COMPETENCY OF MEDICAL EXPERT WITNESSES: STANDARDS AND QUALIFICATIONS

INTRODUCTION

Because of the highly technical aspects of the practice of medicine, expert testimony has often been held necessary in medical malpractice actions to determine the appropriate standard of medical care and whether a breach of that standard has occurred. Medical expert witnesses are the most commonly used trial experts, and their testimony is used in two scenarios: (1) in personal injury cases to define injuries and causes of the injuries; and (2) in malpractice cases to define the standard of care required of the defendant physician and to give an opinion as to whether that standard was breached.

In 1989, the Florida District Court of Appeal held in Brown v. Sims, that a neurosurgeon was competent to give expert testimony regarding a gynecologist’s standard of presurgical care. Although Florida statutes specify the qualifications required of an expert witness in a medical malpractice action, trial courts are given wide latitude in deciding whether to allow a general practitioner or a specialist from another field to testify against the defendant specialist.

2. AM. JUR. TRIALS § 13 (1964).
5. Id. at 904.
6. A specialist is a physician who has increased training and education in one clinical area of practice. If a certifying board exists, this physician must meet the criteria for certification. AM. JUR. P.O.F. 3d, Taber's Cyclopedic Medical Dictionary 1590 (15th ed. 1988).

Section 766.102 of the Florida Statutes provides in part:
(b) If the health care provider whose negligence is claimed to have created the cause of action is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a “similar health care provider” is one who:
1. Is trained and experienced in the same specialty; and
2. Is certified by the appropriate American board in the same specialty.

FLA. STAT. ANN. § 766.102 (West Supp. 1990). The section further provides:
(c) . . . Any health care provider may testify as an expert in any action if he:
1. Is a similar health care provider pursuant to paragraph (a) or paragraph (b); or
2. Is not a similar health care provider pursuant to paragraph (a) or paragraph (b) but, to the satisfaction of the court, possesses sufficient training, experience, and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional stan-
Both federal and state courts provide for admission of expert testimony. Some jurisdictions have specific statutes which address the qualifications which must be met by an expert witness in medical malpractice actions. Others have established such qualifications through case law.

This Comment examines the relevant statutory provisions governing medical expert testimony, and analyzes the case law of various jurisdictions to determine what criteria are used to qualify a physician as a competent expert witness. Suggestions for selecting an expert witness and strategies for excluding the expert testimony introduced by the opposing party are included.

FACTS AND HOLDING

BROWN v. SIMS

In April of 1980, Mary Brown suffered a debilitating stroke during or shortly after surgery to remove an abnormal ovarian cyst. Mrs. Brown had been to see her gynecologist, Dr. Sims, prior to the surgery and had complained at that time of pain in her right arm. Dr. Sims had sought an opinion from Dr. Keedy, a neurologist, who found that Mrs. Brown had an objective grip weakness on the right side. He did not write a report for this consultation but gave oral

An objective sign is defined as one that can be seen, heard, measured, or felt by the diagnostician. Such a sign may be used to confirm or deny the physician's impression of suspected disease. AM. JUR. P.O.F. 3D, Taber's Cyclopedic Medical Dictionary 1150 (15th ed. 1988).

The evidence as to whether the examination and history were contraindications to
presurgical clearance to Dr. Sims to operate on Mrs. Brown.\textsuperscript{15}

After the operation, Mrs. Brown sued both Dr. Sims and Dr. Keedy for medical malpractice.\textsuperscript{16} At the trial, Mrs. Brown presented an expert witness, Dr. Gross, a neurosurgeon.\textsuperscript{17} He testified that Dr. Sims had breached the standard of accepted medical practice for gynecologists by failing to get a presurgical written opinion from a competent physician clearing Mrs. Brown for surgery.\textsuperscript{18} Dr. Gross testified that this failure was causally related to Mrs. Brown’s stroke.\textsuperscript{19} Another expert neurologist, Dr. Cohen, was not allowed to testify that Dr. Sims had failed to conduct a thorough presurgical examination on Mrs. Brown, despite Dr. Cohen’s testimony that he himself had previously performed presurgical exams for gynecologists.\textsuperscript{20} The trial court stated that Dr. Cohen did not “‘possess sufficient training, experience and knowledge as a result of practice or teaching in the obstetrics and gynecologic specialty and that his experience does not qualify him to testify about Dr. Sims.’”\textsuperscript{21} A directed verdict was entered for the defendant doctors.\textsuperscript{22}

On appeal, the judgment was reversed and remanded for a new trial.\textsuperscript{23} The Florida District Court of Appeal held that Dr. Cohen’s testimony was improperly excluded by the trial court.\textsuperscript{24} The court merely followed precedent set earlier by the Florida Supreme Court which had held that a neurologist was competent to testify as to a gynecologist’s presurgical standard of care.\textsuperscript{25}

BACKGROUND

ESTABLISHING MEDICAL MALPRACTICE

Historically, expert testimony was not required to establish medical negligence.\textsuperscript{26} In \textit{Cross v. Guthery},\textsuperscript{27} a surgeon had performed a surgery was conflicting, but Dr. Keedy admitted that if the plaque in Mrs. Brown’s carotid artery had been cleaned out, she would not have suffered the stroke. \textit{Brown}, 538 So. 2d 901 at 903.

\textsuperscript{15} \textit{Brown}, 538 So. 2d at 903.
\textsuperscript{16} \textit{Id.} at 902.
\textsuperscript{17} \textit{Id.} at 903.
\textsuperscript{18} \textit{Id.} at 903-04.
\textsuperscript{19} \textit{Id.}.
\textsuperscript{20} \textit{Id.} at 904.
\textsuperscript{21} \textit{Id.}.
\textsuperscript{22} \textit{Id.} at 902.
\textsuperscript{23} \textit{Id.} at 908.
\textsuperscript{24} See \textit{id.} at 904.
\textsuperscript{25} See \textit{id.} at 904 (citing Chenowith v. Kemp, 396 So. 2d 1122 (Fla. 1981)). See infra notes 80-85 and accompanying text.
\textsuperscript{26} Compare \textit{Cross v. Guthery}, 2 Root 90 (Conn. 1794) (reporting an early American medical malpractice action) with Comment, Medical Malpractice — The Necessity of Expert Testimony and the Use of a General Physician as an Expert Witness in a
mastectomy on the plaintiff's wife.\textsuperscript{28} The plaintiff contended that the surgeon had "performed the [operation], but in so unskillful and cruel a manner, that the plaintiff's wife survived but three hours."\textsuperscript{29} No expert testimony was offered.\textsuperscript{30}

To establish a prima facie case of professional negligence in a medical malpractice case, the plaintiff must plead and prove (1) that the physician had a duty to adhere to a particular standard of care; (2) the scope of the standard of care and that the physician's actions did not conform to that particular standard; (3) that the plaintiff suffered actual damage; and (4) that the physician's conduct was the proximate or legal cause of such damage.\textsuperscript{31} In a malpractice action against a specialist, the standard of care will be higher than that for a non-specialist.\textsuperscript{32} The existence of the physician's duty of care may be demonstrated by the doctor-patient relationship.\textsuperscript{33} Expert testimony may be required to establish the remaining three elements.\textsuperscript{34} Whenever the triers of fact are faced with issues which cannot be determined on the basis of common knowledge or practical experience, expert testimony may be provided to aid them in making their findings.\textsuperscript{35}

Federal and state courts have provided for the admissibility of such expert testimony.\textsuperscript{36} Under Rule 702 of the Federal Rules of Evidence, a witness may be qualified as an expert by "knowledge, skill, experience, training, or education."\textsuperscript{37} Because of the complex and technical nature of the practice of medicine, juries and courts usually


\begin{enumerate}
\item 27. 2 Root 90 (Conn. 1794).
\item 28. Id.
\item 29. Id.
\item 30. Id.
\item 32. See, e.g., Morrison v. Stallworth, 73 N.C. App. 196, --, 326 S.E.2d 387, 391 (1985) (holding a physician who held himself out as a specialist in obstetrics and gynecology to a higher standard of care); Hundlev v. Martinez, 151 W. Va. 977, --, 158 S.E.2d 159, 169 (1967) (holding that an ophthalmologist is charged with a higher degree of skill in treatment of diseases of the eye than a physician without additional training).
\item 36. \textit{See supra} note 7. \textit{See also infra} Appendix for state statutes.
\item 37. FED. R. EVID. 702. \textit{See supra} note 7.
cannot determine whether the proper degree of care has been given without the use of expert testimony.38 Some state legislatures have enacted statutes which require medical expert testimony to establish the particular standard of care and the departure from that applicable standard.39 Courts have generally held that the only medical malpractice cases that do not require expert testimony to establish the standard of care and the breach of that standard are those in which negligence can be determined on the basis of practical experience and common knowledge, or when the doctrine of res ipsa loquitur can be applied.40

QUALIFICATION OF EXPERT WITNESSES — FAMILIARITY WITH STANDARDS

An expert witness must be qualified to testify as to the applicable standard of care based on "knowledge, skill, experience, training, or education."41 It must be demonstrated that the expert witness has knowledge of the applicable standard of care for that jurisdiction in which the malpractice took place.42 The qualifications of the expert witness and the applicable professional standards vary among jurisdictions.43

Locality Rule

Some states adhere to the requirement that the expert witness must be familiar with the standard of medical care applied in the same or a similar community, reasoning that physicians who practice in small or rural communities do not have the resources or opportunities to stay current with medical advances.44 In Tennessee, the lo-

38. Comment, 10 OHIO N.U.L. REV. at 40.
39. See infra Appendix.
40. Comment, 10 OHIO N.U.L. REV. at 48-52. The common knowledge exception may be applied when everyday knowledge and understanding is sufficient to establish a case of medical negligence. Id. at 50. See also Richardson v. Fuchs, 523 A.2d 445, 448 (R.I. 1987) (requiring expert testimony in the malpractice trial of an orthopedic surgeon).

