found that Dr. Joseph was subject to discipline for the statements he made. Dr. Joseph appealed the board's decision, arguing that he was not practicing a health occupation when giving an expert opinion.

The Court of Appeals cited the statutory definition of the practice of medicine as the "application of scientific principles to prevent, diagnose and treat physical and mental diseases, disorders and conditions . . ." and then noted that Dr. Joseph essentially "diagnosed" the deceased girl's cause of death, much in the same way a consultant might. The Court also granted deference to the decision of the Board of Medicine, noting that the board had much more expertise than judges in interpreting medical terms, such as the "practice of medicine." In affirming the Board of Medicine's decision, the Court also referenced the "paramount" legislative purpose to protect the public interest in this manner by pursuing dishonorable and impermissible behavior exhibited by Dr. Joseph.

***Austin v. American Association of Neurological Surgeons*.**[18] Despite the lack of corroborating evidence, Dr. Austin, a plaintiff expert witness, testified that a defendant physician must have "rushed" while performing an anterior cervical fusion, retracting tissues too forcefully and causing damage to a patient's recurrent laryngeal nerve. Dr. Austin also testified that a majority of neurosurgeons would agree with his view that the patient's nerve injury could not have happened unless the defendant physician had been careless.

Although Dr. Austin cited two articles supporting his assertions, neither of the articles addressed the issues about which he testified. When cross-examined on why most literature did not confirm his assertions about what a majority of neurosurgeons think, Dr. Austin replied ("lamely," according to the court) that the legal atmosphere had deterred the surgical community from acknowledging that the injuries the patient sustained could occur only through the surgeon's negligence. Dr. Austin acknowledged that he never actually discussed the case with other neurosurgeons to determine whether they agreed with his unorthodox views.

The case in which Dr. Austin testified as a plaintiff's expert ultimately was decided in favor of the defendant physician, who then promptly complained to the American Association of Neurological Surgeons (AANS) regarding Dr. Austin's testimony.

After a hearing at which both sides were represented by counsel, the AANS suspended Dr. Austin's membership. Dr. Austin then sued the AANS, claiming that the decision was made in bad faith and adversely affected his "important economic interest" in earning income from expert testimony. He sought monetary damages for his loss of income and expungement of his record of disciplinary suspension from the society.

The Court of Appeals first noted that expert witness work was "moonlighting" income for Dr. Austin and that even a drop from $220,000 to $77,000, as he had claimed, was not a professional "body blow" that could be defined as an important economic interest.

Dr. Austin's claim that the AANS singled out plaintiff's experts in bad faith also was dismissed by the court, noting that the only complaints made to AANS were against plaintiff's experts and that AANS members had little incentive to make complaints against defense experts.

In addressing *Daubert* concerns, the court stated that judges may not be able to exclude shoddy medical testimony because judges are not experts in highly technical fields and may have no basis for questioning an expert's assertions. "Judges need the help of professional associations in screening experts," the court stated.

The Court also noted several issues of public interest addressed by actions the AANS took. There was an interest in sanctioning irresponsible testimony so that experts could not use association memberships to dazzle juries and deflect scrutiny of shoddy testimony. "More policing of expert witnessing is required, not

less," the Court held. There was also a "national" interest in identifying and sanctioning "poor-quality physicians" thereby improving the overall quality of health care. The Court ended its opinion by stating that Dr. Austin was performing "medical services" for the plaintiff and that if his testimony was any reflection of his medical judgment, he was probably a poor physician whose discipline and sanction would likely improve the overall quality of health care. The Supreme Court refused to hear Dr. Austin's appeal, letting the Circuit Court's opinion stand.

The *Austin* opinion sets an important precedent that professional associations have the ability to review expert testimony and to sanction conduct they deem inappropriate.

Legal Liability for Expert Witness Testimony

Because expert testimony has been deemed admissible does not mean that the testimony necessarily is appropriate or credible. Courts have even acknowledged "a judge's ruling that expert testimony is admissible should not be taken as conclusive evidence that [the testimony] is responsible."[19]

When a trial court is faced with a decision whether to allow shaky testimony, lawyers often argue that jurors should be the ones to determine whether to believe the expert and what weight to place on an expert's testimony. Unfortunately, when faced with contradictory expert opinions on the same issue, jurors may not have the ability to separate real science from junk science. Although medical experts still may testify about any opinions they wish, unsubstantiated opinions in medical malpractice cases are drawing closer scrutiny. In some cases, experts who provide unsubstantiated opinions are finding that they and their testimonies have become the targets of legal actions.

