Treating physicians - Is it expert testimony or not? By C. Stephen Stack, Jr.

A question which often arises when a treating physician testifies is whether such testimony constitutes lay or expert testimony. If it constitutes expert testimony, the information required by Miss. R. Civ. P. 26(b)(4)[1] must be provided to the opposing party sufficiently in advance of the trial (or deposition of the physician) to allow that opposing party the opportunity to combat it.

Generally, a physician may testify about his/her treatment of a patient without being formally designated as an expert. For instance, the Mississippi Supreme Court in *Scafidel v. Crawford*, 486 So. 2d 370 (Miss.1986), held that a doctor's describing the facts and circumstances surrounding his care and treatment of the patient and the fact that he had discovered the patient was anemic during that treatment did not constitute expert testimony. Although the plaintiff had argued that his testimony regarding anemia was expert testimony, the Court said the doctor could testify that the patient was anemic without becoming an expert witness, just as he had testified that the patient had fever, chills, and diarrhea. *Id.* at 372. It noted importantly, that "no evidence was presented to the jury of the significance of this condition." *Id.*

That distinction seems easy enough. But as the Mississippi Supreme Court has noted "in some cases, the line between expert opinion and lay opinion can be blurred." *Robinson v. Corr*, 188 So. 3d 560, 565 (Miss. 2016). For instance, in *Griffin v. McKenney*, 877 So. 2d 425 (Miss. Ct. App. 2003), the doctor had performed gallbladder

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[1] Miss. R. Civ. P. 26(b)(4)(A)(i) provides that:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

surgery on the patient, and the patient had suffered many complications after the surgery. The patient sued the doctor for malpractice, alleging that he negligently had perforated the bowel and had failed to timely diagnose and treat the perforation.

The patient in *Griffin* argued that the doctor's testimony strayed into the area of expert testimony when he:

> described how the bowel goes to sleep for numerous reasons, described pancreatitis, elaborated on the risks of laparoscopic surgery, used medical drawings to illustrate [the patient's] surgery, described instruments used during the surgery, discussed reconnection of the bowel, described certain tests to detect blood in urine, discussed medicine to enhance bowel activity after surgery, explained the meaning of nurses' notes, and discussed the pros and cons of CT scans.

Id. at 439.

The Court of Appeals found that such testimony "was comprised of technical knowledge outside the range of knowledge of an ordinary layperson" but held that he "was testifying as a treating physician who is also a party to the case . . . [and that the] description of the surgery and of his care . . . was limited to that context . . . [and that he] never offered an opinion on the standard of care." *Id.* However, the Court of Appeals held that the doctor's testimony went too far when he began opining about what he *would have done* if he'd found certain conditions and what he *would have* expected to occur given those conditions. This constituted expert testimony. *Id.* at 441.

Similarly, the Mississippi Supreme Court in *Robinson*, *supra*, affirmed the exclusion of testimony from a physician as being expert testimony where he opined as to what he would have done if he had known of a certain condition. See *Robinson*, 188 So. 3d at 568 ("Like the physician in *McKenney*, Dr. Robinson was answering questions

which require expert knowledge. The proposed testimony of Dr. Robinson—the opinion that he would not have attempted removal of the suture *if he had known* of its existence due to friable tissue and potential bleeding—is expert opinion testimony acquired *after* the surgical procedure had ended.").

As is evident from the above cases, the line between expert and lay testimony with regard to treating physicians is a fine one. If there is any doubt about whether the testimony touches on the standard of care or otherwise offers an opinion as to what should have or could have been done during the course of treatment, a practitioner should designate the physician as an expert witness out of an abundance of caution.