The doctrine of res ipsa loquitur applies when injuries which occur during treatment would not have occurred in the absence of negligence by the person in control of the instrumentality causing the injury. When applied, some jurisdictions permit the finding of negligence and some require it. Comment, 10 OHIO N.U.L. REV. at 48-49.
42. 3 C. KRAMER, MEDICAL MALPRACTICE ¶ 29.02, at 29-8 (1990).
43. See infra Appendix.
44. See infra Appendix. Hume, The Locality Rule: Enter the Hired Gun, 12 LEGAL ASPECTS OF MED. PRAC.; APR. 1984, at 6 (noting that a similar community is sometimes defined by similar populations and access to medical facilities or colleagues for consultation). See also Annotation, Medical Specialist — Standard of Care 18 A.L.R. 4TH 603, 607 (1990).
The competency rule continues to be the measure for deciding the competency of an expert witness. In *McCay v. Mitchell*, the plaintiff sued two orthopedic surgeons and a general practitioner for negligently treating her fractured arm, necessitating amputation of her forearm. The trial court excluded the testimony of the plaintiff's expert witness, a physician licensed to practice in Pennsylvania. On appeal, the Tennessee Court of Appeals held that the trial court had not erred in excluding such testimony. The court stated that the competency of an expert witness was to be determined under the trial court's discretion, with reference to the expert's knowledge of the standard of skill and care of medical practitioners in the locality in question. Subsequently, the Tennessee legislature enacted a statute requiring expert witnesses in medical malpractice actions to be licensed either in Tennessee or in a contiguous state. At the same time, the legislature authorized the court to waive this requirement when the appropriate witnesses are not otherwise available.

In the treatment of a common disorder, the expert witness may be required to be familiar with a national standard of medical care and skill. In *Wentling v. Jenny*, the plaintiff sued two physicians from small rural Nebraska communities for negligent diagnosis and treatment of his wife's breast cancer. The Nebraska Supreme Court held that the trial court had abused its discretion in excluding the testimony of the plaintiff's expert witness, a surgeon from Colorado. The supreme court stated that the expert witness need not be

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47. *Id.* at —, 463 S.W.2d at 713.
48. *Id.* at —, 463 S.W.2d at 713, 717.
49. *Id.* at —, 463 S.W.2d at 718.
50. *Id.* at —, 463 S.W.2d at 718.
51. TENN. CODE ANN. § 29-26-115(b) (1980). *See infra* Appendix.
52. TENN. CODE ANN. § 29-26-115(b)(1980). *See also* Pyle v. Morrison, 716 S.W.2d 930, 933 (Tenn. Ct. App. 1986) (holding that a trial court had not abused its discretion in allowing a physician from Maryland to testify as to the standard of care in Tennessee after the plaintiff showed that he was unable to procure a local expert).
53. *See, e.g.*, Purtill v. Hess, 111 Ill. 2d 229, —, 489 N.E.2d 867, 876 (1986) (holding that an expert witness who was familiar with the uniform minimum standards for the treatment of rectovaginal fistulae was competent to testify in a medical malpractice action); Wentling v. Jenny, 206 Neb. 335, 338-40, 293 N.W.2d 76, 79 (1980) (holding that the expert witness need only be aware of the national standard of care applied to physicians in the treatment of breast cancer); Hundley v. Martinez, 151 W. Va. 957, —, 158 S.E.2d 159, 168-69 (1967) (holding that an expert witness was competent to testify in a medical malpractice action if knowledgeable about the standard of care uniformly applied across the country to physicians operating on cataracts).
54. 206 Neb. 335, 293 N.W.2d 76 (1980).
55. *Id.* at 335, 293 N.W.2d at 77.
56. *Id.* at 339-40, 293 N.W.2d at 79. The trial court had excluded the expert's testimony because he lived and practiced in Colorado rather than in Nebraska. *Id.* at 337, 293 N.W.2d at 78. Nebraska's statutes regarding admissibility of expert testimony are
from the same locality if he is familiar with local standards, and that 
the standards which apply to the diagnosis and treatment of breast 
cancer are the same anywhere such diagnosis and treatment take 
place.57

For medical specialists, courts have frequently held that the ex-
pert witness needs to be familiar with the national standard of care 
applied to all physicians practicing within that specialty.58 In Snead 
v. United States,59 the plaintiff brought a malpractice claim against 
two gynecologists who had contracted with the United States Depart-
ment of State Health Clinic to treat employees of the State Depart-
ment.60 The plaintiff claimed that the defendants had departed from 
the required standard of care by failing to detect preinvasive cervical 
cancer which resulted in subsequent metastasis of the malignancy.61 
The United States District Court for the District of Columbia stated 
that medical standards are largely nationalized because national 
boards certify specialists.62 For that reason, the national standard for 
board certified specialists was applied in the federal courts in the Dis-
trict of Columbia.63 The District of Columbia Court of Appeals had 
replaced the “locality rule” with the national standard of care re-
quired of board certified physicians and hospitals.64

Expert witnesses need to be familiar with the standard of care 
required of specialists in their jurisdictions.65 In 1975, the Connecti-
cut Supreme Court stated that the standard of care required of a spe-
cialist was “that degree of care, skill and diligence which physicians 
in the same general neighborhood . . . ordinarily possess and exercise 
in like cases.”66 By 1983, the “general neighborhood” included the 
entire nation.67


57. Wentling, at 339-40, 293 N.W.2d at 79.

the standard of care applied to specialists in the District of Columbia is a national one 
and that expert witnesses need to be familiar with it); Kobos v. Everts, 768 P.2d 534, 
539 (Wyo. 1989) (holding an expert witness competent to testify because he was aware 
of the national standard applied to the defendant specialist); see also Okla. Stat. Ann. 
tit. 76, § 20.1 (West 1987) (defining standard of care applied to physicians in 
Oklahoma). See infra Appendix. But see note 188 and accompanying text.


60. Id. at 660.

61. Id.

62. Id. at 663.

63. Id.

64. Id. (citing Morrison v. MacNamara, 407 A.2d 555, 565 (D.C. 1979)).

65. See notes 31, 42 and accompanying text.

66. See Fitzmaurice v. Flynn, 167 Conn. 609, —, 356 A.2d 887, 891 (1975) (quoting 
Snyder v. Pantaleo, 143 Conn. 290, —, 122 A.2d 21, 23 (1956)).

There remain a few states which have either retained or modified the requirement that medical expert witnesses know the standard for the same or a similar locality in malpractice cases against specialists. In *Richardson v. Fuchs*, the plaintiff brought a malpractice action against an orthopedic surgeon for negligent treatment of a broken arm. The plaintiff attempted to introduce expert testimony from a professor of pathology and internal medicine who was from a neighboring state. The Rhode Island Supreme Court affirmed the trial court's exclusion of the testimony. The court stated that the exclusion was not an abuse of discretion because the expert witness had not demonstrated his familiarity with the medical standard for the practice of orthopedics in localities such as Connecticut, which were similar to Rhode Island.

**Same Specialty Requirement**

Another consideration in qualifying a medical expert witness is whether the expert witness is a practicing member of the same specialty as the defendant specialist. Many jurisdictions adhere to the principle that a physician from one specialty may testify as an expert witness against a physician from a different specialty.

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68. See, e.g., Poulin v. Zartman, 542 P.2d 251, 270 (Alaska 1975) (retaining the similar locality rule in a medical malpractice action against a pediatrician); Priest v. Lindig, 583 P.2d 173, 174-77 (Alaska 1978) (interpreting medical malpractice statute as requiring expert witness to be familiar with the standard of care exercised by physicians practicing the same specialty as the defendant in similar communities to the defendant's); Waterford v. Halloway, 142 Ill. App. 3d 668, —, 491 N.E.2d 1199, 1202 (1986) (retaining the same locality rule in an action against a gynecologist); Richardson v. Fuchs, 523 A.2d 445, 448 (R.I. 1987) (retaining the locality rule in an action against an orthopedic surgeon).


70. 523 A.2d 445 (R.I. 1987).