Expert witnesses traditionally have been afforded absolute immunity from civil prosecution for the opinions they give in court. For example, when addressing witness immunity in *Briscoe v. Lahue*, the United States Supreme Court expressed concern about witnesses slanting their testimony to avoid subsequent lawsuits, thereby depriving the jury of "candid, objective, and undistorted evidence."[20] The Court realized that some witnesses might fabricate evidence purposely, but believed that it was "in the end better to leave unredressed the wrongs done by dishonest [witnesses] than to subject those who try to do their duty to the constant dread of retaliation."[21] The Court extended the privilege of absolute immunity to witnesses, stating that witness "participation in bringing the litigation to a just — or possibly unjust — conclusion is . . . indispensable."[22]

Despite the doctrine of witness immunity created by the Supreme Court, several courts have imposed or upheld findings of liability against expert witnesses. One California court distinguished itself from the ruling in *Briscoe*, stating that absolving an unethical expert from liability "does not encourage witnesses to testify truthfully; indeed, by shielding a negligent expert witness from liability, it has the opposite effect."[23] Various other court opinions have warned that "more policing of expert witnessing is required, not less,"[24] and that "the day of the expert who merely opines and does so on the basis of vague notions of experience is over."[25] There have been several instances in which experts have had adverse legal actions taken against them.

LLMD of Michigan, Inc. v. Jackson-Cross Co.[26] This case did not involve medical testimony, but it does underscore the fact that although expert witness testimony may be immune from civil prosecution, expert witnesses still can be sued for negligently preparing their testimony.

In this case, the plaintiff's expert testified that his client had $6 million in lost profits, but the expert's calculation contained a mathematical error that overestimated the damages by more than $3 million. When this error was exposed at trial and the expert's integrity undermined, the plaintiffs chose to settle their case for $750,000. The plaintiffs then sued their expert for breach of contract and for professional negligence. The Pennsylvania Appellate Court dismissed the case, holding that expert witnesses were immune from civil prosecution for the testimony they give. The Pennsylvania Supreme Court reversed, holding that there could be a cause of action against experts — not for negligence in stating an opinion, but for negligence in formulating the opinion. The Court was careful to distinguish between articulating an opinion and formulating an opinion, stating that "an expert witness must be able to articulate the basis for his or her opinion without fear that a verdict unfavorable to the client will result in litigation," but also noting that the judicial process will be enhanced only by requiring that an expert witness render services to the degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent members of their profession.

Murphy v. A. A. Mathews.[27] This is another case in which a plaintiff sued its hired expert witness for allegedly providing litigation support services negligently. Again, this case did not involve medical professionals, but the Missouri Supreme Court's reasoning in the opinion is worth mentioning. The Court drew a distinction between fact witnesses and expert witnesses, stating that experts were "professionals selling their expert services" and not "unbiased court servant[s]." The Court therefore reasoned that immunizing an expert who was compensated for providing litigation support services did not advance the underlying public policy of ensuring frank and objective testimony. Instead, the court held that "imposing liability would encourage experts to be careful and accurate." Because the experts could be subject to liability for performing the same job negligently outside of litigation proceedings, the court saw no reason to bar litigation clients the same protection just because the expert's services happened to be performed in relation to litigation.

Note that the plaintiffs in both of the above cases filed negligence suits against their own hired experts. Although it appears that the theory of expert witness malpractice still is evolving, currently there are no published cases in which a defendant physician has brought suit successfully against a plaintiff's testifying expert. The dependence that a malpractice plaintiff's law firm has on its testifying experts makes it highly unlikely that a firm would bring a negligence action against its own hired expert. In addition to civil liability, expert witnesses can be held criminally liable.

Perjury

Experts conceivably can be prosecuted for perjury based upon false statements made during a trial.

