An Opposing Expert's Personal Practices Are Always Relevant and Should Be Admissible in Your Medical Malpractice Case

By Benjamin Ikuta

What a dumb motion, I thought to myself. I thought there was no way that a judge could possibly grant the defendant's motion to exclude the personal practices of their own expert. Medical malpractice cases rest almost entirely on the credibility and experience of the experts. How could the defense possibly try to exclude what their expert would have done in the same circumstances?

At deposition in my wrongful death case, the defendant's expert colorectal surgeon admitted he would have never taken the path of the defendant in relation to the treatment of a high-grade small bowel obstruction. The expert testified that it "would have been nice" had the defendant practiced the way the expert practiced. He even admitted that had the defendant treated the decedent the way the expert treats patients, the decedent would have still been alive.

But with no California law on point, the Riverside County judge *granted* the motion. This tied my hands at trial, excluding me from explaining to the jury that the defense's expert did not dare practice the same way as the substandard care he was paid to defend.

Then it happened again in a similar case, a few years later, where a judge in Orange County did the same thing. I lost both trials.

Almost every med mal defense firm files this MIL as part of their dozens of form, boilerplate motions in limine. The motion is often very short, spanning about three pages, with a dearth of California law. The argument is that the standard of care does not require exceptional, A+ level care, but rather what a reasonable physician would do under the same or similar circumstances. They will argue that even if a minority of physicians would take the path of the defendant in the case, that the standard of care is still met. (See CACI 506 titled "Alternate Methods of Care"; *Clemens v. Regents of Univ. of California* (1970) 8 Cal.App.3d 1, 13.)

The defense will then argue that their expert is exceptional and often exceeds the standard of care. They will claim that it would be irrelevant and unduly prejudicial under Evidence Code section 352 to allow inquiry into the expert's personal practices because such practices reflect exceptional, rather than simply reasonable, care.

Again, without any California law directly on point and with the wrong judge who wants to speed through your trial as fast as possible with minimal questioning, the judge may grant the motion, crippling your ability to engage in an effective cross-examination. It is critical that in that medical malpractice case you fully brief an opposition, including citation to pertinent out-of-state authority given the lack of any California law on point.

An Expert's Personal Practices that Deviate from the Defendant's Actions Is Directly Relevant to Credibility

First, point out that the defendant's boilerplate motion does not contain a single cite that supports the defense's contention that an expert's personal practices are not *relevant*. While there are no California cases directly on point, there are a plethora of cases from various jurisdictions that specifically hold that in medical malpractice cases, an expert's personal practices are relevant and admissible.

For example, in *Wallbank v. Rothenberg* (Colo. App. 2003) 74 P.3d 413, 416, the Colorado Court of Appeals affirmed that the trial court was correct in *denying* a motion to exclude such cross-examination. *Wallbank* involved a medical malpractice action where the jury found for the plaintiff after the defendant surgeon negligently failed to obtain a CT scan before surgery, causing facial paralysis. (*Ibid.*) Just as in the motions I've seen, the surgeon argued "that such evidence is irrelevant, because the personal preferences of a particular expert do not establish the standard of care." (*Ibid.*) As in the motions I've seen, the surgeon argued that "such evidence is irrelevant because a practice different from that personally followed by an expert witness may also fall within the applicable standard of care." *(Ibid.*)

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The Court of Appeals explained in detail why such testimony was proper: "The relevance and importance of a medical expert's personal choice of a course of treatment is highly probative of the credibility of the expert's opinion concerning the standard of care." (*Id.* at p. 417.) As such, as to the credibility of the surgeon's expert, it was highly probative when he "testified that obtaining a CT scan or MRI was not required by the applicable standard of care, but that he personally would have obtained those tests." (*Ibid.*)

