Familiarity Breeds Success: Strategies For Bullet-Proofing The Medical Expert In Malpractice Cases

By Mark R. McGrath

Familiarity may breed contempt, but it can also serve as a touchstone for success when it comes to qualifying expert witnesses in medical malpractice cases.

In Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393 (1970), the North Carolina supreme court rejected the "locality rule" in favor of the "same or similar communities" standard. Following Wiggins, the North Carolina General Assembly codified the same or similar communities standard in N.C. Gen. Stat. Sect. 90-21.12.

In recent years the same or similar communities standard has morphed into something neither the Wiggins court nor the General Assembly could have imagined. Emboldened by a series of Byzantine appellate decisions, some trial judges are increasingly inclined to exclude the testimony of any medical expert who cannot articulate specific demographic points of similarity between the community where she practices and the community where the malpractice occurred. Experts who have the temerity to testify at trial that a national or uniform standard of practice governs a given procedure, however elementary it might be, can expect to take an early flight home.

As described in earlier articles, maneuvering within this uncertain environment can be perilous business for plaintiffs' attorneys. Because defense lawyers can generally count on a friendly pool of country club chums from which to recruit experts for their clients, defense experts rarely confront the kind of traps that separate experts for the plaintiff from the courthouse door. As a result, because plaintiffs generally have to look beyond the defendant's medical community to find experts, injured patients bear a disproportionate share of the perils that attend application of this bastardized standard.

As long as this subtle variety of tort reform continues to be legislated from the bench, no attorney can completely insulate himself from danger. There are, however, a number of strategies that can help minimize the risk posed by this recent trend.

Three Ways To Demonstrate Familiarity

The North Carolina courts have recognized three foundational bases by which an expert witness can demonstrate sufficient familiarity with the community at issue to satisfy N.C. Gen. Stat. Sect. 90-21.12 and testify as an expert witness at trial. See the dissent in Henry v. Southeastern 08- GYN, 145 N.C. App. 208, 214-215, 550 S.E.2d 245, 249-250, affirmed, 354 N.C. 570, 557 S.E.2d 530 (2001).

. Expert practices in same community as defendant.

First, experts who have actually practiced in the subject community, or who have some other basis for demonstrating first-hand personal knowledge of the standards of practice prevailing in that community, are qualified to testify as experts in malpractice cases. If you believe that finding a physician in the defendant's community who is willing to testify against him is a reasonable prospect, you might want to consider another line of work. For those who wish to proceed, consider this method of satisfying Sect. 90-21.12 deader than the rule in Shelley's Case.

. Expert practices in similar community.

Expert witnesses can also satisfy the foundational requirements of N.C. Gen. Stat. Sect. 90-21.12 by demonstrating that they are familiar with the standards of practice in communities that are similar to the subject community. See Dickens v. Everhart, 284 N.C. 95, 199 S.E.2d 440 (1973); Simons v. Georgiade, 55 N.C. App. 483, 286 S.E.2d 596, petition denied, 305 N.C. 587, 292 S.E.2d 571 (1982) (physician qualified to testify where he trained in communities similar to Durham); Leatherwood v. Ehlinger, 151 N.C. App. 15, 564 S.E.2d 883 (2002), rev. denied, 357 N.C. 164, 580 S.E.2d 368 (2003) (expert permitted to testify where he had practiced in communities in South Carolina, Alabama and Mississippi that were similar to the subject community).

Unfortunately, similarity, like beauty, resides in the eye of the beholder. As previously reported, when medical experts testify that two communities are medically similar, some trial courts are requiring those experts to support their conclusions with specific demographic evidence. For example, if an expert from Wilmington were to testify at trial that Wilmington and Durham are similar communities, and that this similarity allowed her to evaluate care rendered by a defendant in Durham, some judges would require the expert to identify specific demographic points of similarity between the two communities, such as similarities in population, economy, industrial base or financial resources.

The degree of scrutiny given to claims of similarity will invariably be the product of your judicial draw. Judges who interpret the evidentiary rules liberally are not likely to reject experts who forget how many acres of arable land in Johnston County are under cultivation for tobacco. On the other hand, some judges are always going to cast a wary eye toward out-of-state experts. After all, why should a doctor who doesn't know liver mush from cirrhosis be allowed to testify in a North Carolina courtroom?

