Proving the standard of practice:
The admissibility of experts' personal practices

By Howard A. Kapp

It is common in medical malpractice litigation in California for the defense to present a motion in limine asserting that the experts – and by experts, they mean plaintiff's experts – should be precluded from informing the jury of their own "personal practices." The defense presumes that the plaintiff's expert "personal practices" are both "different from" and "better than" the supposedly lowest-common-denominator standard of practice. This convenient boilerplate argument assumes that the standard of care equates to the defense experts' opinions.

The defense bar argues, based on the dubious premise that plaintiff's expert's personal practices are "different" from the standard of care, that evidence of such "personal practices" is "irrelevant" or somehow would be "confusing" or "misleading."

Invariably, these largely boilerplate motions – which may be filed long before the plaintiff's liability expert's deposition – contain little or no discussion of the facts of the case. Indeed, the never-stated theme of these motions is that the standard of care is not related to the real-life practices in the community – including those of the plaintiff's expert – but that the standard is some sort of free-floating speed limit created ad hoc by the defense expert.

It is also universally true that these motions, which have been a longstanding fad of the medical malpractice defense bar, are unsupported by any meaningful California authority.

While the issue has never even been addressed in California,[1] it has been addressed in sister states on multiple occasions; the overwhelming modern authorities hold, in different contexts and for sometimes multiple reasons, that an expert's personal practices are admissible. While there was a handful of cases that previously excluded such evidence, those cases have now been largely abandoned or overruled, or have become archaic.

In the absence of binding California authority, the marked national trend is not just persuasive, but convincingly so. This article addresses some of the more significant recent cases, in chronological order and provides extensive quotations from these persuasive authorities since the quality of the reasoning in these nonbinding authorities would be useful in opposing such defense motions in limine.

In *Wallback v. Rothenberg* (2003) 74 P.3d 413, the Colorado Court of Appeal discussed the question at length in upholding a trial court's admission of such evidence:

> One of the Wallbanks' experts testified that the failure of Rothenberg to obtain a CT scan or MRI prior to operating on Emily was below the preoperative standard of care for physicians performing cystic hygroma surgery. The Wallbanks' other expert testified that while the standard of care would not necessarily have required obtaining a CT scan or MRI prior to surgery, she herself would have done so.
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> Rothenberg's expert testified that obtaining a CT scan or MRI was not required by the applicable standard of care, but that he personally would have obtained those tests before performing cystic hygroma surgery.
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> In denying the motion in limine, and again during trial when the Wallbanks' expert testified that obtaining a CT scan or MRI was not required by the standard of care, the trial court ruled that such testimony of the experts' personal practices was admissible and relevant as some evidence of the standard of care, as long as additional evidence was presented that Rothenberg's conduct fell below the standard of care.
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> Rothenberg argues that such evidence is irrelevant, because the personal preferences of a particular expert do not establish the standard of care. Indeed, Rothenberg maintains, such evidence is irrelevant because a practice different from that personally followed by an expert witness may also fall within the applicable standard of care. We are not persuaded.

While *McCroskey* and *Vitello* make it clear that a standard of care may not be established by the testimony of the personal practices of expert witnesses,

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those cases do not address whether this testimony may be relevant when other evidence is presented concerning the applicable standard of care. This question is a matter of first impression for Colorado appellate courts.

We conclude, as did the trial court, that testimony concerning the experts' personal practices was of some relevance because each expert also testified concerning the applicable standard of care. We reach this conclusion for the following reasons.

First, as the *McCroskey* court noted, 'the actual practice in a community' is the starting point in determining a reasonable standard of care. Thus, once the expert testifies concerning the standard of care, then testimony of that expert's personal practices may help the jurors understand why that standard of care is followed by that expert or other experts.

Second, testimony regarding an expert's personal practices may either bolster or impeach the credibility of that expert's testimony concerning the standard of care. Here, the Wallbanks' expert who stated that the standard of care did not require obtaining a CT scan or MRI nevertheless stressed the importance of obtaining those tests when questioned about why she did so on a regular basis. Under CRE 607, the Wallbanks could impeach their own expert. Similarly, the Wallbanks properly cross-examined Rothenberg's expert concerning his personal practice to obtain tests, when he testified that the standard of care did not require obtaining a CT scan or MRI. See C. Frederick Overby, Trial Practice and Procedure, 51 Mercer L.Rev. 487, 501–02 (1999) ('The relevance and importance of a medical expert's personal choice of a course of treatment is highly probative of the credibility of the expert's opinion concerning the standard of care. A jury is free to disregard the expert's opinion entirely and find that the standard of care is reflected by the course of treatment the expert would have chosen, a highly probable scenario if other evidence admitted in the case supports this proposition.')

