

What I say versus what I do

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So, you're an expert in a malpractice case; for which side is irrelevant. The legal issue is a simple one. Can you say that the doctor's care fell within the prevailing standard of care if you would have done it differently? Some courts allow an expert to be cross-examined on this point, and some don't. Let's take a look at how Indiana handles this matter and why.

The facts of *Oaks v Chamberlain*, No.92A04-1609-CC-2041 (Ind. Ct. App. May 11, 2017) are as follows. The patient, who had a history of chronic obstructive pulmonary disease (COPD), went to the emergency room complaining of chest pain and a cough. He was admitted and 2 days later developed gastrointestinal problems and abdominal pain. After a computed tomographic scan he was diagnosed with gallstones and a dilated transverse colon. What follows is the medical and surgical history of the patient's treatment.

Based on the x-ray results and the entire clinical picture, Dr. Chamberlain suspected that Oaks had an early infection in his gallbladder. Dr. Chamberlain determined that gallbladder removal surgery was the proper course of treatment and that it would likely resolve the ileus in Oaks' colon, which Dr. Chamberlain believed was secondary to the gallbladder infection.

Dr. Chamberlain performed laparoscopic surgery to remove Oaks' gallbladder on December 11. During surgery, Dr. Chamberlain saw that Oaks' colon was swollen. After surgery, Dr. Chamberlain carefully monitored Oaks' condition, specifically, his swollen colon and continued ileus. Following Oaks' surgery, he had no fever, his right upper quadrant pain was "minimal," and he began ambulating. In order to stimulate the bowel and alleviate the ileus, Dr. Chamberlain reduced the amount of narcotics Oaks was taking and ordered the drug neostigmine. Subsequently, Oaks began passing gas on a regular basis, had several bowel movements, and his abdomen went from firm and distended to soft and not distended. Because he believed the clinical picture showed marked improvement, Dr. Chamberlain did

not obtain x-ray images of Oaks' abdomen in the days following surgery.

On the afternoon of December 15, Oaks' colon perforated, allowing air and fecal matter to escape into his abdomen. The perforation of the colon was due to a combination of enlargement of, and a lack of blood supply to, the colon. Dr. Chamberlain performed emergency surgery during which he repaired and resected the bowel and performed an anastomosis—a surgical procedure in which he reconnected the two ends of the bowel after the resection. During the surgery, Oaks' spleen was removed. Following the surgery, Oaks had various complications—including another perforation—and he required additional treatment and surgeries by other medical providers and a stay in a rehabilitation facility.

During a pretrial conference, Oaks indicated that he planned to elicit testimony from one of Chamberlain's experts that the expert would have treated the patient differently even though the defendant's actual treatment met the standard of care. The testimony was being sought to impeach the witness's opinions. The defendant opposed the planned impeachment testimony because he believed it would conflict with the fact that the standard of care was adhered to, was essentially irrelevant, and could only serve to mislead the jury.

The battle of the experts hinged on whether the standard of care was to routinely take postoperative serial x-rays to monitor the bowel or whether the patient's clinical signs of progress and improvement negated the need to acquire additional abdominal x-rays, which would have been appropriate only if the patient were not improving or there was negative symptomatology. Out of the presence of the jury, Chamberlain's expert admitted that while not taking the x-rays fell within the standard of care given the facts at hand, he personally would have acquired them. The trial court judge excluded the testimony stating:

I don't disagree that there [are] instances where a physician who is giving an opinion on standard of care [can] have their opinion attacked by demonstrating [that] even though they say this is the standard of care, they do contrary to the standard of care; but they've testified what the standard of care would be. I think the distinction in this situation was

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... what was represented to me in argument, ... was that the doctor said standard of care was this but in his own personal practice, he practices above what he believes the standard of care to be and that's why I did not permit that.

The jury returned a verdict for Chamberlain and the appeal ensued.

The Appellate Court first noted the law as stated in the jury instruction that was given; it noted:

A general surgeon is allowed broad discretion in selecting treatment methods and is not limited to those most generally used.

When more than one method of treatment is available, a general surgeon must use sound judgment in choosing which method to use.

