QUALIFICATION OF EXPERTS

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QUALIFICATION OF EXPERTS

I. WHO QUALIFIES AS AN EXPERT

Civil Practice and Remedies Code Section 74.351(r)(5)(a) defines an "expert" to mean "with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of care, an expert qualified to testify under the requirements of Section 74.401."

Section 74.401(a) provides that "[i]n a suit involving a healthcare liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who:

> **(1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;**
>
> **(2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the *illness, injury, or condition involved in the claim*; and**
>
> **(3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.**"

The definition of and qualifications of an "expert" witness in a suit against a physician are identical in all respects to former Article 4590i, Section 14.01(a). The test to determine whether a medical expert is qualified to render opinions is "rooted in the expert's training, experience and knowledge of the standards applicable to the *illness, injury or condition involved in the claim.*"[1] An expert witness has never been disqualified solely on the basis that the expert does not have a practice identical to the defendant. Experts have been disqualified because they failed to *say* they were an expert who possessed knowledge of the subject.

While the proponent of expert testimony has the burden to show that the expert possesses special knowledge as to the very matter on which the expert proposes to give an opinion, what is required is simply that the offering party establish that the expert has "knowledge, skill, experience, training or education *regarding the specific issue before the Court* which would qualify the expert to give an opinion *on that particular subject*."[2] In addition, when a party can show that **a subject is substantially developed in more than one field**, testimony can come from a qualified expert in any of those fields.[3]

II. TO BE QUALIFIED, THE EXPERT DOES NOT NEED TO BE A SPECIALIST OR BE OF "THE SAME SCHOOL OF PRACTICE" AS THE DEFENDANT-PHYSICIAN

The physician serving as the expert witness need *not* be a specialist in the particular branch of

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[1] *Blan v. Ali*, 7 S.W.3d 741, 746 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (emphasis added) (referencing Tex.Rev.Civ.Stat.Ann.art.4590(i), Section 14.01(a)).

[2] *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1995); *Ponder v. Texarkana Memorial Hosp*., 840 S.W.2d 476, 477-78 (Tex. App.–Houston [14th Dist.] 1991, writ denied) (non-physician with a doctorate in neuroscience who conducts research on the causes of neurological injuries and teaches neurophysiology, neuroanatomy and neurochemistry to M.D.'s and Ph.D.'s may qualify as a medical expert on the cause of brain damage); *Bilderback v. Priestley*, 709 S.W.2d 736, 741 (Tex. App.–San Antonio 1986, writ ref'd, n.r.e.) (in a trial against a medical doctor who prescribed physical therapy, a non-physician professor of biophysics who taught physical therapy students to testify about "the mechanics, forces and effects of weights used in administering physical therapy").

[3] *Porter v. Puryear*, 153 Tex. 82, 262 S.W.2d 933, 936 (1953). *See also Hersch v. Hendley*, 626 S.W.2d 151, 154 - 55 (Tex. App.–Fort Worth, 1981, no writ) (Orthopedic surgeon could testify in suit against podiatrist on the standard of care for podiatric surgery since it **"was common throughout the medical profession.")**

the profession for which the testimony is offered.[4] For example, an orthopedic surgeon can testify as to the standard of care for a radiologist because **the two professions work closely together, and their specialties are intertwined.**[5] Likewise, a general surgeon is qualified to testify regarding the standard of care for post-operative procedures performed by a gynecologist because **post-operative procedures are common to both fields.**[6] Because the determination of an expert's qualifications under both Rule 702 and section 14.01(a) is based on knowledge, training, or experience, it is incumbent upon the plaintiff in a medical malpractice case to present expert testimony of a medical doctor with knowledge of the specific issue which would qualify him or her to give an opinion on that subject.[7]