Because the "proving two communities are similar" avenue of qualifying experts is so vulnerable to vagaries of judicial temperament, lawyers would be well-advised to steer clear of this option whenever possible. We all have our nightmares, and mine would be having to watch an Ivy League trained uber-surgeon straining to explain why Boston and Charlotte are demographically "similar" communities. With the wrong judge on the bench, this exercise could become the legal analogue of watching Willie Mays take his last pathetic swings for the New York Mets in 1973.

. The expert has acquainted and familiarized himself with the standards of practice in the community at issue.

Experts from outside the community are competent to testify when they demonstrate an acquired familiarity with the standards of practice prevailing in the community at issue. More specifically, experts from outside the subject community are qualified to testify when they make reasonable efforts prior to trial to acquaint or familiarize themselves with the standards of practice in the community at issue.

For example, in Coffman v. Roberson, 153 N.C.App. 618,571 S.E.2d 255 (2002), rev. denied, 356 N.C. 668, 577 S.E.2d 111 (2003), plaintiff tendered two experts who both practiced obstetrics and gynecology outside Wilmington, the community where the alleged malpractice occurred. The firstwitness testified at trial that he was familiar with the standards of practice inthe subject community, even though he practiced in Charlotte, North Carolina, a metropolita area that dwarfs Wilmington. The doctor testified that he had developed his familiarity through "Internet research about the size of the hospital, the training program. . . the AHEC (Area Health Education Center)" and by virtue of the fact that "the

hospital involved was 'a training hospital, very sophisticated.'" Id. at 624, 571 S.E.2d at 259. The court held that this testimony was "sufficient to satisfy the requirements" of N.C. Gen. Stat. Sect. 90-21.12. Coffman, 153 N.C. App. at 625, 571 S.E.2d at 259. The court also allowed the testimony of the plaintiffs second expert, who practiced obstetrics and gynecology in Colorado and California, based on similar Internet research and testimony from the physician that there was "no reason to think that their standard of care would be any different than where I practice now or where I have practiced in the past." Id. See also Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003) (expert gained sufficient foundational knowledge of community at issue by reviewing written information regarding the community from plaintiffs counsel).

Given the problems associated with the first two methods of qualifying medical experts, except in those extremely rare cases where we are able to find an expert from within the defendant's community who is willing to testify for the patient, we always proceed with this third option and ask our experts to apply the standard of care existing in the community where the malpractice occurred.

As a result, our focus in preparing experts is quite different from what one would expect under the preceding two methods for qualifying medical experts. Because the expert is applying the standards of practice for the defendant's community, the expert does not need to be wood-shedded to regurgitate specific demographic points of similarity between the community where the practices and the community at issue. Instead, our focus is on providing the expert with information from which she can develop an acquaintance, an appreciation and ultimately a professional understanding of the standards of practice for the very community where the defendant treated the patient.

Utilizing this third option for qualifying a medical expert avoids the snares attending the previous two. At trial, the qualification process on direct or during voir dire essentially boils down to three questions: .

Q: Dr. Expert, in forming your opinions in this case, can you tell us what standard you applied in evaluating the performance of the defendant?

A: Yes. I applied the standards of practice for Wilmington as they existed at the time of Ms. Victim's surgery.

Q: Dr. Expert, can you tell us why you feel qualified to testify regarding the standards of practice in Wilmington, North Carolina?

A: Yes. I have spent a great deal of time and effort familiarizing and acquainting myself with those standards, and as a result I now have a firm medical understanding and appreciation of those standards.

Q: And please tell us how you developed that understanding and appreciation....

Familiarizing With Local Community

How can an out of town medical expert acquaint and familiarize herself with the community at issue? While this process may sound daunting at first blush, it is anything but. There are limitless data and sources of information from which an out of town physician can derive a meaningful and defensible understanding of the standards of medical practice in the subject community. The following are offered only byway of example.

1. As a starting point, have your expert review medical and demographic information for the subject community. Clearly, the median income, industrial base and birth rate for the community at issue shed little light on the standards of medical practice for performing LASIK or interpreting x-rays. Still, these are factors that our appellate courts have considered relevant in weighing the qualifications of medical experts. Accordingly, acquainting your expert with some of the more salient socio-economic features of the subject community will be time well-spent. This information can be found on the Internet with a minimal investment in time. Among other sources, download and print information from community web sites, chambers of commerce and the like, and furnish these to your expert. Also, be sure to avail yourself of the Cecil G. Sheps Center web site that can be found at http://www.shepscenter.unc.edu. This site provides a rich source for data such as the availability of medical specialties in the county at issue, mortality rates, unemployment rates, the county's racial composition, and hospital data. When the care at issue was rendered at a hospital or other facility, provide your expert with Internet information for that institution. Most hospitals now have Internet sites that provide detailed information regarding their patient population, medical departments, available equipment and other technologies, medical staff, laboratories and other services, and other valuable information, all of which can help to develop and refine your expert's appreciation for the standards of practice in the subject community. Be sure to provide your expert with information for other hospitals in the community as well. Like hospitals, many practice groups (e.g., surgical, anesthesia, etc.) maintain Internet sites. These pages can provide experts with detailed information regarding the group, including biographies and curricula vitae for physicians and other personnel.