Contrary to common belief, criminal charges of perjury are more difficult to prove than simply showing that a witness lied under oath. To prove a criminal charge of perjury, a prosecutor must prove *beyond a reasonable doubt*, that a defendant:

- took an oath to tell the truth;
- made a material statement (i.e., one that would influence a decision about a case);
- falsified the material statement;
- had knowledge that the statement was false at the time the statement was made.[28]

There aren't any published perjury cases against expert witnesses, but one recent case in the California courts shows that physicians aren't immune from perjury claims when providing medical testimony.

Chein v. Shumsky.[29] In this case, Dr. Chein appealed a conviction of perjury for testimony he gave as a treating physician in a personal injury case. He was prosecuted for making three allegedly untrue statements.

The first allegedly untrue statement Dr. Chein made was that he was a "specialist in orthopedic surgery." He apparently had not completed an orthopedic residency; however, he said he was board-certified by the American Board of Orthopedic and Neurological Surgery *(Editor's note: There is not an organization by this name approved by the American Board of Medical Specialties.)* The court dismissed the perjury charge on this count, holding that the issue of whether Dr. Chein "specialized" in orthopedics was an issue of semantics and was not patently untrue.

Dr. Chein also testified at trial that he worked from only one office. In a deposition prior to the trial, he admitted that he, in fact, had three office locations. The Court held that the number of office locations was a material fact because a physician with several offices could be considered to be running a "personal injury mill" instead of a legitimate medical practice. The conviction for perjury on this statement was upheld.

Finally, Dr. Chein also made a sworn written statement that he attended medical school in Florida. In fact, the school was located in the Caribbean, but had a Florida mailing address. The court dismissed the perjury conviction on that issue because the location of the medical school lacked materiality — it would not influence a decision about any of the issues in the case.

The *Chein* case illustrates the difficulty in being able to establish each of the elements necessary to uphold a perjury charge against a medical expert witness. What may appear as obvious misstatements to other medical professionals may be dismissed as misunderstandings or ambiguities by a court. The necessity to prove intentional misstatements beyond a reasonable doubt may explain the hesitancy of most prosecutors to file perjury charges against witnesses. Untrue statements alone are insufficient to sustain the prosecutor's burden.

An Ethical Opinion that Withstands Scrutiny

As expert opinions become subject to closer and more detailed review, creation of an opinion that

stands up to such scrutiny is important to both the expert and to the expert's client.

Before taking the time to create an opinion, experts should consider that some clients might not want a written opinion. For example, a law firm might not want to use an opinion that does not support its theory of the case. Although an unfavorable opinion may add impetus for a party to either dismiss or settle a case, some attorneys might prefer not to possess a written — and possibly discoverable document — refuting their case. Any questions about whether to create a written opinion ideally should be addressed at the time the expert is retained.

If a written opinion is desired, the first step in providing an opinion that stands up to scrutiny is fulfilling statutory requirements. The requirements for creating an expert opinion vary from state to state. An expert who is unsure of the statutory requirements for creating an opinion in a given forum would be wise to obtain a copy of the applicable statute. Recall the *Sommer v. Davis* case cited earlier. Tennessee statutes require a testifying expert to be familiar with the standard of care in a community similar to that of the defendant physician. The testifying expert was unfamiliar with the characteristics or the standard of care in the community in which the defendant expert practiced. That lack of knowledge alone was sufficient to bar the expert's testimony and ultimately caused the plaintiff to lose the case. Once the statutory requirements are known, the expert can structure a report that fulfills the requirements.

Using federal courts as an example, Federal Rule of Evidence 26 requires that any party with witnesses who may provide opinion testimony at trial provide a written disclosure signed by the expert and containing the following information:

- a statement of all the expert's opinions and the reasons for those opinions;
- a description of the information the expert considered in forming the opinions;
- exhibits to be used as a summary of or support for the opinions;
- the expert's qualifications;
- a list of all publications the expert authored within the previous 10 years;
- the compensation the expert will receive for testifying;
- a list of any other cases in which the expert testified in the previous four years.