Additionally, the courts have held that a medical witness who is not of the same school or practice may be qualified to testify if **he or she has practical knowledge of what is usually and customarily done** by other practitioners under circumstances similar to those that confronted the defendant charged with malpractice.[8] The Texas Supreme Court has made it clear that if **a subject of inquiry is substantially developed in more than one field**, a qualified expert in *any* of those fields may testify.[9] Likewise, the courts have held that if **the subject matter is common to and equally recognized and developed in all fields of practice**, any physician familiar with the subject may testify as to the standard of care.[10]

C. CASES OF IMPORTANCE

1. BRODERS V. HEISE

In *Broders v. Heise* the trial court's exclusion of the testimony of Fred Condo, M.D. an emergency room physician was upheld by the Texas Supreme Court because Dr. Condo, while knowing both that neurosurgeons should be called to treat head injuries and what treatments they could provide, *never testified that* ***he knew, from either experience or study, the effectiveness of those treatments in general, let alone in that particular case.*** "*On this record*, the Heise's simply did not establish that Dr. Condo's opinions on cause in fact would have risen above speculation to offer genuine assistance to the jury."[11] The Texas Supreme Court made it clear however that:

> Our holding does not mean that only a neurosurgeon can testify about the cause in fact of death from an injury to the brain, or even that an emergency room physician could never so testify. **What is required is that the offering party establish that the expert has "knowledge, skill, experience, training or education" regarding the specific issue before the Court which would qualify the expert to give an opinion on that particular subject.**[12]

Since this Texas Supreme Court opinion in *Broders v. Heise*, Texas courts have held that an expert witness opinion regarding a specific medical condition is admissible if **he or she testifies affirmatively that he or she is qualified by knowledge, skill, experience, training or education to testify regarding those opinions.**

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[4] *See Hernandez v. Altenberg,* 904 S.W.2d 734, 738 (Tex. App.–San Antonio 1995, writ denied); *Simpson v. Glenn,* 537 S.W.2d 114, 116 (Tex. Civ. App.–Amarillo 1976, writ ref'd n.r.e.).

[5] *See Silvas v. Ghiatas,* 954 S.W.2d 50, 54 (Tex. App.–San Antonio 1997, writ denied).

[6] *See Simpson,* 537 S.W.2d at 116–18.

[7] *See Broders v. Heise,* 924 S.W.2d 148, 152 (Tex.1996).

[8] *See Marling v. Maillard,* 826 S.W.2d 735, 740 (Tex. App.–Houston [14th Dist.] 1992, no writ) (citing *Bilderback v. Priestley,* 709 S.W.2d 736, 740 (Tex. App.–San Antonio 1986, writ ref'd n.r.e.)

[9] *See Broders,* 924 S.W.2d at 152.

[10] *See Garza v. Keillor,* 623 S.W.2d 669, 671 (Tex. Civ. App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.) (infection process); *Hersh,* 626 S.W.2d at 154 (taking a medical history, discharging a patient); *Sears v. Cooper,* 574 S.W.2d 612, 615 (Tex. Civ. App.–Houston [14th Dist.] 1978, writ ref'd n.r.e.) (use of a diuretic).

[11] *Broders v. Heise* at 153.

[12] *Id.* at 153.

2. BLAN V. ALI

In *Blan v. Ali,*[13] a neurologist, Dr. Reisbord, was qualified to give an opinion regarding the standard of care applicable to a cardiologist and an emergency room physician. In that case, Blan was rushed to the emergency room after his family found him slumped over in the shower of his home. His wife immediately telephoned Dr. Ali, a cardiologist who had treated Blan in the past. After being admitted through the emergency room to the hospital, Blan suffered a stroke. He sued both the cardiologist and the emergency room physician, alleging that the failure to timely diagnose and treat his impending stroke caused him injury and harm. Summary judgment in favor of the cardiologist and the emergency room physician was granted by the trial court because the plaintiff's expert Dr. Reisbord was a neurologist and could not testify to the standard of care applicable to a cardiologist or emergency room physician.