71. Id. at 447.

72. Id.

73. Id. at 449.

74. Id.


A Virginia statute mandates that physicians may testify as expert witnesses only if they have had active clinical practice in the same specialty of medicine as the defendant physician.\textsuperscript{77} The Florida statute regarding expert witnesses specifies that the expert must be trained, experienced, and "certified by the appropriate American board in the same specialty" as the defendant specialist.\textsuperscript{78} However, the statute also provides for waiver of this requirement if the trial judge is satisfied that the witness is competent to provide testimony as to the appropriate standard of care required of the defendant physician.\textsuperscript{79}

In \textit{Chenowith v. Kemp},\textsuperscript{80} the Florida Supreme Court held that two neurologists were competent to testify against a gynecologist and an anesthesiologist in a medical malpractice action.\textsuperscript{81} The trial court in \textit{Chenowith} had excluded the two doctors' testimony because they were neither board certified nor specialists in anesthesiology or gynecology.\textsuperscript{82} The supreme court held that the trial court had erred in excluding the testimony of the two neurosurgeons.\textsuperscript{83} The court found that the statutes regarding medical expert witnesses were not properly followed by the trial court.\textsuperscript{84} The court stated that to determine an expert witness's competency, the trial court should have considered the expert's training, experience, or knowledge of the standard of care required for the acts in question.\textsuperscript{85} This ruling was followed two years later in \textit{Wright v. Schulte},\textsuperscript{86} when the Florida District Court of Appeal reversed a lower court's decision to exclude

\begin{itemize}
\item 1258 (1989) (allowing a neurologist to testify to the standard of care applied to a general surgeon); Ornoff v. Kuhn and Kogan Chartered, 549 A.2d 728, 731 (D.C. 1988) (stating that a hematologist could testify to the standard of care for gynecologists); Beatty v. Morgan, 170 Ga. App. 661, —, 317 S.E.2d 662, 664 (1984) (allowing a general practitioner to testify against a urologist); McLean v. Hunter, 495 So. 2d 1298, 1302 (La. 1986) (holding that specialists' knowledge of the subject matter, rather than the specialty itself, determined whether they were competent to testify as expert witnesses in a medical malpractice action); Brown v. Mladenoff, 504 So. 2d 1201, 1202 (Miss. 1987) (allowing a surgeon to testify against a gynecologist); Swope v. Prinz, 468 S.W.2d 34, 40 (Mo. 1971) (qualifying a psychiatrist as an expert witness in a medical malpractice action against a surgeon); Sewell v. Wilson, 97 N.M. 523, —, 641 P.2d 1070, 1075 (Ct. App. 1982) (stating that a non-specialist could testify to the standard of care required of a specialist); Morrison v. Stallworth, 73 N.C. App. 196, —, 326 S.E.2d 387, 391 (1985) (allowing a surgeon to testify against a gynecologist in a medical malpractice action).
\item 77. VA. CODE ANN. § 8.01-581.20 (Supp. 1989). \textit{See infra} Appendix.
\item 79. \textit{Id.}
\item 80. 396 So. 2d 1122 (Fla. 1981).
\item 81. \textit{Id. at} 1124.
\item 82. \textit{Id. at} 1124-25.
\item 83. \textit{Id. at} 1125.
\item 84. \textit{Id. at} 1124-25.
\item 85. \textit{Id. at} 1125.
\item 86. 441 So. 2d 660 (Fla. Dist. Ct. App. 1983), \textit{review denied}, 450 So. 2d 488 (Fla. 1984).
\end{itemize}
expert testimony from a pathologist who had extensive experience in obstetrics and gynecology.\textsuperscript{87}

In Connecticut, the legislature has enacted a statute mandating that medical expert witnesses be certified by the same American board in the same specialty as the defendant specialist.\textsuperscript{88} However, the statute also provides for the trial court to exercise its discretion in qualifying an expert witness who is not a "similar health care provider" if the expert "possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine."\textsuperscript{89} Such training, experience, or knowledge must have been the result of active involvement in medicine within five years preceding the cause of action.\textsuperscript{90} The Connecticut Supreme Court upheld a trial court's ruling, in \textit{Pool v. Bell},\textsuperscript{91} that a neurologist could testify as to the standard of care required of a general surgeon.\textsuperscript{92} Without ruling on the implied necessity that specialties overlap in care or that the same standard of care be applied to both specialties, the court stated that the neurologist was competent to testify because he demonstrated that he had sufficient knowledge of the standard of care required of the defendant's specialty.\textsuperscript{93}

West Virginia statutes require that medical expert witnesses be licensed to practice medicine in the United States and be "qualified in the same or substantially similar medical field as the defendant health care provider."\textsuperscript{94}

In a Colorado case, \textit{Connelly v. Kortz},\textsuperscript{95} the plaintiff sued a surgeon for negligent diagnosis of a gastrointestinal disorder.\textsuperscript{96} The trial court ruled that the plaintiff's expert witness, a physician of internal medicine, could testify as to when surgery was indicated to an internist, but could not testify to when a surgeon would deem surgery necessary.\textsuperscript{97} The Colorado Court of Appeals upheld the trial court's ruling on the ground that the expert had not satisfied the requirement that he have sufficient familiarity with the standard of care ap-

\textsuperscript{87} \textit{Wright}, 441 So. 2d at 661, 663.
\textsuperscript{88} \textit{CONN. GEN. STAT.} § 52-184(b)(c), (d) (Supp. 1990).
\textsuperscript{89} \textit{CONN. GEN. STAT.} § 52-184(d) (Supp. 1990). \textit{See infra Appendix.}
\textsuperscript{90} \textit{CONN. GEN. STAT.} § 52-184(c) (Supp. 1990).
\textsuperscript{91} 209 Conn. 536, 551 A.2d 1254 (1989).
\textsuperscript{92} \textit{Id.} at 543, 551 A.2d at 1258.
\textsuperscript{93} \textit{Id.} at 542-43, 551 A.2d at 1258. In a previous case, the court had held that the defendant's specialty and the expert's must overlap in practice or the same standard of care must be applicable to both specialties. \textit{Marshall v. Yale Podiatry Group}, 5 Conn. App. 5, ---, 496 A.2d 529, 531 (1985).
\textsuperscript{94} \textit{W. VA. CODE} § 55-7B-7 (Supp. 1990). \textit{See infra Appendix.} This statute has apparently not been challenged to date.
\textsuperscript{95} 689 P.2d 728 (Co. Ct. App. 1984).
\textsuperscript{96} \textit{Id.} at 729.
\textsuperscript{97} \textit{Id.}
plicable to the defendant’s specialty.\textsuperscript{98} The court stated that the plaintiff must have shown by expert testimony that the standard of care required of practitioners of the expert’s specialty was similar to that for practitioners of the defendant’s specialty.\textsuperscript{99} Alternatively, she could have shown that the expert witness had more than a “casual familiarity” with the standard of care governing the defendant physician’s conduct so as to be able to testify that the standards of care for the two specialties were the same.\textsuperscript{100} Such knowledge could have been gained through training, education, or experience.\textsuperscript{101} The court held that the plaintiff had not sustained her burden of proof in this case.\textsuperscript{102}

The competence of the expert witness to testify is usually a matter for the trial court’s discretion.\textsuperscript{103} Some legislatures have enacted statutes which guide the trial court judge in determining the competency of an expert witness in a medical malpractice action.\textsuperscript{104} Many jurisdictions allow specialists from one medical field to testify against specialists from another medical field if certain prerequisites are met.\textsuperscript{105}

\textbf{Same School Requirement}

Another general requirement is that the medical expert witness must be of the same school of medicine as the defendant physician.\textsuperscript{106}

\textsuperscript{98} Id. at 730.
\textsuperscript{99} Id.
\textsuperscript{100} Id. But cf. Ornoff v. Kuhn and Kogan Chartered, 549 A.2d 728, 731-32 (holding that it is not necessary for the expert witness to be familiar with all the standards of another specialty).
\textsuperscript{101} Connelly, 689 P.2d at 729.
\textsuperscript{102} Id. at 730.
\textsuperscript{104} E.g. ILL. ANN. STAT. ch. 110, para. 8-2501 (Smith-Hurd Supp. 1990); MICH. COMP. LAWS ANN. § 600.2169 (West Supp. 1990). See infra Appendix.
\textsuperscript{105} See, e.g., supra notes 77-93 and accompanying text.
\textsuperscript{106} E.g., CONN. GEN. STAT. § 52-184c (b) (Supp. 1990). See infra Appendix. For a
In *Dolan v. Galluzzo*, the plaintiff sued a podiatrist for negligently performing an osteotomy. The trial court granted the defendant’s motion in limine to exclude testimony of all physicians and surgeons concerning the standard of care the defendant podiatrist owed the plaintiff. The trial court allowed the plaintiff to take an interlocutory appeal and the appellate court affirmed. The Illinois Supreme Court vacated and remanded the appellate court’s decision because the exclusion of all physicians’ testimony was overbroad. The court agreed with the appellate court that in order for an expert witness to testify as to the standard of care for a school of medicine, the expert must be licensed in that school of medicine. The court reasoned that because Illinois recognized osteopaths as a separate profession whose standards and practices differed from those of allopathic physicians, it would be inequitable to judge the conduct of a licensed practitioner of one school of medicine by the standards applicable to another school of medicine. The court further delineated a two-part test for qualifying an expert witness to testify regarding the standard of care required of a given school of medicine. First, the witness must be licensed in that school of medicine. Once that is established, the trial court may use its discretion to determine whether the witness is otherwise competent to testify. However, the supreme court remanded the case because

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**General Discussion**

*Stedman’s Medical Dictionary* defines allopathy as a treatment in which a disease is combated by producing a second condition which is antagonistic or incompatible with the first. The school of homeopathy “holds that a medicinal substance that can evoke certain symptoms in healthy individuals may be effective in the treatment of illnesses having symptoms closely resembling those produced by the substance.” *Id.* at 721.