Likewise, *Smethers v. Campion* (Ariz. Ct. App. 2005) 210 Ariz. 167, 169 involved a medical malpractice action against an ophthalmologist who did not re-measure the patient's eyes prior to performing LASIK. At deposition, the defendant's expert testified that the decision not to re-measure was within the standard of care but "that, in his own practice, he would have re-measured before proceeding with surgery." (*Ibid.*) The trial court granted a motion in limine to exclude evidence regarding the expert's personal practices. (*Ibid.*)

The Court of Appeals reversed, finding the order excluding the expert's personal practices to be reversible error. (*Ibid.*) The court explained that "the jury is entitled to fully evaluate the credibility of the testifying expert, and the fact that an expert testifies that the standard of care does not require what that expert personally does in a similar situation may be a critical piece of information for the jury's consideration." (*Id.* at p. 177.) The court further explained that a jury should be allowed to determine whether an expert's personal practices are "perhaps closer to reflecting the applicable standard of care than that espoused by [the expert] in his official standard of care opinion." (*Ibid.*)

Likewise, numerous other cases have specifically held that a party must be allowed to question an opposing expert on that expert's personal practices to question that expert's credibility:

- *Oaks v. Chamberlain* (Ind. Ct. App. 2017) 76 N.E.3d 941, 949 – "Given the prevailing view in other states, Indiana's long-standing rule that a witness' credibility may be attacked by any party, and the essential role of cross-examination in determining the trustworthiness of testimonial evidence, *we join the abundant authority from other states and hold that the admission of an expert's testimony about his or her personal practices in medical malpractice cases is permissible for the purpose of impeaching that expert's testimony about the standard of care*." (Emphasis added.)
- *Condra v. Atlanta Orthopaedic Group, P.C.* (2009) 285 Ga. 667, 669 – "We ... hold that evidence regarding an expert witness' personal practices, unless subject to exclusion on other evidentiary grounds, is admissible both as substantive evidence and to impeach the expert's opinion regarding the applicable standard of care."
- *Schmitz v. Binette* (Ill. App. Ct. 2006) 368 Ill.App.3d 447, 461 – "[A]n expert's personal practices may well be relevant to that expert's credibility, particularly when those practices do not entirely conform to the expert's opinion as to the standard of care."
- *Swink v. Weintraub* (N.C. Ct. App. 2009) 195 N.C.App. 133, 149 – "[A] medical expert's personal practices may well be relevant to that expert's credibility, particularly when those practices do not entirely conform to the expert's opinion as to the standard of care."
- *Jaynes v. McConnell* (Ariz. Ct. App. 2015) 238 Ariz. 211, 217 – The trial court committed reversible error by excluding an expert's personal practices because such testimony impacts the expert's "credibility as an expert witness by suggesting that his personal practices differ from the standard of care he espoused."
- *Gallina v. Watson* (Ill. App. Ct. 2004) 354 Ill.App.3d 515, 521–22 – Trial court committed reversible error by excluding questioning on the defendant's expert's personal preference because such testimony "goes to the credibility and persuasive value of his opinion [that the defendant's actions were within the standard of care]."
- *Jones v. Rallos* (Ill. App. Ct. 2008) 384 Ill.App.3d 73, 93 – Holding that the trial court properly allowed cross-examination as to an opposing expert's personal preferences because "an expert medical witness's personal preferences can be relevant because it affects the persuasive value of the expert's opinions."
- *Griffin v. Bankston* (Ga. Ct. App. 2009) 302 Ga.App. 647, 652 – "[T]he trial court erred in excluding the evidence of [the expert]'s personal practice, and, in doing so, undermined the jury's ability

to fully evaluate [the expert]'s credibility and deprived [the plaintiff] of her substantial right to a thorough and sifting cross-examination."

- *Adams v. Sarah Bush Lincoln Health Center* (Ill. App. Ct. 2007) 369 Ill. App.3d 988, 1004 – "Testimony regarding personal preference is admissible if it addresses issues of the witness's credibility and the persuasiveness of the expert's testimony."

Faced with this overwhelming out-of-state authority, it would be difficult for a judge to grant the motion in limine.