The Court of Appeals correctly held that the trial court erred in granting summary judgment based on the challenge to the qualifications of Dr. Reisbord because Dr. Reisbord's affidavit listed **his experience and training as a neurologist and enunciated the standard of care for patients suffering a stroke** in accordance with the requirements of Section 14.01(a) and Rule 702. The Court of Appeals noted that Dr. Reisbord as a neurologist was qualified by training and experience to offer expert testimony regarding the *diagnosis, care and treatment of a neurological condition* such as stroke, and *since the condition involved in the Blan's claim was a CVA or stroke* found Dr. Reisbord qualified to testify regarding the standard of care applicable to a cardiologist and an emergency room physician regarding the diagnosis, care and treatment of a stroke. "The doctor's argument [that Dr. Reisbord was not qualified because he was neither a cardiologist nor an emergency room physician] ignores the plain language of the statute, which focuses not on the defendant doctor's area of expertise, but on the condition involved in the claim."[14]

3. MITCHELL V. BAYLOR

In *Mitchell v. Baylor University Medical Center,*[15] Mitchell sued the hospital and a plastic surgeon alleging medical negligence in leaving a surgical sponge in her body during a mastectomy and breast reconstruction. Dr. Davidson, Mitchell's surgeon who later discovered the foreign body, testified that he removed a surgical sponge from Mitchell's breast. The defendant's expert Jeff Barnard, M.D., a forensic pathologist, testified that he had examined the material removed from Mrs. Mitchell and that the material was not a surgical sponge. The hospital and physician moved for summary judgment contending that the plaintiff's expert was not a pathologist and therefore not qualified to identify the mass he removed from Mitchell.

In reversing the granting of the summary judgment and remanding the case for trial, the Dallas Court of Appeals noted that Dr. Davidson, the surgeon, stated **his opinion was based on his "education, training and experience as a medical doctor and surgeon"** and that he was **"qualified by his training and experience as a surgeon to testify to surgical procedures and materials, including identifying a surgical sponge."** The Dallas Court of Appeals noted that to be qualified as an expert, "the witness must be shown to possess special knowledge as to the very matter on which he gives his opinion."[16] Based upon his testimony, the Court of Appeals concluded that Dr. Davidson was qualified to offer the opinion that the foreign body he removed was a surgical sponge.

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[13] 7 S.W.3d 741 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

[14] *Id.* at 746.

[15] 109 S.W.3d 838 (Tex. App.–Dallas 2003, no pet.).

[16] *Mitchell* at 842. (citing *Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 718 (Tex. 1998) and *Broders v. Heise,* 924 S.W.2d 148, 152-153 (Tex. 1996)).

4. CRESTHAVEN NURSING RESIDENCE V. FREEMAN

Cresthaven Nursing Residence v. Freeman,[17] was a case where the daughters of a resident sued Cresthaven over the negligent care and treatment of their mother that resulted in her death. The jury awarded millions of dollars. In their eighth issue, Defendant complained that the Plaintiffs' expert, Dr. Brittain, who testified on standard of care, breach and proximate cause, was not qualified because he was merely a family practitioner and not qualified "to render an expert opinion on the issues in this case relating to urology, cardiology, and pathology."[18] In rejecting their argument, the Amarillo Court of Appeals pointed out that :

> [T]he fact an expert is not a specialist in the particular branch of medicine for which the testimony is offered will not automatically disqualify him as an expert." *Ali*, 7 S.W.3d at 745. *The question to be resolved is the specific subject matter and the expert's familiarity with it.* See *Heise,* 924 S.W.2d at 153; *Ali,* 7 S.W.3d at 745.[19]

The Amarillo Court of Appeals went on to note that the "focus of our determination is not on the doctor's area of expertise, *but on the condition involved in the claim."*[20] In dismissing the defense's argument that Dr. Brittain could not testify since he was not a cardiologist, urologist or pathologist, the Amarillo Court informed that "if **the standards of care [the expert] discusses applied to any physician or healthcare provider who treats an elderly patient with long term catheter care and cardiology problems**, *then his lack of expertise in those special fields is irrelevant."* [21]