If a general surgeon uses sound judgment in selecting from a variety of accepted treatments, and uses reasonable care and skill in treating a patient, then the general surgeon is not responsible if the treatment does not succeed.

The fact that other methods existed, or that another general surgeon would have used a different method, does not establish medical negligence.

Although it was a correct statement of the law, this jury instruction was a misstatement of the issue. The expert stated that the standard of care did not require serial radiographs in this particular instance but that he would have ordered them anyway. This was not an opinion that he would have chosen one acceptable course of treatment over another. Rather, what the expert was saying was that he would have ordered a procedure that was not within the standard of care at all. Given this fact, because the opinion provided was conflicting in nature it should not have been excluded and the plaintiff's attorney should have been allowed to attempt to impeach the defendant's expert via cross-examination. The court noted that the purpose of cross-examination is in part to "elucidate, modify, explain, contradict or rebut testimony given during direct examination." Quoting 2 other cases to make its point, the court noted that "doctors and other expert witnesses are not oracles whose opinions, once stated, can not be questioned or refuted by other evidence, even if that evidence does not come in the form of another expert's testimony," and that "the time-honored process of cross-examination is the device best suited to determine the trustworthiness of testimonial evidence." (Cits. Omit.)

The court in agreeing with the majority of jurisdictions that have addressed this issue and have allowed

an expert to be questioned about what he personally does as opposed to what the standard of care is was based on the decision of a sister state whose law states:

... although an expert who personally exceeds the standard that he testifies to is not as readily impeached as an expert who provides wholly different treatment than that which he contends is adequate, we can not deny that such a disparity would, nevertheless, be quite relevant to a jury that is charged with determining which of two highly qualified experts should be believed.

The court reversed the decision of the trial court and remanded the case for a new trial.

COMMENTARY

I can think of a few orthodontic analogies. The first is, of course, serial x-rays to check for root resorption. It is my understanding that the standard of care in our specialty is that if everything appears normal on the initial radiographs, a scout film should be taken ~6-9 months into treatment, certainly within the first year, to check for the presence of root resorption. If none is seen, then one is probably safe in not taking another for the remainder of an average 2-year case, at which time a final radiograph is acquired, although the final may be acquired a bit sooner for clinical finishing reasons. If, however, any one of a number of anatomic indications are present on the initial film, then serial x-rays are probably warranted at shorter intervals. If root resorption is noted on the scout film, then certainly serial films are indicated at somewhat shorter intervals, usually defined as every 3-4 months.

The need for serial cephalometric films also comes to mind when treating growing children with adverse growth patterns. Attempting to ascertain the rate and direction of growth on one hand and attempting to discover when dentofacial growth and development has essentially ceased on the other are 2 clinical findings that can be discovered only by serial radiographs. Certainly one can look at the patient and qualitatively assess an answer, but to actually know, one needs to dig a little deeper.

So, suppose, just for argument's sake, we agree that what I have stated above is generally considered to be the standard of care regarding these 2 situations. You are an expert in a case and you personally follow a different protocol in your practice than what you have stated the standard of care to be. You believe that the doctor on the side you are an expert for has complied with what you understand the minimum standard of care to be. Should the opposing side be able to question you about what your personal practices are, even after

you have testified that the standard of care was met? It really shouldn't matter what you personally do, except that it does. It goes to your credibility as an expert.

The "why" that goes into whatever it is you're saying is important for the trier of fact, the jury, to place a weight or value on what you are saying. It goes to defining reasonableness. It goes to defining the undefinable. Whether to believe you or not, and to what extent, is the heart and soul of impeachment testimony.

I've been an expert in a number of cases. Not as many as some people I have known, but more than

enough. When I am on the stand it's like being in a boxing ring. I know the opposing attorney is going to try to beat my brains out. In all honesty, that's part of what every expert witness gets paid for. I do what I do because I believe that the side that I have agreed to testify for needs my help, that I can give it, and that I agree with and support their position. The last item is the important one. You see, in the end, if you can not sell yourself, what you believe in and what you stand for, you haven't got a chance of selling what you are saying to others.