

Should “one-expert-per-side” rule include treating physicians?

JUL 1, 2021

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In Arizona medical liability trials, each side is limited by the “one-expert-per-side” rule. The goal is to avoid unnecessary costs of retaining multiple independent expert witnesses and to reduce cumulative evidence at trial.

So, should a physician defendant or one of the treating physicians be considered the one expert the law allows?

The Arizona Supreme Court is poised to answer that question and the Litigation Center of the American Medical Association and State Medical Societies and the Arizona Medical Association (ArMA) are urging the court to answer that question with a definitive “no” and make clear that treating physicians are not “retained or specially employed experts.”

“A bright-line rule ensures that treating physicians can fully defend themselves against malpractice claims, will provide much needed consistency to an unpredictable area of law, will promote judicial economy by reducing ancillary litigation and is consistent with Arizona case law,” the AMA Litigation Center and ArMA argue in an amicus brief they filed in the case, *McDaniel et al. v. Payson Healthcare Management et al.*

In the case, the trial court allowed treating physicians to testify in addition to the defense’s expert. The Arizona Court of Appeals, however, ruled that a treating physician is the “one retained or specially employed expert” if the physician’s testimony makes a comment that crosses the line from a “factual” observation into an “expert” opinion and ordered a new trial.

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Trial courts can limit testimony

In a previous ruling, Arizona courts had said that a retained or specialty employed expert is someone “who is retained for the purpose of offering expert opinion testimony.” That 2014 case involved a police officer who witnessed an automobile crash and described the scene at trial and performed an accident reconstruction for the plaintiff’s side.

The Arizona Court of Appeals then said that the accident reconstruction was expert testimony, but it did not stop the plaintiff from calling an independent, retained expert.

The AMA Litigation Center and ArMA brief argues that similar to the police officer, “treating physicians are not ‘retained for the purpose of offering expert opinion testimony.’” Instead, treating physicians are brought into the litigation to provide ‘relevant, material and probative’ factual testimony concerning the treatment rendered on a particular patient.”

And, the brief says, a trial judge can stop a treating physician from straying into expert testimony by citing “the one-expert-per-side rule as a justification for limiting a treating physician’s testimony on the ground that the issue had already been covered by an expert witness.”

Further prejudice against physicians

The one-expert-per-side rule has prejudiced physicians since it was introduced, the AMA Litigation Center and ArMA brief explains. Even if there is overwhelming medical consensus supporting the physician’s care, limiting each side to one expert witness makes it appear the dispute has equal footing.

The rule also assumes—improperly—that there is a universally agreed upon way to treat every illness or injury.

“This prejudice will be exacerbated if the Court of Appeal’s decision is upheld here,” the brief says. The decision “potentially limits a medical provider’s ability to retain or specially employ third-party experts and may chill treating physician testimony. This not only hinders a physician’s ability to defend their care, but also will ultimately discourage treating physicians from testifying at trial at all.”