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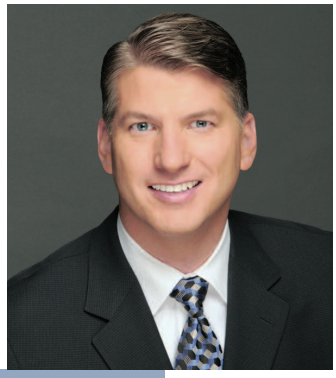
When rules are written for only one side

11th Circuit skewers effort to put limits on plaintiff experts



Med-Mal Matters

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"**Review bias**" or "hindsight bias" has been a hot topic in radiology and pathology malpractice cases recently. Defense attorneys argue that plaintiffs' experts' opinions are biased and unreliable because they reviewed a film or slide in "hindsight," already knowing the patient's diagnosis.

Two professional organizations have taken this argument to its limits by purporting to determine what type of review should be admissible in a malpractice trial. A recent opinion from the 11th U.S. Circuit Court of Appeals involved the application of those limits to expert witness testimony regarding Pap smear interpretation.

In *Adams v. LabCorp*, 2014 U.S. App. LEXIS 14471 (11 Cir. 2014), the plaintiff alleged that LabCorp's cytotechnologists failed to detect abnormal cells in five separate Pap smear tests between January 2006 and September 2008. The plaintiff attorney retained Dr. Dorothy Rosenthal to review the slides sent to LabCorp.

Rosenthal, a professor at Johns Hopkins, was board-certified in anatomic and clinical pathology and held additional qualifications in cytopathology and had even served on the initial task force that developed the "Bethesda system" terminology, which is the classification system used by cytotechnologists, including the technologists at LabCorp, to describe Pap smear results.

To form her opinions, Rosenthal traveled to LabCorp's laboratory in Atlanta and spent about 90 minutes reviewing the slides, using the same microscope that the technologists had used. She determined that LabCorp's employees had failed to report identifiable abnormal cells.

After discovery was complete, LabCorp moved to bar Rosenthal's testimony, claiming that her slide review was tainted by an "unreliable methodology." The U.S. District Court granted the motion, characterizing her methodology as an ipse dixit assessment that could not be meaningfully reviewed by other experts. The court specifically held that Rosenthal should have used a "blinded review" procedure, citing expert witness guidelines published by the College of American Pathologists (CAP) and the American Society of Cytopathology (ASC).

Both sets of guidelines condemn patients' experts for reviewing slides after learning that the patient has already been diagnosed with cancer. This type of "focused review," according to the ASC, " ... inevitably biases the objectivity of the review against the laboratory and does not reflect standard practice." According to CAP's guidelines, "[u]nless the review is blinded, it cannot establish deviation from the standard of practice." Both sets of guidelines require the plaintiff expert to conduct a review of slides from multiple patients without knowing the identity of the patients and without having any clinical information, including the ultimate diagnosis.

In a strongly worded and well-reasoned opinion, however, the 11th Circuit reasserted judicial control over the admissibility of expert testimony. According to the court, *Daubert* and its progeny do not allow potential defendants to determine when and how they may be held accountable for their mistakes.

In this issue of first impression before the 11th Circuit, or any other court, an industry had promulgated guidelines that attempt to limit the evidence courts should accept when its members are sued. As the court noted: "The members of the CAP and ASC have a substantial interest in making it more difficult for plaintiffs to sue based on alleged negligence ... and their guidelines do just that."

The court noted that neither set of guidelines had anything to do with how cytotechnologists go about examining slides but everything to do with how courts should go about their duty to adjudicate claims against cytotechnologists. The guidelines are not objective, scientific findings but policy proposals to limit how courts can find technologists and doctors liable for professional negligence when they are sued.

In reversing the exclusion of an eminently qualified physician's testimony, the 11th Circuit noted that the guidelines the district court relied upon seek to "skew the evidentiary rules in civil litigation against plaintiffs" in two ways. The first way is by imposing an entirely unprecedented requirement on plaintiffs' experts to eliminate "any potential review bias."

The guidelines treat the mere risk of review — or hindsight — bias as intolerable, but they provide no actual evidence of the frequency or degree to which it affects experts' opinions. They also cite zero evidence to support the notion that knowing the outcome always biases the reviewer.

The second way the guidelines skew the evidentiary rules, and the last nail in their coffin as far as the 11th Circuit was concerned, is by imposing an onerous blind review requirement only on the patient. Indeed, the court specifically noted that LabCorp's expert did not employ a blind review process but rather used the same methodology as the plaintiff's expert.

As the court noted, if the CAP and ASC can define what expert testimony is admissible against their members, what will stop any other group whose members do not like being held accountable for the harms they cause from doing the same? Bravo, 11th Circuit. ■

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