In addition, the holdings in *Daubert* and *Kumho Tire* suggest that judges look for the following qualities in determining whether expert testimony is admissible whether:

- the theory has undergone empirical testing;
- the theory has been subjected to peer review or published;
- the theory has demonstrated an acceptable error rate;
- the theory has gained widespread acceptance or has been shunned within the relevant scientific community;
- the process leading up to the theory has used the same level of "intellectual rigor" in the courtroom that is used when practicing in the expert's relevant field.

An expert opinion in a federal court case ideally would address each of these requirements. Information the expert uses and provides likely will overlap with several of the categories. Creating a report with headings, much in the same way a scientific paper is created, might emphasize that an expert considered each of the legal requirements when formulating the opinions.

Information Considered

An objective review of pertinent medical literature is extremely important in creating a strong expert opinion. The only problem with reviewing pertinent literature is that it is impossible to read all literature ever printed about a given subject — especially broad subjects such as myocardial infarctions or febrile illnesses. Reviewing several emergency medicine texts and performing a Medline search[30] is a reasonable approach and would probably provide an emergency medicine expert with information sufficient to create an objective opinion. A sample opinion might list the textbooks the expert has reviewed and the terms used in a Medline search on the issue in question. The opinion could then summarize the data obtained in the search and used for the basis of the expert's opinion. Note that the literature reviewed must be current with the time of the alleged malpractice. Reviewing current literature for a case that happened many years ago would hold the physician responsible for standards of care that may not have been developed.

In addition, an expert must review all pertinent hospital records, including a patient's medical records, lab tests, and original x-rays (not reports). If old records may have contributed to the patient's care, it may be beneficial to review copies of the patient's old records

as well, although it would be unreasonable to hold a physician responsible for information contained in records that were not readily available during a patient's care. The expert should also create and submit a list of all patient records that were reviewed in reaching an opinion.

Realize that information in a malpractice case is not static. Parties and other experts will be deposed, creating additional information that must be reviewed and incorporated into an opinion. It may be helpful to state in the opinion that it is subject to change based upon review of future additional facts.

Expect alternative theories to surface. An attorney's job is to support his client's argument while refuting an opposing client's argument. Because an expert's role in litigation is one of teacher and not of advocate, alternate views must be considered and addressed. If information contrary to an expert's opinion either is discovered by the expert or is brought to the expert's attention by opposing counsel, the expert should incorporate that information into the expert's opinion. Failure to do so will allow an opposing attorney to cast doubt on the expert's opinion and motives as being biased and may allow a successful challenge to the expert's opinion for lack of intellectual rigor in formulating the opinion.

When new information is reviewed, it would be wise to discuss this information and its implications with the hiring attorney. It may also be necessary to supplement any pre-existing written opinions to incorporate the new information.

Opinions and Reasoning

Once information pertinent to a case has been obtained and reviewed, an expert should formulate an opinion. A report ideally should have a rationale for each opinion rendered. Conclusory opinions can and should be challenged extensively by opposing counsel and likely will not withstand a *Daubert* challenge. As a general rule, if no support for an opinion can be found in the medical literature, an expert should reconsider whether the opinion portrays an accurate representation of the medical community's beliefs on the issue involved. By providing citations to literature, an expert can increase the credibility of each opinion and can fulfill several of the criteria listed above.

A report may list other literature that uses the same rationale used by the expert, providing appropriate citations. Creating such a list may be used to show that the expert's opinion has undergone peer review and has been published, that the rationale has gained acceptance in the medical community, and that the expert has used intellectual rigor in creating the rationale.

If the expert has discussed the opinion with other physicians or has worked in hospitals or training programs where similar treatment methods were used, describing these experiences can show that the opinion has gained acceptance within the medical community and that other practicing physicians agree with the expert's views.

The presence of information that refutes the expert's opinion is not fatal to an expert's argument. Few, if any, issues in medical practice are black and white. Acknowledging adverse information and then providing a reason why the expert chooses not to agree with it can be powerfully persuasive.

A strong opinion will show explicitly how the opinion is relevant to the issues and reliable in the medical malpractice case as required in the *Daubert* and *Kumho Tire* decisions. It also will explain the intellectual rigor that the expert used to formulate the opinions.

In short, an opinion likely to withstand any challenges will summarize the facts of the case, apply the reasoning in multiple citations to the facts of the case, and let the citations speak for themselves.