Osteopathic medicine is based on the concept that a normal body in correct adjustment is capable “of making its own remedies against infections and other toxic conditions; practitioners use the diagnostic and therapeutic measures of ordinary medicine in addition to manipulative measures.” *Id.* at 1110.

108. *Id.* at 2d 14. An osteotomy is described as a surgical cutting of the bone. *Id.*
109. *Id.* A podiatrist is an osteopathic practitioner who specializes in diseases of the foot. *Stedman’s Medical Dictionary* 1228 (25th ed. 1990). A physician or surgeon is trained in the allopathic school of medicine. An orthopedic surgeon is an allopathic physician who specializes in the form and function of the musculoskeletal system. *Id.* at 1102.
110. *Dolan*, 77 Ill. 2d at 2d 14.
111. *Id.* at 2d 17.
112. *Id.* at 2d 16.
113. *Id.* at 2d 15.
114. *Id.* at 2d 16.
115. *Id.*
116. *Id.*
the trial court's ruling excluding all physicians’ testimony was over-
broad in excluding the possible testimony of those orthopedic sur-
geons who were also licensed podiatrists.\footnote{117}

The Florida medical malpractice statute requires that the medi-
cal expert witness be experienced and trained in the same school or
discipline as the defendant practitioner.\footnote{118} However, the same stat-
ute provides for waiver of the same school requirement if the trial
court is satisfied that the proffered witness has the qualifications to
testify to the prevailing professional standard of care in the physi-
cian’s field of medicine.\footnote{119}

The same school requirement, like the same or similar locality
rule for specialists, has been abandoned in some jurisdictions.\footnote{120} An
Ohio case that illustrates the abandonment of the same school re-
quirement is \textit{King v. LaKamp}.\footnote{121} The plaintiff sued her podiatrist
for negligently performing surgery on her foot.\footnote{122} The Ohio Court of
Appeals held that the trial court had abused its discretion in exclud-
ing testimony from the plaintiff’s witness, an orthopedic surgeon.\footnote{123}
The court stated that where fields of medicine overlap and where
practitioners from different schools were performing the same surgi-
cal procedure, the identical standard of care would be applied to all
practitioners regardless of the school of training.\footnote{124} The court rea-
soned that the test of admissibility is whether the expert witness can
aid the trier of fact in determining the truth.\footnote{125} The jury determines
how differences in schools of training affect the weight of the ex-
pert’s testimony.\footnote{126} The court further said that “[a]ll practitioners
who perform a given surgical procedure are subject to the identical

\footnote{117} Id. at —, 396 N.E.2d at 16-17.
\footnote{118} FLA. STAT. ANN. § 766.102(2)(a) (West Supp. 1990). See infra Appendix.
physician from a different school of medicine than the defendant because proper foun-
dation was not laid to establish that methods governing the procedure were the same
across the schools of medicine).
\footnote{120} \textit{See, e.g., Moore v. Francisco}, 2 Kan. App. 2d —, 583 P.2d 391, 394 (1978) (hold-
ing that a physician from a different school of medicine than the defendant could tes-
tify against the defendant if the method of treatment of the condition was the same for
both schools); \textit{Ishler v. Miller}, 56 Ohio St. 2d 447, —, 384 N.E.2d 296, 300 (1978) (stating
that where schools or specialties of medicine overlap, expert witnesses from one school
or specialty are competent to testify against a defendant from another school or spe-
orthopedist to testify against a podiatrist in a medical malpractice action).
\footnote{121} 50 Ohio App. 3d 84, 553 N.E.2d 701 (1988).
\footnote{122} Id. at 84-85, 553 N.E.2d at 702.
\footnote{123} Id. at 85, 87, 553 N.E.2d at 702, 704.
\footnote{124} Id. at 85, 553 N.E.2d at 703.
\footnote{125} Id. at 85-86, 553 N.E.2d at 703.
\footnote{126} Id.
standard of care. The court stated that such a standard of care does not depend on the school of training.

**Familiarity with Medical Procedure**

Familiarity with a certain medical or surgical technique is sometimes a prerequisite to qualification as an expert witness. In *Peters v. Gelb*, the plaintiffs brought an action against two physicians for negligently performing a vasectomy. The plaintiffs' expert witness had not performed or assisted in a vasectomy in the previous ten years. The Delaware Supreme Court affirmed the superior court's ruling that the witness did not possess the "current expertise" to be a qualified expert. The court further stated that it was within the lower court's discretion to conclude that the expert's lack of current familiarity with the procedure in question rendered his testimony inadmissible.

Actual personal performance of a medical procedure is seldom necessary in order for qualification as a medical expert witness. In *Radman v. Harold*, the plaintiff sued her gynecologist for negligently puncturing her bladder during a hysterectomy. The plaintiff proffered testimony of her expert witness, an internal medicine specialist, who had never performed a hysterectomy. The Maryland Court of Appeals held that a trial court should not exclude a medical expert's testimony merely because such expert has never personally performed the procedure in question.

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127. *Id.* at 86, 553 N.E.2d at 703-04.
128. *Id.* at 86, 553 N.E.2d at 704.
130. 314 A.2d 901 (Del. 1974).
131. *Id.* at 902.
132. *Id.* at 903.
133. *Id.* at 904. The appellants had argued that the expert's lack of expertise should go to the weight of his testimony, not the admissibility. *Id.*
134. *Id.* at 903-04. The court stated that the current expertise could be acquired through study of texts and medical journals, or through practical experience. *Id.* at 903.
137. *Id.* at —, 367 A.2d at 473.
138. *Id.* at —, —, 367 A.2d at 473, 477.
139. *Id.* at —, 367 A.2d at 475. The court stated that the expert must have more than a passing familiarity with the standard of care for the defendant physician's specialty but this knowledge may be acquired through experience or study of the standards of that specialty. *Id.*
Miscellaneous Qualifications

A few states have specific requirements for the percentage of time physicians must have spent in active clinical practice in order to qualify as expert witnesses. For example, in Kansas, medical expert witnesses are not competent to testify unless they have spent at least fifty percent of the two-year period prior to the malpractice action in active clinical practice. In Ohio, medical expert witnesses must devote seventy-five percent of their professional time to active clinical practice. This statute was interpreted by the Ohio Supreme Court in McCrory v. Ohio. The court upheld a decision which allowed a physician who spent eighty-five percent of his time supervising a staff of physicians engaged in the evaluation and development of drugs for human use to testify as an expert witness regarding possible brain damage as a result of a Dilantin overdose. The court stated that the Ohio statute requiring medical expert witnesses to be engaged in active clinical practice seventy-five percent of their professional time applied primarily to physicians who were treating patients seventy-five percent of the time. However, the statute also includes the physician "whose work is so related or adjunctive to patient care as to be necessarily included in that definition for the purpose of determining fault or liability in a medical claim." 

Locating Expert Witnesses

Before seeking expert testimony, lawyers must check the relevant statutes in their jurisdictions. If qualifications for expert witnesses are specified, attorneys need to ensure that the expert witness possesses the requisite qualifications. When the jurisdiction does not have statutes regarding the competency of expert witnesses, the rule is that the expert’s competency to testify will be determined by the trial court judge. The attorney will want to choose an expert whose qualifications are as similar to the defendant’s as is possible,

140. See, e.g., KAN. STAT. ANN. § 60-3412 (Supp. 1989); OHIO REV. CODE ANN. § 2743.43 (Baldwin 1989). See infra notes 141-46 and accompanying text. See also Appendix.