Then, address head-on the defendant's argument that their stellar expert exceeds the standard of care and, thus, is not relevant to whether the defendant was reasonable. Explain that the defendant will be permitted to explain to the jury how the expert's personal practices exceed the standard of care on direct and re-direct examination. As explained in *Oaks, supra,* 76 N.E.3d at p. 950, "even if [the expert] had testified that he would merely go 'above' the standard of care by ordering an x-ray, his personal practices testimony would be relevant and admissible." (See also *Schmitz v. Binette* (Ill. App. Ct. 2006) 368 Ill.App.3d at p. 459 ["(A)lthough 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 cannot 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."].)

Personal Practice Testimony Is Important to Determine Why a Certain Standard Is Performed as Well as Establishing a Foundation for that Expert's Opinion

Also explain to the judge that even beyond credibility, personal practice testimony goes directly to that expert's ***experience.*** To testify as an expert in a medical malpractice case, a person must have enough knowledge, learning and skill with the relevant subject to speak with authority, and the expert must be familiar with the standard of care to which the defendant is held. (Evid. Code § 720, subd. (a); *Ammon v. Superior Court* (1988) 205 Cal.App.3d 783, 790–791.)

As explained by the California Supreme Court, "the [trial court's] gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies *or personal experience*, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 772-773 [quoting *Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137, 138].)

An expert is competent to testify only "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." (Evid. Code § 720(a).) Therefore, "a person must have enough knowledge, learning and skill with the relevant subject to speak with authority, and he or she must be familiar with the standard of care to which the defendant was held." (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467.) A witness who is eminently qualified to express an opinion in a particular field may be unqualified to express an opinion in some other related field. (*Putensen v. Clay Adams, Inc*. (1970) 12 Cal.App.3d 1062, 1080-81.)

Cross-examination on personal practices is relevant because it goes to ***why*** a certain medical standard is used by the expert. As explained in *Wallbank, supra,* 74 P.3d at pp. 416–17, such personal practices testimony is relevant and admissible because "once the expert testifies concerning the standard of care, then testimony of that expert's personal practices may help the jurors understand why that standard of care is followed by that expert or other experts." (See also *Smethers, supra,* 210 Ariz. at p. 177 ["[H]ow a testifying expert approaches a medical problem may be relevant and of assistance to the jury in determining what the standard of care requires in a similar circumstance."].)

Personal practices are also relevant in establishing the foundation for the expert's opinions. As only qualified experts are permitted to testify under Evidence Code section 720(a), questions about an expert's personal practices go towards qualifications and foundation. (See *Donathan v. Orthopaedic & Sports Medicine Clinic, PLLC* (E.D. Tenn., Oct. 26, 2009, No. 4:07-CV-18) 2009 WL 3584263, at *11 ["The Court finds that the evidence regarding the personal practices of an expert is necessary to establish the foundation for the testimony of an expert witness …. A trier of fact could discount the testimony of an expert with personal knowledge of the standard of care if that expert regularly departs from it in his or her own practice."].)

It is also important to set up this opposition during the expert's depositions. At our firm, when we take depositions, we always establish that the defense expert never actually saw or treated the patient. We then have the expert establish that he is basing his opinion, in part, on his review of the medical records, depositions, and documentary evidence. Of course, we then also have the expert admit that he is also basing his opinions on his background, training, education, and experience. We then finish the questioning with: "Doctor, you would agree that since you are basing your expert opinion based on your years of experience in practice, it would be fair for me to ask you about your personal practices, correct?"

This testimony, when attached to an opposition to this motion in limine, really helps in ensuring that the trial judge comes to the right decision.

While there Is No California Law Directly on Point, Explain that Particularly in Med Mal Cases, Wide Latitude Must be Afforded to Cross-Examine Opposing Experts

Critically, "[o]pinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims." (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310.) Indeed, CACI 502 specifically instructs the jury that: "You must determine the level of skill, knowledge, and care that other reasonably careful [insert type of medical practitioner] would use in similar circumstances *based only on the testimony of [insert type of medical practitioners] who have testified in this case.*" (See also CACI 501 [substantially stating same].)