Seven Suggestions for Expert Witnesses

1. **Agree upon and understand the scope of your assignment in advance.** Your job as an expert is to educate; the attorney's job is to advocate.
2. **Don't provide an opinion beyond your expertise.** An emergency physician who testifies against a dermatologist is asking for trouble.
3. **Perform research and ask questions.** A what-you-would-have-done testimony doesn't necessarily represent a standard to which all other physicians should be held.
4. **Concentrate less on your opinions and more on the facts and research supporting your opinions.**
5. **Don't inflate your opinion.** If you would feel uncomfortable stating your opinion in front of a lecture hall full of doctors, you'll feel even more uncomfortable stating it in front of 12 jurors while being grilled by the opposing attorney.
6. **Don't be afraid to modify your opinion.** If new information changes your opinion, it is better to settle a weak case than to take a losing case to trial.
7. **Maintain your integrity.** If you don't, none of the other six suggestions matter.

A picture is worth 1,000 words. Perhaps the expert possesses an anatomic model, medical diagram, or picture that would be useful in making the expert's point. Any such exhibits would then be listed with the expert's opinion, perhaps including the reasoning why the exhibit supports the expert's opinion.

Expert Qualifications

Many *Daubert* challenges are based upon expert qualifications. If a court makes the decision that an expert is not qualified to render an opinion, the expert will not be able to testify. To demonstrate qualification by "knowledge, skill, experience, training, or education,"[31] the expert can submit examples of the expert's knowledge, skill, experience, training, and education to the court.

If the expert has given lectures or attended courses involving the points at issue in the medical malpractice case, those lectures or courses can be listed. Attendance at such courses, if they support the expert's view, also may demonstrate that the opinions the expert expresses have been peer reviewed and have gained acceptance in the medical community. Realize that an opposing attorney will seek copies of the expert's notes or a syllabus of any listed courses or lectures to find information that supports the opposing side's theory.

Any material the expert has published relating to the issues in the case would strongly suggest that the expert is qualified to testify about those issues. A list of the publications also fulfills one of the requirements for Federal Rule of Evidence 26 noted above. Again, note that any of the expert's publications are fair game for cross-examination.

Previous hospital or emergency department peer-review activities could be cited as evidence that other medical professionals consider the expert's opinions medically sound and that the expert has both treated the conditions at issue as well as reviewed other physicians' treatment of the same issues.

Membership in professional organizations or on organizational committees may bolster an expert's qualifications if the duties involved with those memberships are relevant to the issues involved in the suit.

In cases where an expert must be familiar with the standard of care in a given community practice (such as in the *Sommer v. Davis* case cited above), current or previous employment in a similar type of hospital might be used to demonstrate an understanding of the standard of care in that community. An expert also can contact colleagues in other hospitals in similar communities to discuss the similarities and differences between the expert's practice setting and that of the physician whose care is being examined.

Conclusion

Expert witness testimony is a necessary part of any medical malpractice case. By methodically formulating an opinion that is both ethical and is supported in the medical literature, an expert witness can minimize personal liability while maximizing the client's benefit.

Endnotes

1. Federal Rules of Evidence 402 and 602.
2. Federal Rules of Evidence 403 and 404.
3. Federal Rule of Evidence 702.
4. *Frye v. United States*, 293 F. 1013 (1923).
5. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
6. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
7. See, e.g., Andrew L. *The Ethical Medical Expert Witness*. North Carolina Medical Bureau Forum, No. 4, 2003.
8. For example, www.dauberttracker.com and www.daubertontheweb.com are two web sites that track *Daubert* decisions.
9. *Sosna v. Binnington*, 321 F.3d 742 (2003).
10. *Sommer v. Davis*, 317 F.3d 686 (2003).
11. Each policy can be found by performing a search under the respective policy number on the AMA web site at www.ama-assn.org.
12. Policy #400114, Expert Witness Guidelines for the Specialty of Emergency Medicine, Approved August 2000. Available at www.acep.org/1,560,0.html.
13. For more information about ACEP's expert witness reaffirmation statement, go to www.acep.org/1,33167,0.htm.
14. AAEM's position statements may be accessed at: www.aaem.org/positionstatements/experts.shtml.
15. AAEM's case reporting site may be accessed at www.aaem.org/aaemtestimony/index.html.
16. Lenzer J, Solomon R, Hired guns: Finding solutions to the expert witness quagmire. *ACEP News*; March 2003. Available on-line at www.acep.org/1,32566,0.html.
17. *Joseph v. District of Columbia Board of Medicine*, 587 A.2d 1085 (D.C. 1991).
18. The briefs filed in this case are available at: www.ca7.uscourts.gov/efn/efns.fwx?caseno=00-4028&submit=showdkt&yr=00&num=4028.
19. *Austin v. American Association of Neurological Surgeons*, 253 F.3d 967, 973 (2001).
20. *Briscoe, et al. v. Lahue, et al*., 460 U.S. 325 (1983).