142. OHIO REV. CODE ANN. § 2743.43 (Baldwin 1989). Ohio also requires that medical expert witnesses be licensed in both medicine and surgery. Id.
143. 67 Ohio St. 2d 99, 423 N.E.2d 156 (1981).
144. Id. at —, 423 N.E.2d at 160-61.
145. Id. at —, 423 N.E.2d at 160.
146. Id. at —, 423 N.E.2d at 160.
147. For relevant state statutes, see infra Appendix.
148. See infra Appendix.
149. See supra notes 38-37, 103 accompanying text.
because even if the testimony is admitted, the jury decides what weight to give the evidence.\textsuperscript{150}

The ideal expert witness is one who is (1) from the same or a similar locality as the defendant; (2) actively practicing medicine in a clinical environment; (3) from the same school of medicine as the defendant doctor; (4) familiar with the particular procedure in question, and; (5) certified in the same specialty as the defendant.\textsuperscript{151} For largely psychological reasons, such an ideal expert witness may be unwilling to testify against a colleague in the same medical community.\textsuperscript{152} When attorneys cannot find ideal witnesses, they must find ones who can satisfy the trial court that they have knowledge of the jurisdiction's applicable standard of care for physicians.\textsuperscript{153} The knowledge may have been acquired through study of journals and books, observation, or practical experience.\textsuperscript{154}

Lawyers have several options when trying to locate doctors to testify as expert witnesses.\textsuperscript{155} They can ask well-known academic physicians to recommend medical experts.\textsuperscript{156} Professors may also direct lawyers to appropriate medical journals, treatises, and articles.\textsuperscript{157} Academic physicians may be expert witnesses themselves.\textsuperscript{158} However, even highly renowned academicians and eminent physicians will carry little weight with the jury if they have so much knowledge or skill in particular areas of medicine that they apply higher standards than those which apply to average, ordinary physicians in the same specialties in smaller, rural communities or in specialties requiring lower standards of care.\textsuperscript{159}

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\textsuperscript{150} See supra note 103.

\textsuperscript{151} See supra notes 41-146 and accompanying text. The ideal expert would encompass a compilation of all the possible standards since the trial court judge has much discretion in determining competency. An expert witness closely matched to the defendant physician would have credibility with the jury. See supra note 103 and accompanying text.

\textsuperscript{152} See infra notes 206-18 and accompanying text. See also 1 D. LOUISELL \& H. WILLIAMS, MEDICAL MALPRACTICE ¶ 14.01, at 14-10 to -11 (1990). The authors state that physicians in America are highly revered and do not have the temperament to have their credibility or qualifications questioned on cross examination. Id. at 14-11. See generally Keiner, The Medical Conspiracy of Silence, CASE AND COMMENT, July-Aug. 1982, at 10; Seidelson, Medical Malpractice Cases and the Reluctant Expert, 16 CATH. U.L. REV. 158 (1966).

\textsuperscript{153} See 3 C. KRAMER, MEDICAL MALPRACTICE ¶ 29-02, at 29-8 (1990).

\textsuperscript{154} See supra note 134 and accompanying text.

\textsuperscript{155} See infra notes 156-60 and accompanying text.

\textsuperscript{156} Raff \& Weiss, Expert Medical Witnesses, 25 TRIAL 83 (1989).

\textsuperscript{157} 1 D. LOUISELL \& H. WILLIAMS, supra note 152, ¶ 7.02, at 7-6.

\textsuperscript{158} Id. at ¶ 7.02, at 7-8.

\textsuperscript{159} Id. at ¶ 7.02, at 7-8 to -9. Cf. Melville v. Southward, 791 P.2d 383, 390 (Colo. 1990) in which a lower court allowed an orthopedic surgeon to testify to the standard of care required of a podiatrist in a particular procedure because the orthopedic surgeon had more education and training than the podiatrist. The Colorado Supreme
Another method a lawyer may employ to locate an expert witness is to examine existing directories of specialists. The same caveat that applies to the academic physician expert applies to a non-local specialist found in a medical directory. Legal journals that contain advertisements for expert witnesses should be viewed with caution because such advertisements frequently do not indicate which witnesses are true "experts" or whose testimony will stand up to vigorous cross examination. Members of state medical societies are concerned about professional experts who spend a substantial portion of their time appearing in medical malpractice actions. These organizations have actively and successfully lobbied some state legislatures to enact statutes governing expert testimony. Delaware's "wandering expert" statute was enacted to preclude testimony from expert witnesses who travel from outside Delaware to testify in malpractice actions. The Tennessee legislature has adopted a statute requiring that expert witnesses be licensed in Tennessee or in a contiguous state. Kansas, Ohio, and Michigan require experts to spend a substantial portion of their time engaged in clinical practice.

Excluding or Discrediting Medical Expert Testimony

Since the trial court judge generally has unfettered discretion in deciding the admissibility of expert testimony and the decision of the trial court will not be overturned absent an abuse of discretion, the astute lawyer will want to try to exclude or discredit the opposing Court upheld the court of appeals reversal of the trial court's ruling on the ground that merely having more education or training does not qualify an expert to render an opinion as to whether a podiatrist has breached the standard of care applicable to the podiatry profession. Raff & Weiss, 25 Trial at 83 (stating that such directories include Who's Who in Medical Science and the Directory of Medical Specialists).

160. Raff & Weiss, 25 Trial at 83 (stating that such directories include Who's Who in Medical Science and the Directory of Medical Specialists).

161. 1 D. LOUISELL & H. WILLIAMS, supra note 152, § 7.02, at 7-8 to -9.

162. Raff & Weiss, 25 Trial at 83. The authors say that those doctors who advertise themselves as expert witnesses have various reasons for becoming expert witnesses. Some doctors become experts because they enjoy the intellectual challenge, to supplement their incomes, or because they feel morally obligated to become involved. Id.

163. 3 C. KRAMER, supra note 153, ¶ 29.02, at 29-7. Physicians are concerned that the availability of traveling experts will result in increases in malpractice insurance premiums and time and effort spent in defense of these actions. See infra notes 208-17 and accompanying text.

164. 3 C. KRAMER, supra note 153, ¶ 29.02, at 29-7.


166. TENN. CODE ANN. § 29-26-115(b) (1980). See infra Appendix.

party's expert testimony. In order for an attorney to introduce expert testimony into evidence, a proper foundation must be laid. Such foundation must include the expert's qualifications. The trial court judge then makes a determination of the expert witness's competency. If the trial court judge deems the expert witness competent to testify, the opposition's lawyer must attempt to discredit the expert. This attack on the witness should include questions about his fee for testifying; how many times he has testified before; and his qualifications to testify. Before the trial, the opposition attorney should investigate expert witnesses to see if they have testified in other malpractice actions or written any articles and if there are any inconsistencies between what the experts said then and what they are stating in the present trial.

ANALYSIS

CASE LAW TRENDS — WHAT THE EXPERT MUST KNOW

The general rule emerging in the case law of medical malpractice is that the expert witness must have knowledge of the applicable standard for individual jurisdictions. The trial court judge is given great discretion to decide the competency of expert witnesses. Locality, specialty, and same school standards have evolved over time with advancements in communications and technology and continue...

169. Mangrum, 21 CREIGHTON L. REV. at 511. See also Mann v. Cracchiolo, 38 Cal. 3d 18, 38, 694 P.2d 1134, 1145, 210 Cal. Rptr. 762, 773 (1985) (stating that the trial court will be deemed as having abused its discretion in excluding testimony of an expert witness if such witness demonstrates sufficient knowledge of the subject to allow the opinion to go to the jury); Burton v. Youngblood, 711 P.2d 245, 249 (Utah 1985) (excluding testimony of physician when no proper foundation was laid to qualify him as an expert witness).
170. Mann, 38 Cal. 3d at 38, 694 P.2d at 1145, 210 Cal. Rptr. at 773.
171. Id.
172. See infra notes 173-74 and 220-28 and accompanying text. The opposition lawyer may accomplish this by presenting an expert of her own. The jury will resolve conflicting expert opinions. See Piano v. Davison, 157 Ill. App. 3d 649, —, 510 N.E.2d 1066, 1078 (1987) (allowing the jury to hear and resolve the "battle of the experts" in a medical malpractice action).
173. 3 C. KRAMER, supra note 153, ¶ 26.05, at 26-37. The author states that in asking these questions the lawyer makes the jury more receptive to her attack on the witness's opinion testimony. Id.
174. Id. at ¶ 26.06, at 26-70; D. LOUISELL & H. WILLIAMS, supra note 152, ¶ 7.02, at 7-10. For more good suggestions for cross examining expert witnesses, see 3 C. KRAMER, supra note 153, ¶ 25.09 at 25-110 to -111.
175. 3 C. KRAMER, MEDICAL MALPRACTICE ¶ 29.02, at 29-8 (1990).
176. See supra notes 103-04 and accompanying text.
to change.177

The original justification for the "locality rule" was that a physician practicing in remote areas or small, rural communities could not meet the national standard because of the poor quality or availability of resources in the community.178 With advancements in technology and communication, such a reason has little merit today.179 If a physician has little or no access to facilities deemed as standard in other places, patients should be advised that superior medical services are available in other locations.180

The "locality rule" for medical specialists has been abandoned by many jurisdictions.181 While the rule has survived in some jurisdictions for non-specialists, the trend for specialists is toward a more uniform national standard.182 One reason for the uniform standard is that medical education in this country has largely standardized the requisite education, skill, and training required of a medical specialist.183 Before he can hold himself out as a specialist, a physician is required to be board certified, a process which entails increased residency and training in a particular area of clinical practice.184 Because national certification boards now apply a uniform standard to all specialists within a specialty, many jurisdictions have held that the locality rule no longer applies to medical specialists.185

