STANDARD OF CARE MEDICAL EXPERT - SAME OR SIMILAR SPECIALTY REQUIRED?

In medical practice cases in every state, absent clear negligence readily perceptible by a lay juror (i.e. scalpel left in the body), a plaintiff is generally required to produce expert medical testimony to establish a facial case of negligence. In many states these standards are adopted by the legislature,and therefore can vary considerably from state to state, preempting "common law" standards created by the courts (Someone once described legislative law as "common sense as amended by the legislature.")

Judges are of course still called upon to construe legislative standards. Several days ago the Missouri Supreme Court ruled in Spradling et al. v. SSM Health Care St. Louis et al., No SC 90613 (June 29, 2010), that a radiologist was permitted to testify for the plaintiff in a medical malpractice case as to the standard of care on a vertebroplasty gone bad. A verebroplasty is an invasive procedure where needle is inserted into a vertebral compression fracture, injecting bone cement into the fracture. Under the Missouri law a plaintiff's expert must have "substantially the same specialty" as the defendant. On first blush it might seem incongruous that a radiologist could testify as to the standard of care by a neurosurgeon. The court, noting that "substantially the same" is not necessarily the same as "the same" specialty, essentially construed the statute to require a testifying expert to have familiarity with the standard of care for the procedure itself without the necessity of matching up specialty credentials.

The radiologist in the case had performed or assisted in more than 3,000 vertebroplasties. In a span of over 15 years, he gave more than 50 lectures and 15 scientific presentations about vertebroplasty. He wrote 15 book chapters and 20 peer reviewed article son the subject.He served as a medical consultant for a bone cement company. He taught physicians, including neurosurgeons, how to perform the procedure. In short, he was qualified.

In Melville v. Southward, 791 P 2d 383 (Colo. 1990), the Colorado Supreme Court arrived at a similar standard through pure common law analysis, but found that an orthopedic surgeon could not be qualified to testify in a malpractice case against a podiatrist, where he could not establish substantial familiarity with the podiatry standard or that the orthopedic standard and podiatry standard were essentially the same. There was a measure remonstrance in the court's decision.

> A patient is free to select a practitioner from any of the healing professions and by so doing, chooses to be exposed to the kind of care and treatment recognized by that particular profession.

In Ives v. Redford,252 SE 2d 315, (Va. 1979), the Virginia Supreme Court ruled in a common law case that a surgical pathologist and a surgeon were qualified to testify in a case against a gynecologist for failure to diagnose breast cancer and prescribing contra-indicated medications. The court noted that qualifications to testify should not be based upon the presence or absence of some difference in their specialties, but rather upon whether the standards are the same or whether the witness demonstrates knowledge of the standard of defendant's specialty. The court determined that the physicians share a " commonality in their special knowledge and skill concerning the organ and the disease that are the subjects of the present controversy."

Compare the result in Woodard v. Custer, M.D.; Lipscomb, M.D. et al. v. University of Michigan Medical Center and Shirley Hamilton et all, v. Killligowski, D.O., 719 NW 2d 842 (Mich. 2006), the Michigan Supreme Court construed a Michigan statute to require not only qualification of a plaintiff's witness as a member of the same specialty, but the same subspecialty. The court held that a physician who was board certified in pediatrics was not qualified by his credentials to testify in a case against a pediatrician board certified in pediatrics critical care medicine and that a physician who was board certified in general internal medicine and treated infectious diseases, was not qualified to testyify as an expert against a physician who specialized in and practiced general internal medicine.

The Michigan legislature left the Michigan Supreme Court little wriggle room to determine these case by applying rational and nationally prevailing qualifications to deliver expert testimony in Michigan. Specific credentials trump substantive knowledge in Michigan, where the narrower the defendant's specialty can be drawn, the less likely he is to be met by the required expert with identical credentials.