The Proper Care and Feeding of Experts

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There's usually a moment in a trial, just before the first expert testifies, when the judge tells the jury how experts are different from other witnesses. Experts don't have percipient, first-hand knowledge of the facts. Instead, they possess education, training, or experience that permits them to share helpful opinions with the jury. Such an instruction sounds like build-up. But based on what we hear from jurors once a case is over, that build-up is usually a prelude to disappointment. Maybe it's like when somebody introduces you to new people and tells them how funny you are. Your new friends stare at you, awaiting a thunderous witticism. They expect Oscar Wilde -- or at least Adam Carolla. But you stammer and come up with zero chuckle-bait. You're not only not funny, you're guilty of false advertising.

It's remarkable how often jurors say that they paid less attention to the experts than anyone else in the case. How was such a wonderful opportunity squandered? Usually the jurors report disgust at how obvious it was that the experts would say whatever they were paid to say. Experts emerge as jukeboxes -- insert a quarter (or more like $25,000) and play a tinny song. Maybe it's simply the amount of money paid that feeds juror cynicism. More often it's more than that. The expert comes across as an advocate, not a neutral opinion-giver. The expert is free and jocular on direct, and then on cross-examination turns furtive and combative. Moreover, the expert relies uncritically on whatever facts and interpretations his or her side's lawyer served up on a platter.

If the expert dance is all for naught, what's the point? Well, there are ways to use experts effectively. Today you probably received five-plus emails advertising CLE programs on precisely that topic. At least some of those classes would be useful. When in doubt, choose the one in Maui. And then, after hearing about how to find and develop experts, how to work with them collaboratively, treat them with respect, and help them frame opinions that are honestly held and fully-owned by them and that are clear and persuasive to the fact-finder because they make sense and show the reasoning process, you can don a flowery shirt, have a mai-tai under the banyan tree, and briefly rediscover tiny bubbles of unadulterated joy.

... Where were we? Hmmm, looking out the window to the West, we see a section of Philadelphia that doesn't look a tiny bit like the South Pacific. In any event, if an expert is

unlikely to win a case for you, lack of an expert can certainly lose a case for you, or even prevent you from getting to a jury. And preparing an expert badly can result in not being able to use that expert, which, can, in turn, launch your case into the dumpster. Try explaining that to a client some enchanted evening.

That's what happened in *Huerta v. Bioscrip Pharmacy Services, Inc*., No. 10-2203 (10th Cir. July 12, 2011). The plaintiff received a kidney transplant in 2003, when she was seven years old. As part of her medication regime, she took immunosuppressants, including tacrolimus, to help prevent her body from rejecting the transplanted kidney. In 2006, the plaintiff suffered pneumonias and other symptoms and went through a serious kidney rejection episode. The plaintiff's doctors were concerned that her tacrolimus level was too high, though they didn't measure it, and so they reduced it. The plaintiff partially recovered from the 2006 rejection episode, but suffered another episode in 2007. The treatment notes from the 2007 episode showed that the plaintiff had "undetectable levels" of tacrolimus and her doctors were concerned "that her mother wasn't dosing her properly." Just prior to the 2006 rejection, a distributor of tacrolimus issued a recall for tacrolimus because it was subpotent. But the tacrolimus that the plaintiff had taken was not subject to the recall.

The plaintiff filed claims under New Mexico law for strict liability, negligence, misrepresentation, breach if warranties, etc. All of the claims were premised on the theory that the defendant had dispensed subpotent tacrolimus to her, resulting in the kidney rejection. The district court granted summary judgment to the defendant after throwing out the plaintiff's medical causation expert opinions. The Tenth Circuit affirmed those rulings.

After seeing what the plaintiff's experts relied upon, it is easy to see why.

The district court held that the plaintiff's experts were qualified to testify that the plaintiff's rejection was most likely caused by insufficient levels of tacrolimus. The problem was that they had no reliable basis for opining as to the "cause of the insufficient tacrolimus level." Put another way, the district court found the experts qualified to opine on general causation, or what might cause a kidney rejection. But the district court held that the experts could not render specific causation opinions that the defendant's tacrolimus suspension was subpotent.

What was unreliable about the plaintiff expert opinions? Pretty much everything:

-- One expert assumed that the plaintiff had taken the recalled tacrolimus. She had not.
-- Some of the experts also relied on plaintiff attorneys' erroneous representations that test results showed that the defendant's tacrolimus suspension was subpotent. Such test results did not exist.
-- One expert based his opinion that the defendant's tacrolimus suspension was subpotent on the erroneous assumption that "other physicians had definitively established that the tacrolimus suspension was subpotent when they had not." Oops.
-- That expert also assumed that other likely causes of the kidney rejection had been ruled out because of their absence from the medical records. That is not exactly a rigorous "differential diagnosis."
-- Several of the experts acknowledged that the plaintiff's (really the plaintiff's family's) noncompliance with the medication regime could have caused the kidney rejection, but they ruled that possibility out based on "knowing" the plaintiff's family. Huh? Yeah, exactly. The court didn't buy that as the stuff of expert testimony -- especially when the plaintiff's treating doctors worried about noncompliance.
-- One of the plaintiff experts, Dr. Tackett (maybe you've heard of him), was found to have inconsistencies in his testimony while "dodg[ing] the issue" of the plaintiff's 2007 kidney rejection where noncompliance was suspected.

It's easy to berate the experts for sloppy work. But when four of them suffer from the same methodological deficits, one starts to suspect another source for the problem. Plainly, it is the lawyer's responsibility to supply the expert with a full, or at least representative, evidentiary record. There's always the issue of who's choosing the reliance materials, the expert or the lawyer. Sometimes it's possible to make it look like the other side's choice -- look at everything they relied upon. At least make it clear to the expert that the expert is free to ask for more, or more types, of reliance materials. And for heaven's sake, don't have the expert rely on something that isn't supported by the record.

Even though this is a defense-oriented blog, and even though the result in *Huerta* is a defense win for which we are heartily glad, there is something depressing about having to type that last sentence in the previous paragraph.