2. A well-taken deposition of the defendants will provide invaluable information regarding the standards of practice in the subject community. Who is better situated to articulate those standards than the defendant himself? Among other things, deposition transcripts can provide your expert with information regarding the mechanics of performing the medical procedure at issue, the expectations of practitioners in the community, the training and experience of practitioners within the community, the types of imaging facilities, laboratories and other technology that is available in the community, the job descriptions, scope of responsibilities, duties and tasks assigned to or assumed by various practitioners within the community, the defendant's characterization of the quality and level of care provided in the community (perhaps as compared to other communities where he has trained or practiced), and descriptions of the kind of equipment used during the procedure at issue.

3. Policies, procedures, guidelines and protocols from the subject hospital (or any hospital in the subject community) can also be a fruitful source of data that will inform your expert's acquaintance with the relevant standards of practice. Whether such policies and procedures establish the standards of practice for your case is not the issue. Rather, given the level of detail and breadth of issues addressed in these materials, there can be no arguing that a conversational familiarity with such materials will go a considerable distance toward establishing your expert's familiarity with the standards prevailing in the subject community. In essence, policies and procedures can demonstrate in a detailed and even pedantic manner "how things are done" in the subject community. When misuse of a medical device is at issue in your case, the instructions for use and warnings in the operator's manual will serve the same function.

4. Guidelines, procedures and protocols from professional associations and other groups can also inform your expert's understanding of the relevant standards of practice. For example, the American Association of Blood Banks provides detailed guidelines regarding the provision of blood banking,

transfusion, and intraoperative blood salvage services. Once you determine that the facility at issue is accredited by such a professional body, the guidelines become yet another piece of the "standards of practice" composite.

5. Accreditation by JCAHO, AABB or other bodies can also serve as a touchstone in this process of familiarization. If your expert practices or is a member of the medical staff at an accredited institution, she will have a well-developed and first-hand appreciation for the standards of practice at such facilities. If the facility where the malpractice was committed and the facility where the expert practices are both accredited by the same organizations, it will be difficult for your opponent to claim that the expert is a stranger to the relevant standards of practice.

6. An expert's appreciation of the relevant standards of practice can be further informed by having her review relevant statutes, rules and regulations. For example, the North Carolina Nursing Practice Act and its accompanying regulations provide insights regarding the expectations and qualifications of North Carolina nurses that an out of state expert can use to her advantage. Another example would be the detailed regulations governing nurse anesthesia practice in North Carolina. By reviewing these rules and regulations, your expert can refine her familiarity with the applicable standards of practice.

7. Board certification and membership in professional associations and organizations can also inform your expert's familiarity with the relevant standards of practice. For example, while having your expert testify that a uniform or national standard of care governs all services rendered by board-certified physicians would be an extremely risky venture, common board certification certainly advances the expert's understanding of what would be expected of a board-certified physician in the subject community. Membership in professional associations can provide a similar basis for familiarity. For example, attendance at regional or national conferences, communicating with other professionals within the organization and subscribing to national journals invariably expand a physician's familiarity with standards of practice in communities other than her own. Frequently, professional associations also have policies or position statements that can impact your expert's inquiry. For example, the American Association of Nurse Anesthetists certifies CRNAs across the country. Its Internet site (www.aana.com) contains detailed information regarding the professional standards and scope of practice applicable to certified CRNAs, wherever they might practice. Accordingly, this information can provide an additional basis for claiming familiarity with the standards of practice prevailing in the subject community.

8. When deposing the defendant, force him to identify each and every nuance that is characteristic of the treatment at issue in the subject community. Every physician who testifies in this state, and every lawyer who handles malpractice cases in North Carolina, knows that the standards of practice for performing routine medical procedures is the same in Wilmington as it is in Spokane. Unfortunately, this fundamental truth has gone unappreciated by our appellate courts in a number of recent decisions. To read these opinions in a vacuum, one would conclude that every community in North Carolina has a unique standard of practice for every procedure in the medical repertoire. Of course this is nonsense, but nonetheless, these are the boundaries of the field upon which we are forced to play. To combat any contention at trial that the standards of practice for performing a wart removal in Wilmington are somehow different than those in Spokane, ask the expert during his deposition to identify any features of the standards of practice for performing the procedure at issue that are unique or idiosyncratic to the subject community.