Absent a statute to the contrary, the medical expert witness testifying in a medical malpractice case against a specialist usually does not have to be aware of the standard of care required in the same or a similar locality.186 However, the expert must demonstrate familiarity with the national standard governing the defendant specialist's conduct.187 Lawyers should be aware of those few jurisdictions which have retained the locality rule for specialists.188

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177. See infra Appendix for state standards.
180. Id. at 8-88.
181. See supra notes 58-67 and accompanying text.
182. See supra notes 44-52, 58-67 and accompanying text.
183. 3 C. KRAMER, MEDICAL MALPRACTICE, ¶ 29.02, at 29-12 (1990).
185. 3 C. KRAMER, supra note 183, ¶ 29.02, at 29-10.
186. Id. See supra notes 178-83 and accompanying text. See infra Appendix.
187. See supra notes 178-85 and accompanying text.
188. See, e.g., Poulin v. Zartman, 542 P.2d 251, 268-70 (Alaska 1975) (retaining the locality rule in a medical malpractice action against a pediatrician); Waterford v. Hal-
The Florida case of *Brown v. Sims* is an example of the trend in medical malpractice cases to allow a specialist to testify against a physician of a different specialty. With few exceptions, the rule is that medical expert witnesses do not have to be practicing in the same specialty as the defendant specialist. Many courts have held that when testimony is offered from a physician of one specialty against a physician from another specialty, the question of admissibility is for the judge to decide. The weight given to the testimony is for the jury to decide. Therefore, even a general practitioner may testify as an expert witness against a medical specialist if adjudged competent to testify by the trial court. Generally, non-medical professionals are excluded from testifying against physicians.

Allowing specialists from different fields or from different schools of medicine to testify against each other in medical malpractice cases is a sound practice. There are some general principles of medicine and standards of care which are uniform across the entire field of medicine. *Any* physician in good standing should qualify as an expert when the question is whether one of these standards has been breached. Although the duty of care is greater for specific

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190. Id. at 904.
191. See supra notes 95-103 and accompanying text.
192. See supra note 103 and accompanying text.
194. E.g., Beatty v. Morgan, 170 Ga. App. 661, —, 317 S.E.2d 662, 664 (1984) (allowing a general practitioner who was familiar with the standard of care applied to a urologist to testify against the urologist in a medical malpractice action).
196. See Morrison v. Stallworth, 73 N.C. App. 96, —, 326 S.E.2d 387, 391 (1985) (allowing testimony that the procedures for detecting breast cancer are learned easily and that any licensed physician should have the ability to perform a standard competent examination). See also 1 D. LOUISELL & H. WILLIAMS, supra note 179, ¶ 8.06, at 8-88.
197. Such physician would satisfy the requirements of FED. R. EVID. 702 for admission of expert testimony. See supra note 7 and accompanying text.
procedures performed by medical specialists, these standards may overlap other specialties or be known to specialists in other medical fields. The expert witness's function is to aid the trier of fact in finding the truth. It should not matter what specialty the expert witness practices if this goal can be accomplished. Since it is difficult to find physicians who are willing to testify against colleagues, parties to malpractice actions should be given latitude in presenting their evidence. The requirement that an expert witness must demonstrate sufficient familiarity with the standard of care to be applied for the procedure in question is a safeguard built into the system of admissibility. Even if the trial court judge is satisfied that the physician has adequate knowledge of the applicable standard of care, the jury will still make the final determination of credibility. The greater the discrepancy between the qualifications of the expert witness and those of the defendant specialist, the greater the likelihood that the jury will not find the testimony credible.

THE RELUCTANT EXPERT

In medical malpractice actions, the question arises of why attorneys are attempting to introduce expert testimony from physicians who do not have the same qualifications as the defendant physician. Reports of malpractice cases do not generally include reasons for this phenomenon and no specific fact patterns have emerged from these cases. Personal injury lawyers are particularly aware that it is axiomatic that in medical malpractice cases, one great obstacle that the lawyer must overcome is that of obtaining expert testimony. Much has been written about the reluctance of physicians to testify against fellow physicians. The so-called "conspiracy of silence" is imprinted on physicians throughout medical school and subsequent training. Physicians may not wish to testify in a medical malprac-

198. See supra notes 32, 88-93 and accompanying text.
199. FED. R. EVID. 702. See supra note 7.
200. See supra notes 75-105 and accompanying text.
201. See infra notes 206-18 and accompanying text.
202. See supra notes 53-139 and accompanying text.
204. See 1 D. LOUISELL & H. WILLIAMS, supra note 179, ¶ 7.02, at 7-8 to -9.
205. See infra notes 108-17 and accompanying text.
pactice case because they may feel that the possibility of error is great in the demanding and complex practice of medicine. In a small medical community, the physician may be personally acquainted with the defendant physician. Doctors generally believe that even the allegation of malpractice in a legal complaint irreparably damages their reputations and practices. The fear of being sued for malpractice may produce a sympathetic response from other physicians consistent with human reluctance to injure fellow colleagues and friends. Many physicians feel that malpractice claims are nonmeritorious and are the creation of greedy plaintiffs and scheming lawyers. Some doctors believe that the prosecution of medical malpractice actions will impede the advancement of medical practice. The physician who agrees to testify against a colleague may become persona non grata, receive less referral work, or become a professional and social outcast. Therefore, the plaintiff's lawyer may have difficulty locating a competent and willing expert witness.

EXCLUDING EXPERT TESTIMONY

The trial court judge is given great discretion in determining the competency of medical expert witnesses and that decision will generally be upheld upon appeal absent abuse of discretion. The opposition lawyer must try to take advantage of the trial court's wide latitude in determining the competency of the expert witness by (1) trying to exclude the expert's testimony on the basis of rules of evidence and discovery; (2) trying to discredit the expert's testimony by showing that this expert has made conflicting statements in the past; or, (3) showing that this expert does not have an adequate grasp of the standard of care applicable to the defendant physician.

The Rhode Island Supreme Court recently stated that a trial

209. Seidelson, 16 CATH. U.L. REV. at 158.
210. Id. The author points out that the doctors who choose not to testify in medical malpractice actions have a "natural reluctance to assume a Judas role." Id.
211. Id. at 166. Each physician feels that "there but for the grace of God am I." Id. at 158.
212. 1 D. LOUISELL & H. WILLIAMS, supra note 179, ¶ 14.01, at 14-12.
213. Id. at 14-13.
214. Id.
216. See supra note 103 and accompanying text.
218. 1 D. LOUISELL & H. WILLIAMS, supra note 179, ¶ 11.35, at 11-123.
219. See supra notes 41-43 and accompanying text.
judge, in determining competency of an expert witness, must take into consideration the jury's natural tendency to give greater weight to testimony from a qualified expert. The Delaware Supreme Court held that a proffered witness's "current expertise" should go to the admissibility and not the weight of the testimony. Such holdings indicate that an argument could be made to exclude medical expert testimony on the basis of rules of evidence other than those related to admission of expert testimony. This argument has been made successfully in cases outside the medical malpractice arena in which the expert testimony was equivocal or where the court determined that the basis for the expert's opinion was only slightly probative and the expert's academic credentials would cause a jury to give more weight to the testimony than it deserved.

The lawyer may try to show that the proffered expert witness is a professional expert witness who travels from malpractice case to malpractice case and may not have adequate familiarity with the applicable standards for that jurisdiction. The jury can frequently see through a witness whose testimony can be bought and may retaliate by finding in favor of the other side.

CONCLUSION

In a medical malpractice action the plaintiff bears the burden of proof of the standard of care which applies to the defendant physician and whether a breach of that standard occurred. In the highly complex profession of medicine, expert testimony is usually required to assist the jury in determining whether an action for malpractice will stand.

The standards that apply to physicians vary among jurisdictions and remain in flux today. As a general rule, anyone who can demon-

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222. FED. R. EVID. 403 provides that relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." FED. R. EVID. 703 allows the court to assess the reliability of the basis for the expert's opinion. See Viterbo v. Dow Chemical Co., 826 F.2d 420, 422 (5th Cir. 1987) (excluding the expert witness's testimony because he formed his opinion based on inadequate sources).
223. See, e.g., United States v. Vinieris, 611 F. Supp. 1046, 1048-49 (S.D.N.Y. 1985) (excluding testimony of expert psychiatrist because it was equivocal and confusing).
224. See, e.g., In re Pauli R.R. Yard PCB Litigation, 706 F. Supp. 358, 373 (E.D. Pa. 1988) (holding that courts are permitted to examine the bases for expert witness's testimony pursuant to FED. R. EVID. 703); United States v. Vinieris, 611 F. Supp. 1046, 1048 (S.D.N.Y. 1985) (excluding expert testimony by psychiatrist on the basis of FED. R. EVID. 403 because such testimony was confusing to the jury).
225. See supra note 44 and accompanying text.
226. 1 D. LOUISELL & H. WILLIAMS, supra note 179, ¶ 7.02, at 7-8.
strate knowledge to the trial court's satisfaction of the applicable standard of care and who has the requisite skill and knowledge upon which to base an opinion as to whether that standard was breached, may be an expert witness. The astute lawyer will try to obtain a medical expert witness who is as closely matched as possible to the defendant physician in medical training and experience.

