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COA decision on med-mal expert qualifications may yield more exhaustive discovery practice

Majority rules on 'majority' rule

By Todd C. Berg, Esq.

Medical-Malpractice Law — Analysis

The Michigan Court of Appeals ruling on qualifications for medical-malpractice standard of care experts may have plaintiffs' and defense lawyers digging deeper into experts' backgrounds during the discovery process, say legal specialists.

But one medical-malpractice lawyer warned the effect may be felt more harshly by plaintiffs, making it more difficult to locate already hard-to-find doctors who are willing to accuse colleagues of malpractice.

In *Kiefer v. Markley, et al.*, a two-judge majority held that, in order to qualify as a medical-malpractice standard of care expert witness, "a proposed expert physician [must have spent] greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice."

Mount Clemens attorney Ronald F. DeNardis of DeNardis McCandless & Miller PC, who represents the plaintiff in *Kiefer*, said the "majority" element of a proposed expert's qualification has typically been addressed during a doctor's deposition, when he is testifying under oath.

But, DeNardis said, that may

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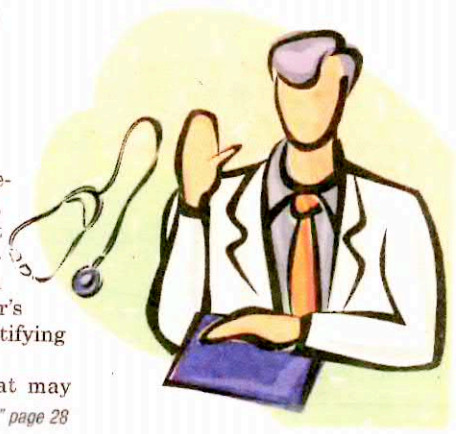

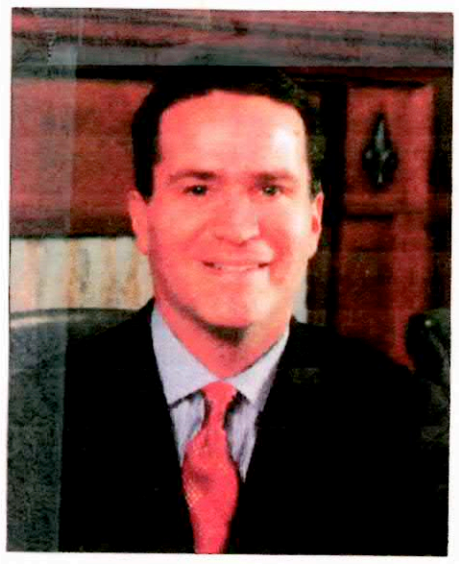

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— Bloomfield Hills attorney Jesse M. Reiter

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Experts

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change if parties are successful in using the Court of Appeals decision as authority to push the "majority" inquiry farther.

Billing codes may establish expertise

Doctors bill insurance companies by using codes that match up with the medical procedures that were performed on the doctors' patients, DeNardis said. Accordingly, he said, the court's decision may give parties the necessary justification to demand access to a doctor's billing records long enough to collect the relevant code information.

"That way, a lawyer can compare the gross number of procedures performed with the number of procedures involving the specialty at issue to determine whether the 'greater than 50 percent' rule has been satisfied," DeNardis said.

Detroit attorney Daniel J. Schulte of Kerr Russell & Weber PLC, who represents the Michigan State Medical Society (who was neither a party to nor an amicus curiae in *Kiefer*), said a review of a doctor's billing codes may be an "easy and efficient" way to find information to corroborate or challenge "majority" claims.

"By moving for a protective order, for example, to audit a doctor's billing records only to take out the numerical billing codes that are submitted to the insurance company," Schulte said, "parties could get the information they need without impinging on a doctor's obligation under HIPAA to keep protected health information confidential."

HIPAA, the Health Insurance Portability & Accountability Act, is a federal law that prohibits physicians from releasing patient information, except under specific, limited circumstances.

Bloomfield Hills attorney Jesse M. Reiter of Gregory & Reiter, P.C., who focuses his practice on representing medical-malpractice birth-trauma plaintiffs, said the "code" strategy — possible as it may be — was undesirable.

It's going to "start a lot of mischief," he said.

"Once this can of worms is opened up, it's going to get a lot harder for plaintiffs to find experts who are willing to testify in their cases," Reiter said.

"Already, plaintiffs' experts are feeling the heat from professional associations who are going after them for testifying against their colleagues," he said. "Now, add to that the possibility of having their client's records rifled through. That's a pretty strong disincentive against testifying."

Reiter noted the "code" strategy may also result in increased expert and litigation costs associated with retrieving the desired information.

He conceded the "code" strategy could be used against both plaintiffs' and defense experts, but insisted plaintiffs would feel its adverse effects more acutely.

"Defendants have a much easier time finding experts to support their cases than plaintiffs do," Reiter said.

Bloomfield Hills attorney Julie McCann O'Connor of O'Connor, DeGrazia, Tamm & O'Connor, PC, who represents the defendant in *Kiefer*, said a doctor's deposition testimony would in most cases be sufficient for purposes of addressing the "majority" requirement.

"Unless there's a good reason to believe the doctor is being deceitful in his deposition," she said, "lawyers in my firm will accept what the doctor said."

O'Connor declined to comment about the "code" strategy.

Surgery case sets the stage

In *Kiefer*, Marilyn and George Kiefer sued Dr. John Markley and the Center for Plastic and Reconstructive Surgery for medical-malpractice, claiming injuries from an alleged negligently performed hand surgery.

The defendants moved to strike the plaintiffs' expert as unqualified because he allegedly didn't devote a majority, i.e., greater than 50 percent, of his professional time to hand surgery. The plaintiffs' expert testified at his deposition that he spent 30-40 percent of his time on hand surgery, but more than 50 percent of his time on the combined areas of hand surgery and reconstructive surgery for other extremities.

The trial court agreed with the defendants, granting their motion to strike. And, the Court of Appeals affirmed.

A proposed medical-malpractice standard of care expert witness must have spent "greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice," said the two-judge panel majority.

In reaching that conclusion, the court determined that "greater than 50 percent" was the proper interpretation of the word "majority" as used in the statute governing the qualifications of medical-malpractice standard of care witnesses.

According to MCL 600.2169(1)(b)(i-ii), an expert must have, "during the year immediately preceding the date of the occurrence that is the basis for the action, devoted a majority of his or her professional time to … [t]he active clinical practice of the same health profession [or specialty] in which the party against whom or on whose behalf the testimony is offered is licensed …"

"Given the unambiguous language of the statute and the case law on this issue, this panel is constrained to affirm the trial court's decision," said the court. "However, we note that this is not a result we think the Legislature intended."

Judge Donald S. Owens, joined by Judge William C. Whitbeck, authored the court's April 28 majority opinion. Judge Peter D. O'Connell dissented.

Owens explained that he and Whitbeck believed the plaintiffs' expert was qualified given that his board certification and added qualification matched the defendant's, and that his combined practice of hand and extremity surgery accounted for more than 50 percent of the expert's professional time.

DeNardis said he plans to file with the Michigan Supreme Court an application for leave to appeal.

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— Detroit attorney Daniel J. Schulte

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