The following excerpt illustrates the efficacy of this technique:

Q: Dr., what is the standard of care for the laparoscopic procedure you performed on Ms. Jones?

A: I'm not sure I understand the question.

Q: Well, what would a physician in Raleigh have to do in performing this procedure in order to pass professional muster, in order to perform the procedure non-negligently?

A: Among other things, it would be incumbent upon the physician to perform the procedure carefully, exercising proper professional judgment, and making every reasonable effort to achieve the desired outcome.

Q: And that would be the standard of care here in Raleigh, at least with respect to the performance of this procedure?

A: I would say so, yes.

Q: Now doctor, you trained in New York, correct?

A: Yes sir.

Q: And you performed this procedure in New York, I take it?

A: Numerous times.

Q: You also practiced in California and in Ohio.

A: That's right.

Q: And did you perform this procedure in those states as well?

A: Hundreds of times.

Q: Based on your experience performing this procedure in New York, and in California and Ohio, have you been able to identify anything unique about the way the procedure is performed here in Raleigh?

A: No.

Q: Would you agree that the standards of practice governing the performance of this surgery are the same in all three locations?

A: For the most part.

Q: Can you identify for me anything unique or idiosyncratic or characteristic of the standards of practice here in Raleigh for performing this procedure that set it apart and distinguish it from those other locations where you have practiced.

A: No.

Q: If someone were to come into court at the trial of this case and suggest that the standards of practice for this procedure in Raleigh are somehow unique to Raleigh, or that they are different in Raleigh than they are in New York or California or Ohio, how would you respond to that?

A: I would disagree quite strongly with that characterization.

Q: Doctor, as you sit here today, are you aware of any idiosyncrasy or nuance unique to the Raleigh community that governs the standards of practice for performing this procedure?

A: I am not.

Q: And if I were trying to explain the standards of practice that govern the performance of this surgery in Raleigh to a surgeon from, say, Rhode Island, can you identify for me anything unique about the standards of practice here in Raleigh that he might need to acquaint himself with before he attempted to perform this operation in Raleigh? Can you think of any variation on the standard of care that is characteristic of the Raleigh community that he might not be aware of?

A: I don't understand. Any properly trained surgeon should know how to perform this surgery properly, regardless of where he practices medicine.

Q: Is it fair to say that you do not believe, and will not contend at trial, that there is a standard of care or standard of practice unique to Raleigh that governs this surgery?

A: That would be fair to say.

9. Finally, to bolster and memorialize the research and other efforts undertaken by your medical expert, attorneys might consider the use of standard of care affidavits. These affidavits identify the sources and data consulted by the expert in developing her familiarity with the standards of practice in the subject community. These affidavits are useful not only to counter foundational challenges on voir dire, but to serve as aids in preparing witnesses for deposition and trial testimony. In essence, the affidavit lays out in precise detail each and every morsel of information synthesized by the expert in developing her familiarity with the relevant standards of practice.

Conclusion

The same or similar communities standard has created problems for attorneys that its framers neither intended nor envisioned. Indeed, it has now been distorted to such extremes that it has lost any utility or relevance that it might once have possessed.

Unfortunately, misapplication of the same or similar communities standard has cost several patients their day in court. The risk of such catastrophes can be minimized if expert develop a professional familiarity with the standards of practice that exist in the community where the care was rendered, and then measures the defendant's conduct against that standard. This approach avoids entirely the nightmarish challenges confronting an out-of-state witness who is asked to recite demographic points of similarity between Chicago and Raleigh or memorize the number of citizens who sit on the New Bern Board of Aldermen.

Given the wealth of resources at the disposal of creative practitioners, acquainting medical experts with the standards of practice in the subject community should not be a difficult task. When a board-certified physician testifies that she has (1) reviewed multiple data sources that impact and illuminate the standards of medical practice in the community, (2) that she has synthesized these data applying her medical education, training and experience, (3) that she has developed a resultant familiarity with the standards of practice in the subject community, and (4) that she has applied those standards in

evaluating the conduct of the defendant, it is difficult to imagine an exclusion of that expert's testimony that would withstand appellate scrutiny.