APPENDIX: ABRIDGED STATE STATUTES AND STANDARDS

Alabama:

**ALA. CODE § 6-5-484 (1990): Degree of care owed to patient.**

(a) In performing professional services for a patient, a physician's, surgeon's or dentist's duty to the patient shall be to exercise such reasonable care, diligence and skill as physicians, surgeons, and dentists in the same general neighborhood, and in the same general line of practice, ordinarily have and exercise in a like case. . . .

CASE LAW NOTE: The degree of reasonable care imposes a legal duty on physicians to exercise that degree of care that reasonably competent physicians in the national medical community would exercise under the same or similar circumstances. Bradford v. McGee, 534 So. 2d 1076, 1079 (Ala. 1988).

**ALA. CODE § 6-5-548 (1990): Burden of proof; reasonable care as similarly situated health care provider; . . .**

(a) In any action for injury or damages or wrongful death, whether in contract or tort, against a health care provider for breach of the standard of care the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in a like case.

(b) If the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a “similarly situated health care provider” is one who:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state; and

(2) Is trained and experienced in the same discipline or school of practice; and

(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

(c) If the health care provider whose breach of the standard
MEDICAL EXPERT WITNESSES

of care claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similarly situated health care provider" is one who:

1. Is licensed by the appropriate regulatory board or agency of this or some other state; and

2. Is trained and experienced in the same specialty; and

3. Is certified by an appropriate American board in the same specialty; and

4. Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

(e) . . . A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he is a "similarly situated health care provider" as defined above.

Alaska:

(a) In a malpractice action based on the negligence or wilful misconduct of a health care provider, the plaintiff has the burden of proving by a preponderance of the evidence

1. the degree of knowledge or skill possessed or the degree of care ordinarily exercised under the circumstances, at the time of the act complained of, by health care providers in the field or specialty in which the defendant is practicing;


Arizona:

The following shall be necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care:

1. The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances;

Arkansas:
(a) In any action for medical injury, the plaintiff shall have the burden of proving:

(1) The degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality;

California:
CAL. EVID. CODE § 720 (West 1966). Qualification as an expert witness.
(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

CASE LAW NOTE: California requires physicians and surgeons to exercise that reasonable degree of care ordinarily exercised by members of the medical profession under similar circumstances. Mann v. Cracchiolo, 38 Cal. 3d 18, 39, 694 P.2d 1134, 1145, 210 Cal. Rptr. 762, 763 (1985).

Colorado:

No person shall be qualified to testify as an expert witness concerning issues of negligence in any medical malpractice action or proceeding against a physician unless he not only is a licensed physician but can demonstrate by competent evidence that, as a result of training, education, knowledge, and experience in the evaluation, diagnosis, and treatment of the disease or injury which is the subject matter of the action or proceeding against the physician defendant, he was substantially familiar with applicable standards of care and practice as they relate to the act or omission which is the subject of the claim on the date of the incident. The court shall not permit an expert in one medical subspecialty to testify against a physician in another medical subspecialty unless, in addition to such a showing of substantial familiarity, there is a showing that the standards of care and practice in the two fields are similar.

Connecticut:
CONN. GEN. STAT. ANN. § 52-184c (West 1990): Standard of
care in negligence action against a health care provider. Qualifications of expert witness

(a) In any civil action to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a health care provider . . . . The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in the light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

(b) If the defendant health care provider is not certified . . . as being a specialist, is not trained . . . in a medical specialty, or does not hold himself out as a specialist, a "similar health care provider" is one who:

   (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and

   (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

(c) If the defendant . . . is certified . . . as a specialist, is trained . . . in a medical specialty . . . or holds himself out as a specialist, a "similar health care provider" is one who:

   (1) Is trained and experienced in the same specialty; and

   (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

(d) Any health care provider may testify as an expert in any action if he:

   (1) Is a "similar health care provider" pursuant to subsection (b) or (c) of this section; or

   (2) is not a similar health care provider . . . but, to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

Delaware:
DELAWARE:

(a) No person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with that degree of skill ordinarily employed in the community or locality where the alleged malpractice occurred, under similar circumstances, by members of the profession practiced by the health care provider; provided, however, that any such expert witness need not be licensed in the State.

(b) Any physician who has been in the active practice of medicine or surgery for at least the past 5 years and who currently practices in the State or within a state contiguous to the State and within a radius of 75 miles of the Capitol of the State shall be presumed to be competent to give expert medical testimony as to applicable standards of skill and care, if it shall be established that the degree of skill and care required of the expert in the locality where the expert practices or teaches is of the same or equivalent standard as the skill and care employed in the community or locality where the alleged malpractice occurred.

District of Columbia:


FLORIDA:

FLA. STAT. ANN. § 766.102 (West Supp. 1990): Medical Negligence; standards of recovery
(1) In any action for recovery of damages . . . in which it is alleged that such death or injury resulted from the negligence of a health care provider . . . the claimant shall have the burden of proving . . . that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider.

The prevailing professional standard of care . . . shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

(2)(a) If the health care provider whose negligence is claimed to have created the cause of action is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similar health care provider" is one who:

1. Is licensed by the appropriate regulatory agency of this state;
2. Is trained and experienced in the same discipline or school of practice; and

3. Practices in the same or similar medical community.

(b) If the health care provider . . . is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who:

1. Is trained and experienced in the same specialty; and

2. Is certified by the appropriate American board in the same specialty.

However, if any health care provider described in this paragraph is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider."

(c) . . . Any health care provider may testify as an expert in an action if he:

1. Is a similar health care provider pursuant to paragraph (a) or paragraph (b); or

2. Is not a similar health care provider . . . but, to the satisfaction of the court, possesses sufficient training, experience, and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge must be as a result of the active involvement in the practice or teaching of medicine within the 5-year period before the incident giving rise to the claim.

Georgia:


Hawaii:

HAW. REV. STAT. § 626-1, Rule 702 (1985)

This rule is identical with FED. R. EVID. 702 except for the deletion of a comma after the word "education."

CASE LAW NOTE: The question of whether a witness qualifies as an expert is a matter left to the sound discretion of the trial court. Larsen v. State Sav. & Loan Ass’n, 64 Haw. 302, —, 640 P.2d 286, 288 (1982).

Idaho:
IDAHO CODE § 6-1013 (1990): Testimony of expert witness on community standard. The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing himself with the standards and practices of (a particular) such area and thereafter giving opinion testimony in such a trial.

CASE LAW NOTE: A nationally board-certified specialist must demonstrate that he is board certified in the same specialty as the defendant physician. An out-of-the-area specialist must inquire into the local standard of care required of that specialty to insure that there are no deviations from the national standard for that specialty. Buck v. St. Clair, 108 Idaho 743, --, 702 P.2d 781, 784 (1985).

Illinois:


In any case in which the standard of care given by a medical professional is at issue, the court shall apply the following standards to determine if a witness qualifies as an expert witness and can testify on the issue of the appropriate standard of care.

(a) Relationship of the medical specialties of the witness to the medical problem or problems and the type of treatment administered in the case;
(b) Whether the witness has devoted a portion of his or her time to the practice of medicine, teaching or University based research in relation to the medical care and type of treatment at issue which gave rise to the medical problem of which the plaintiff complains;
(c) Whether the witness is licensed in the same profession as the defendant; and
(d) Whether, in the case against a nonspecialist, the witness can demonstrate a sufficient familiarity with the standard of care practiced in this State.

Indiana:

CASE LAW NOTE: Indiana applies a same or similar locality stan-
standard unless there is a common standard throughout the country, in which case it applies a national standard of care for physicians. Ellis v. Smith, 528 N.E.2d 826, 829 (Ind. Ct. App. 1988).

**Iowa:**

IOWA CODE ANN. § 147.139 (West 1989): Expert witness standards

If the standard of care given by a physician and surgeon . . . is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the person's medical . . . qualifications relate directly to the to the medical problem or problems at issue and the type of treatment administered in the case.

CASE LAW NOTE: The standard of care applied in Iowa is that degree of care, skill and learning ordinarily exercised by other doctors in similar circumstances. DeBurkarte v. Louvar, 393 N.W.2d 131, 132-33 (Iowa 1986).

**Kansas:**


In any medical malpractice liability action . . . in which the standard of care given by a practitioner of the healing arts is at issue, no person shall qualify as an expert witness on such issue unless at least 50% of such person's professional time within the two-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed.

CASE LAW NOTE: The standard of care applied in Kansas is that a physician must exercise that reasonable degree of care ordinarily exercised by other physicians in the same or a similar locality. Chandler v. Neosho Memorial Hosp., 223 Kan. 1, —, 574 P.2d 136, 138 (1977).

**Kentucky:**

CASE LAW NOTE: The standard of care applied in Kentucky is that physicians must exercise such ordinary knowledge and skill as physicians in similar neighborhoods and surroundings would ordinarily exercise under like circumstances. Engle v. Clarke, 346 S.W.2d 13, 15 (Ky. Ct. App. 1961).