Explain in your opposition that under California law, it is "well established that wide latitude should be allowed in cross-examining experts on their qualifications and on the reasons given for the opinions expressed." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 796; see also Evid. Code § 721(a) [specifically finding that experts "may be fully-cross examined

(*continued on page 81*)

Opposing Expert's Personal Practices
(*continued from page 46*)

as to ... his or her qualifications."].) As such, "a broader range of evidence may be properly used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion." (*San Diego Gas & Electric Company v. Schmidt* (2014) 228 Cal.App.4th 1280, 1301; see also *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 267 ["While there can be no hard and fast rule regarding the limits of cross-examination, a trial court's rulings should not be so overly restrictive as to deprive trial counsel of the tools necessary to probe, test, and even discredit the adverse expert witness."].)

In addition, in the medical malpractice context and "specifically with regard to a doctor testifying as an expert witness as to his findings and conclusions, wide latitude is allowed on cross-examination." (*Puffinbarger v. Day* (1962) 207 Cal.App.2d 540, 549 [emphasis added.].)

Explain how the parties must be provided broad discretion in cross-examination, particularly as to the expert's credibility and experience. That includes questioning on personal practices, which vary widely from defendant's practice, to show that defendant may have fallen below the standard of care. (See CACI 219 ["You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision."]) Likewise, point out that if the plaintiff's expert testified that a certain procedure fell below the standard of care, of course a defendant should be able to elicit whether that expert performs that procedure in his own practice.

Lastly, Object that the MIL is Boilerplate, Overbroad, and Runs Afoul of *Kelly v. New West Federal Savings* and Should be Denied

While the motion is an important one as it determines whether a plaintiff can fully cross-examine an opposing expert, the defense will often file the same boilerplate motion in limine to exclude such testimony.

First, I try to find another case involving the same defense counsel that includes the same verbatim motion and attach it as an exhibit. If a motion in limine is entirely copy-and-pasted, it is almost by definition improper.

The misuse of motions in limine was addressed in *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669. Indeed, the *Kelly* court dealt with motions like this one and found that motions in limine such as this one are meaningless, improper, and without a proper basis.

The Court of Appeal in *Kelly* held that it is improper to file boilerplate motions in limine that are "not properly the subject of motions in limine, were not adequately presented, or sought rulings which would merely be declaratory of existing law or would not provide any meaningful guidance for the parties or witnesses." (*Ibid*.) The court explained that "until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (*Id.* at p. 671.)

Moreover, the *Kelly* court held that "[m]otions in limine ... are no different than any other pretrial motion and must be accompanied by appropriate supporting documents." (*Id.* at p. 669, fn. 3.) As such, "[a]bsent an appropriate factual showing to support the motion, the court should not entertain the motion." (*Ibid.*; see also *Gordon v. Nissan Motor Co., Ltd*. (2009) 170 Cal.App.4th 1103, 1114 [holding that the granting of such motions is "reversible per se."]; *Mims v. Federal Express Corp.* (C.D. Cal., Jan. 15, 2015, No. CV 13-03947-AB (SSX)) 2015 WL 12711651, at *1 ["[U]nless the motion identifies specific evidence it seeks to exclude and the specific reasons to exclude it, the court would be forced to 'rule in a vacuum' on the admissibility of evidence."]; Finley, et al, § 1:4.Typical use of motion—Limitations on use, Civ. Prac. Guide Ca. Motions in Limine [The Rutter Guide 2023] at § 1:4 ["Matters that are lacking in factual support or argument are not properly the subject of motions in limine."].)

Oftentimes, particularly in medical malpractice cases where the defense will file 20 or more boilerplate motions in limine, the exasperated judge will deny all of the boilerplate motions that do not address specific evidence or testimony. Point out to the judge that this motion is no different. ■