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5. COLUMBIA RIO GRANDE HEALTHCARE V. HAWLEY

Columbia Rio Grande Healthcare v. Hawley[22] was a case where Mrs. Hawley was not told she had cancer until almost a full year after she was diagnosed by the pathologist at the hospital. After a judgment in favor of the plaintiffs, the defendants appealed and challenged the admissibility of Mrs. Holly's treating oncologist, Dr. Escudier, asserting that "she was not qualified as an expert in the field of colon cancer treatment because she had no special training beyond medical oncology." The Defendant also complained about the admissibility of the deposition testimony of Dr. Marek, a second board-certified oncologist who had treated Mrs. Hawley, along with Dr. Escudier. They challenged the testimony of the expert because "his opinion was based on speculation, had no factual or scientific support, was unreliable, and would not assist the jury, but would confuse them to cause them to speculate as to what his opinions really meant."[23]

The Corpus Christi Court of Appeals rejected these arguments and commented:

> We have reviewed the record, as well as the appellate briefs, and must note that one of the most confusing aspects of this case - aside from the highly technical nature of much of the relevant testimony - is *the manner in which the hospital's brief represents the testimony given by Dr. Escudier . ...* We have reviewed Dr. Marek's testimony and find these criticisms unfounded.[24]

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[17] 134 S.W.3d 214 (Tex. App.–Amarillo 2003).

[18] *Id.* at 232.

[19] *Id.* at 233.

[20] *Id.*

[21] *Id.* (emphasis added).

[22] 188 S.W.3d 838 (Tex. App.–Corpus Christi 2006, pet. filed).

[23] *Id.* at 856.

[24] *Id.* at 856.

6. MCKOWEN V. RAGSTON

In *McKowen v. Ragston,*[25] Dr. McKowen, a cardiothoracic surgeon, was sued when the plaintiff suffered injuries as a result of infectious complications associated with a permanent arteriovenous access graft. The Plaintiff's board certified internal medicine physician who practiced in the area of infectious disease stated in his report:

> **I have treated many patients with the type of infection suffered by Ms. Golden Ragston**, specifically, infections of arteriovenous grafts. In addition, **I have cared for many infections caused by Vancomycin Resistant Enterococci. As such, I am aware of the standards of care** that exist related to these infections.

Noting that the plain language of Section 74.401 focuses on the condition involved in the claim and not the defendant doctor's area of practice, the plaintiff's expert was held to be qualified.

III. HOW AN EXPERT QUALIFIES

Civil Practice and Remedies Code Section 74.401 and 74.402 state that a person may qualify as an expert witness if, among other things, the person:

> (2) has knowledge of accepted standards of care for...the diagnosis, care or treatment **of the illness, injury or condition involved in the claim.**

As seen in the cases cited in II above, it is the "illness, injury or condition involved in the claim" and not the specialty or sub-specialty of the defendant that is the relevant inquiry.

Civil Practice and Remedies Code Section 74.403 concerns qualifications of expert witnesses on causation in healthcare liability claims and requires that the expert be a physician and "otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence."

Texas Rule of Evidence 702 provides:

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.*"

A physician who is not of the same school of medicine may be competent if he has practical knowledge of what is usually and customarily done by a practitioner under circumstances similar to those confronting the defendant. See *Ehrlich v. Miles,* 144 S.W.3d 620, 625 (Tex. App.-Fort Worth 2004, pet. denied). Acquisition of this "practical knowledge of what is usually and customarily done by a practitioner under circumstances similar to those confronting the defendant" is not restricted to the expert's medical education and residency.

In *Estorque v. Schafer* 2009 WL 2972892 (Tex. App.-Fort Worth 2009, no pet. h.) the plaintiffs' expert report was challenged on the basis that the expert, a family practitioner, did not have sufficient qualifications in the specialties of nephrology, urology and gynecology to render opinions on the causal relationship between the physician's failure to refer and the resulting kidney disorders and gynecological cysts.