**Louisiana:**


Any licensed physician exercising that degree of skill and care ordinarily employed, under similar circumstances by members of his profession in good standing in the same community or locality, and using reasonable care and diligence with his best judgment in the application of his skill, shall
not be held civilly liable or subject to criminal prosecution for acts arising from his medical opinions, judgments, actions or duties pursuant to any of the provisions of this Part.


Maine:

CASE LAW NOTE: Maine requires expert witnesses to show sufficient familiarity with the national standard of care applicable to the defendant physician. Hauser v. Bhatnager, 537 A.2d 599, 601 (Me. 1988).

Maryland:


Massachusetts:


Michigan:

MICH. COMP. LAWS ANN. § 600.2169 (West Supp. 1990): Medical Malpractice Action; Expert Witnesses; Criteria and Qualifications

(1) In an action alleging medical malpractice, if the defendant is a specialist, a person shall not give expert testimony on the appropriate standard of care unless the person is or was a physician licensed to practice medicine or osteopathic medicine and surgery in this or another state and meets both of the following criteria:

(a) Specializes, or specialized at the time of the occurrence which is the basis for the action, in the same specialty or a related, relevant area of medicine or osteopathic medicine and surgery as the specialist who is the defendant in the medical malpractice action.

(b) Devotes, or devoted at the time of the occurrence which is the basis for the action, a substantial portion of his or her professional time to the active clinical practice of medicine or osteopathic medicine and surgery or to the instruction of students in an accredited medical school, osteopathic medical school, in the same specialty or a related, relevant area of health care as the specialist who is the defendant in the medical malpractice action.

(2) In determining the qualifications of an expert witness in
an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

(a) The educational and professional training of the expert witness.

(b) The area of specialization of the expert witness.

(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of medicine, osteopathic medicine and surgery, . . .

(d) The relevancy of the expert witness's testimony.

(3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

. . .

Minnesota:

CASE LAW NOTE: Minnesota requires expert witnesses to be familiar with the standard of care that applies to physicians in the same or similar localities. Lundgren v. Eustermann, 370 N.W.2d 877, 880 (Minn. 1985).

Mississippi:


In any action for injury or death against a physician, whether in contract or in tort, arising out of the provision of or failure to provide health care services, a person may qualify as an expert witness on the issue of the appropriate medical standard of care if the witness is licensed in this state, or some other state, as a doctor of medicine.

CASE LAW NOTE: The standard of care applied to general practitioners in Mississippi is that required of a general practitioner in the same locality. Pittman v. Gilmore, 556 F.2d 1259, 1260 (5th Cir. 1977) (applying Mississippi law). The standard of care for specialists is that required of minimally knowledgeable competent physicians in the same specialty or field. Brown v. Mladineo, 504 So. 2d 1201, 1202-03 (Miss. 1987).

Missouri:

CASE LAW NOTE: The standard applied to physicians in Missouri is that they must exercise that degree of care as other physicians in the same profession and locality would under similar circumstances. Swope v. Prinz, 468 S.W.2d 34, 39 (Mo. 1971).

Montana:


CASE LAW NOTE: This rule is identical to FED. R. EVID. 702. The standard of care for a specialist in Montana is that skill and learning possessed by other physicians who are certified by the same national

**Nebraska:**


CASE LAW NOTE: This statute is identical to FED. R. EVID. 702. Nebraska applies the same or similar locality standard of care to physicians in medical malpractice actions unless a uniform treatment of the condition exists. Wentling v. Jenny, 206 Neb. 335, 335, 293 N.W.2d 76, 77 (1980).

**Nevada:**

NEV. REV. STAT. § 50.275 (1987)

CASE LAW NOTE: This statute is identical to FED. R. EVID. 702. The determination of the competency of an expert witness is within the trial court's discretion. Walton v. Eighth Judicial Dist. Court, 94 Nev. 690, —, 586 P.2d 309, 310 (1978).

**New Hampshire:**

N.H. REV. STAT. ANN. § 507-C:3 (1983): Qualified testimony
In any action for medical injury:
I. No witness is competent to give expert testimony required by RSA 507-C:2 unless the court finds that the witness was competent and duly qualified to render or supervise equivalent care to that which is alleged to have caused the medical injury at the time that such care was rendered.

**New Jersey:**


**New Mexico:**

CASE LAW NOTE: New Mexico requires physicians to be judged by the standard of reasonable care exercised under similar circumstances. Sewell v. Wilson, 97 N.M. 523, —, 641 P.2d 1070, 1076 (1982).

**New York:**


**North Carolina:**

CASE LAW NOTE: The standard applied in North Carolina is the similar locality rule. However, when the standard of care is the same across the country, an expert witness does not have to be familiar with the local standard. Haney v. Alexander, 71 N.C. App. 731, —, 323 S.E.2d 430, 434 (1984).

**North Dakota:**
CASE LAW NOTE: North Dakota requires expert witnesses to be familiar with the standards of care which are alleged to have been breached. Morlan v. Harrington, 658 F. Supp. 24, 26 (D.N.D. 1986) (applying North Dakota law).

Ohio:

OHIO REV. CODE ANN. § 2743.43 (Baldwin 1989): Competency of medical witnesses

(A) No person shall be deemed competent to give expert testimony on the liability issues in a medical claim, as defined in division (D)(3) of section 2305.11 of the Revised Code, unless:

(1) Such person is licensed to practice medicine and surgery, osteopathic medicine and surgery, and podiatric medicine and surgery by the state medical board by the licensing authority of any state;

(2) Such person devotes three-fourths of his professional time to the active clinical practice of medicine or surgery, osteopathic medicine and surgery, or podiatric medicine and surgery, or to its instruction in an accredited university.

(B) Nothing in division (A) of this section shall be construed to limit the power of the trial court to adjudge the testimony of any expert witness incompetent on any other ground.

Oklahoma:

OKLA. STAT. ANN. tit. 76 § 20.1 (West 1987): Healing arts-
Standard of care
The standard of care required of those engaging in the practice of the healing arts within the State of Oklahoma shall be measured by national standards.

Oregon:


Pennsylvania:


Rhode Island:

CASE LAW NOTE: Rhode Island requires physicians to exercise the same standard of care as ordinarily would be exercised in the same or a similar locality. Richardson v. Fuchs, 523 A.2d 445, 448 (R.I. 1987).

South Carolina:

South Dakota:


Tennessee:


(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant’s negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a) unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this section when it determines that the appropriate witnesses otherwise would not be available.

Texas:


(a) In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if:
(1) The person practicing at the time such testimony is given or was practicing at the time the claim arose and has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; or

(2) the court, after a hearing conducted outside the presence of the jury, determines that the person is otherwise qualified to give expert testimony on said issue.

(b) For the purpose of this section, "practicing" includes, but is not limited to, training residents or students at an accredited school of medicine or osteopathy or serving as a consulting physician to other physicians who provide direct patient care, upon the request of such other physicians.

Utah:


Vermont:

VT. STAT. ANN. tit. 12, § 1908 (Supp. 1990): Burden of proof . . . In a malpractice action . . . the plaintiff shall have the burden of proving:
(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in similar practice under the same or similar circumstances whether or not within the state of Vermont.

Virginia:

A. In any proceeding . . . the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth . . . . An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. No witness shall be qualified to testify as an expert on the standard of care unless he has had active clinical practice in the particular specialty or field of medicine about which he is to testify within one year of the date of the alleged act or omission forming the basis of the action in which he is to testify.

B. In any action for damages resulting from medical malpractice, any issue as to the standard of care to be applied shall be determined by the jury, or the court trying the case without a jury.
Washington:


The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

West Virginia:


The applicable standard of care and a defendant's failure to meet said standard, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. Such expert testimony may only be admitted in evidence if the foundation, therefor, is first laid establishing that:

(a) The opinion is actually held by the expert witness;
(b) the opinion can be testified to with reasonable medical probability;
(c) such expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert testimony is addressed;
(d) such expert maintains a current license to practice medicine in one of the states of the United States; and
(e) such expert is engaged or qualified in the same or substantially similar medical field as the defendant health care provider.

Wisconsin:

WIS. STAT. ANN. § 907.02 (West 1975): Testimony by experts.

CASE LAW NOTE: This rule is identical to FED. R. EVID. 702. Wisconsin applies the national standard when qualifying expert witnesses in medical malpractice actions. Shier v. Freedman, 58 Wis. 2d 269, 206 N.W.2d 166, 174 (1973).

Wyoming:

WYO. STAT. § 1-12-601 (1988). Injury by health care providers; burden of proof.
(a) In an action for injury alleging negligence by a health care provider the plaintiff shall have the burden of proving:

(i) If the defendant is certified by a national certificating board or association, that the defendant failed to act in accordance with the standard of care adhered to by that national board or association; or

(ii) If the defendant is not so certified, that the defendant failed to act in accordance with the standard of care adhered to by health care providers in good standing performing similar health care services.

(b) In either paragraph (a)(i) or (ii) of this section, variations in theory of medical practice or localized circumstances regarding availability of equipment, facilities or supplies may be shown to contravene proof offered on the applicable standard of care.

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