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This Week's Feature

The Limitations on State Medical Organizations' Ability to Regulate Expert Testimony by Physicians: *Fullerton v. The Florida Medical Assoc.*

By Karen C. Duncan

In most states, medical malpractice plaintiffs commonly are required to offer a physician expert witness to support a key element in a negligence cause of action, the medical standard of care. The expert generally reviews the facts specific to the care provided to the plaintiff and then applies his or her medical training and judgment to that patient's individual circumstances in formulating the opinion. Most would agree the physician's expert testimony must be ethical and competent for the legal processes to work effectively. Many disagree, however, on the most effective system to regulate a physician's expert testimony.

Assuming that the witness has qualified to testify, e.g. has the requisite knowledge, training and experience to assist the trier of fact, the reliability of the expert's testimony can be established in a number of ways. The courts have well-known mechanisms, the *Daubert* or *Frye* tests, as well as skilled cross examination, which may eliminate some unreliable experts. Testimony from witnesses who are not credible will be rejected by juries. Physicians who have been excluded from testifying or who have been unsuccessful in persuading juries will have short careers as experts.

Despite those safeguards, many medical malpractice defendants have long believed that those methods have not been effective. Civil defamation remedies are largely unavailable; even unscrupulous expert testimony is protected in most jurisdictions by absolute witness immunity. Convinced that unethical "hired guns" are often still allowed to testify, some state medical organizations have sought to police such expert testimony.

State medical organizations are voluntary groups which promote the ethical practice of medicine. At least one of the limits on a medical organization's reach to regulate a physician's expert testimony is found in *Fullerton v. The Florida Medical Assoc.*, 938 So. 2d 587 (Fla. App. 1st Dist. 2006). In that case, Dr. Fullerton testified as a plaintiff's expert against several Florida physicians in a medical malpractice action. Fullerton, while holding a Florida and California license to practice medicine, was not a member of the Florida Medical Association ("FMA"). The defendant doctors complained to the FMA that Fullerton's testimony fell below

reasonable professional standards and requested an investigation. Following FMA publication of the letter, Fullerton brought defamation and other causes of action against the FMA and the complaining defendant physicians. Relying on the Florida peer review immunity statutes and the federal Health Care Quality Improvement Act (HCQIA), the FMA and the physicians argued that they were shielded from liability. The trial court dismissed Fullerton's complaint, he amended it, and it was subsequently dismissed again. He appealed.

The Florida appeal court reversed and remanded, holding that neither Florida's peer review statute nor the HCQIA unambiguously expressed the legislative intent that a state medical board was immunized from liability for the examination of a physician's expert testimony. The court determined that the Florida immunity statute did not apply, as it was created for the purpose of "evaluating and improving the quality of health care rendered by providers of health service," and medical expert testimony was not the "rendering" of health care. More importantly, the court examined the federal immunity provision of the HCQIA, 42 U.S.C. 11112(a)(1), which provides that, in order for a professional review body to be immune, the peer review action must be taken "in the reasonable belief that the action was in furtherance of quality health care." Nothing in the HCQIA provided that a professional review body's evaluation of a physician's expert testimony was in furtherance of health care.

The court noted and distinguished *Austin v. American Assoc. of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001). In that case, a testifying neurosurgeon was suspended from his membership in a professional organization. The surgeon brought an action against the association, and lost on a summary judgment. The *Fullerton* Court disagreed with the 7th Circuit's interpretation of the immunity provisions of the HCQIA. Even if the HCQIA could be interpreted as conferring immunity, *Fullerton* was distinguishable from *Austin*. *Austin* was a member of the American Association of Neurological Surgeons, while Fullerton was not a member of the FMA. In dicta, the *Fullerton* Court said that, even if HCQIA immunity could be found, the FMA would not have the benefit of immunity because Fullerton was not an FMA member.

The American Medical Association (AMA) has urged subjecting expert witness testimony to peer review processes. The Federation of State Medical Boards considers false, fraudulent or deceptive physician expert witness testimony to be the unprofessional practice of medicine, and recommends that state licensing boards incorporate the regulation of such conduct in state licensure laws and medical practice acts. Many states have included a written expert medical report, opinion, affidavit or testimony within the definition of medical practice. While such language may help confer state statute immunity, *Fullerton* strikes a blow to organized medical associations' attempts to regulate unethical medical testimony, particularly for experts from outside the state.

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