21. *Id*.
22. *Id*.
23. *Mattco Forge Inc. v. Young*, 5 Cal. App. 4th 392 (1992).
24. *Austin v. American Association of Neurological Surgeons*, 253 F.3d 967, 973 (2001).
25. *Kemp v. Tyson Seafood Group Inc*., 2000 U.S. Dist. LEXIS 10258 (D. Minn. July 19, 2000) (also stating that the objective of Daubert was to eliminate "playground-like banter between experts, who each proclaim, without the benefit of a factual showing, that his opinions are correct, while those of the other expert are wrong."
26. *LLMD of Michigan Inc. v. Jackson-Cross Co.,* 740 A.2d 186 (1999).
27. *Murphy v. A. A. Mathews*, 841 S.W.2d 671 (1992).
28. *See,* e.g., *United States v. Kross*, 14 F.3d 751 (1994).
29. *Chein v. Shumsky*, 323 F.3d 748 (2003).
30. One search engine that can be used for Medline searches, available on-line from the National Library of Medicine, can be found at www.ncbi.nlm.nih.gov/PubMed/.
31. Federal Rule of Evidence 703.

CE/CME Objectives

[For information on subscribing to the CE/CME program, contact customer service at (800) 688-2421 or e-mail customerservice@ahcpub.com.]

The participants will be able to:

- identify high-risk patients and use tips from the program to minimize the risk of patient injury and medical malpractice exposure;
- identify a "standard of care" for treating particular conditions covered in the newsletter;
- identify cases in which informed consent is required;
- identify cases which include reporting requirements;
- discuss ways in which to minimize risk in the ED setting.

CE/CME Instructions

Physicians and nurses participate in this continuing medical education/continuing education program by reading the article, using the provided references for further research, and studying the questions at the end of the article. Participants should select what they believe to be the correct answers, then refer to the list of correct answers to test their knowledge. To clarify confusion surrounding any questions answered incorrectly, please consult the source material.

At the conclusion of this semester, you must complete the evaluation form that will be provided at that time, and return it in the reply envelope that will be provided to receive a certificate of completion. When your evaluation is received, a certificate will be mailed to you.

CE/CME Questions

9. Why aren't more experts who testify untruthfully prosecuted for perjury?

A. The charges must be proven beyond a reasonable doubt.
B. Untrue statements may be made due to a misunderstood question.
C. Untrue statements may not be relevant to the issues in the case.
D. The person making the statement may not have known the statement was false at the time the statement was made.
E. All of the above

10. Which of the following criteria is *not* one judges routinely use to determine admissibility of expert witness testimony?

A. The expert is in same specialty as the defendant physician or nurse and has similar training and experience.
B. Testimony is relevant to issues in the case.
C. Testimony has been subjected to peer review.
D. Testimony has gained acceptance within the relevant scientific community.

11. ACEP guidelines recommend how many years of *clinical* emergency medicine practice prior to performing expert witness services?

A. None
B. One
C. Three
D. Five

12. Which of the following items are ways that an expert can demonstrate qualification to testify in a court?

A. Publication of a peer-reviewed article on a topic at issue in the lawsuit.
B. A sworn affidavit that the expert believes malpractice occurred in a lawsuit.
C. Proof that the expert has been qualified to testify in other unrelated cases in the same court system.
D. A and C

Answers: 9. E; 10. A; 11. C; 12. A.

In Future Issues:

Pediatric Fever