In his report, Dr. Miller stated that he **acquired** his "education, knowledge, training and experience" on the condition involved in the claim through:

> A. **Attending classes** that taught the evaluation, treatment, diagnosis and care of patients with the same or

[25] 2007 WL 79330 (Tex. App.–Houston [1st Dist.] 2007, no pet. h.).

similar conditions as the plaintiff;

B. **Acquired knowledge** about the plaintiff's condition **through practical experience**, medical conferences, technical works published in textbooks and journals, consultations with other physicians, communications with hospital nurses, staff and residence, lectures personally given;

C. **Lectures** personally given in conferences, participation in hospitals committees; and

D. **Observation** of nurses and supervising residents that care for and treat patients with the same or similar medical conditions as plaintiff.

The court distinguished *Collini v. Pustejovsky*, 280 S.W.3d 456 (Tex. App.-Fort Worth 2009 no pet.) where the expert was found not qualified to give an opinion on causation when the expert did not state any experience or training regarding prescribing Regalin or diagnosing tardive dyskinesia to support statements about the physician's course of treatment.

In *Leland v. Brandal*, 217 S.W.3d 60 (Tex. App.-San Antonio 2006), *aff'd* 257 S.W.3d 204 (Tex. 2008) the San Antonio Court of Appeals determined that Dr. Gray, an anesthesiologist, was not qualified to provide expert testimony on the causal relationship between the cessation of Plavix and aspirin and Brandal's ischemic stroke. Following remand, the trial court granted a 30 day extension during which the Brandal's served Dr. Gray's supplemental expert report.

Following denial of his second motion to dismiss based on the supplemental report, the San Antonio Court of Appeals found Dr. Gray qualified. *Leland v. Brandal*, __S.W.3d __ (Tex. App.-San Antonio 2009, no pet. h.). In his supplemental report, **Dr. Gray detailed how he had "acquired knowledge of the causal relationship between cessation of Plavix and aspirin and ischemic stroke**, specifically from seminar training in the areas of hematology, pharmacology and physiology. Dr. Gray noted that:

A. He had **attended many seminars** since entering the practice of medicine that focused specifically on how anticoagulant therapies like Plavix and aspirin are processed by the body, how they affect the body immediately before, during and after surgery and how the body responds when those drugs are discontinued.

B. Dr. Gray noted that he "stays abreast of developments in the field **by reading a number of medical journals** that involve the field of anesthesiology and reads "articles describing how anticoagulant therapies like Plavix and aspirin are processed by the body and how they affect the body immediately before, during and after surgery and how the body responds when the drugs are discontinued."

C. Dr. Gray stated that as a clinical professor of anesthesiology, **he is responsible for teaching residents** "about the effects of anticoagulant and antithrombotic therapies of Plavix and aspirin on blood before, during and after surgery."

D. Dr. Gray explained that in his **"consultation with these patients, their surgeons and their primary care physicians**, he has learned about how Plavix and aspirin work, and how the body and specifically, the blood, reacts when these drugs are discontinued."

The Court of Appeals held that Dr. Gray's

statements in his supplemental report regarding his knowledge, skill, experience, training and education were sufficient to enable the trial court to conclude that he was qualified to offer an opinion on causation. The Court of Appeals specifically pointed to statements by Dr. Gray that he had "acquired knowledge about the effects of Plavix and aspirin" through practical experience, attending classes, through technical works published in journal, consultations with other physicians and by teaching medical residents about the risks associated with discontinuing Plavix/aspirin therapy prior to surgery. The court concluded that Dr. Gray's supplemental report demonstrated his qualifications to opine on the specific issue before the trial court and provided a fair summary of his opinion on the issue of causation. The trial court therefore did not abuse its discretion when it denied Leland's motion to dismiss.