Third, because each expert addressed the applicable standard of care, testimony regarding their personal practices was proper direct and cross-examination. Thus, the jury could give whatever weight it determined was appropriate to the testimony of those experts, including ignoring it completely. Similarly, during closing argument, counsel for each party was able to argue the significance of the experts' testimony as to their personal practices. Also, the jury was properly instructed concerning the applicable standard of care.

Accordingly, we conclude that the trial court did not abuse its discretion nor err as a matter of law in allowing the experts here to testify about their own practices as well as the applicable standard of care. See, e.g., *Greenberg v. Bishop Clarkson Mem'l Hosp.*, 201 Neb. 215, 266 N.W.2d 902, 907 (1978) (testimony that a physician would have acted differently from defendant, although not normally admissible, may be considered where ample medical testimony establishes the applicable standard of care); *Miller v. Peterson*, 42 Wash.App. 822, 714 P.2d 695 (1986) (while testimony reflecting only a personal opinion of experts that they would have followed a different course of treatment from that of the defendant is insufficient to establish a standard of care, there was no error to allow such testimony, because there was expert testimony on the standard of care and the jury was given the proper standard of care instruction).

Likewise, in *Smethers v. Campion* (2005) 108 P.3d 946, 210 Ariz. 167, an Arizona court, in reversing a defense verdict on these very grounds, quoted and followed *Wallbank*, adding:

> We agree that how a testifying expert approaches a medical problem may be relevant and of assistance to the jury in determining what the standard of care requires in a similar circumstance. More importantly, the jury is entitled to fully evaluate the credibility of the testifying expert, and the fact that an expert testifies that the standard of care does not require what that expert personally does in a similar situation may be a critical piece of information for the jury's consideration. This is particularly true when, as here, there was other evidence in the record – in the form of Dr. Masket's testimony and the medical literature – that supported the position that Dr. Binder's "personal practice" was perhaps closer to reflecting the applicable standard of care than that espoused by Dr. Binder in his official standard of care opinion.
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> ¶ 33 Finally, based upon our review of the trial transcript, it appears that Dr. Binder may have contradicted himself when he testified that he would have "done the same thing" as Dr. Campion in choosing not to re-measure the corneas of this patient before performing the surgery. Counsel for Dr. Smethers should have been allowed to impeach Dr. Binder with his deposition testimony that he personally would have waited a longer period of time after the lenses were removed before taking the measurements upon which the surgical corrections would be based or would have repeated the measurements prior to surgery.
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> "¶ 34 Accordingly, we hold that it was error to limit the cross-examination of Dr. Binder as it relates to his personal approach to this medical issue. Because we cannot predict how a jury would have reacted to this information, we cannot say that this was merely harmless error. Therefore, we reverse the verdict entered and remand for a new trial.

This trend continued in Illinois's *Schmitz v. Binette* (2006) 857 N.E.2d 846, 368 Ill. App.3d 447, where still another court reversed a defense verdict after the trial court refused to permit plaintiff's counsel to cross-examine the defense expert on his personal practices, concluding a long discussion of the national trend and focusing on the impeachment value of such evidence when used against a defense expert:

> We agree with *Gallina*, *Rush*, *Wallbank*, and *Smethers* that an expert's personal practices may well be relevant to that expert's credibility, particularly when those practices do not entirely conform to the expert's opinion as to the standard of care.

In *Condra v. Atlanta Orthopaedic Group* (2009) 681 S.E.2d 152, 285 Ga. 667, the Supreme Court of Georgia provided a helpful and lengthy list of majority rule states, and joined with "the growing body of case law from other jurisdictions supportive of the admissibility of expert personal practices testimony":

Also important in our decision to shift course on this issue is the growing body of case law from other jurisdictions supportive of the admissibility of expert personal practices testimony, at least for some purposes. See, e.g., *Swink v. Weintraub*, 672 S.E.2d 53(III) (N.C.Ct.App.2009) (affirming admission of personal practices testimony); *Bergman, supra*, 313 Ill.Dec. 862, 873 N.E.2d at 507(II)(B)(2)(d) (affirming admission of personal practices testimony for impeachment purposes); *Smethers, supra*, 108 P.3d at 956 (reversing exclusion of personal practices testimony); *Gallina v. Watson*, 354 Ill.App.3d 515, 290 Ill.Dec. 275, 821 N.E.2d 326(II)(A) (2004) (reversing exclusion of personal practices testimony); *Wallbank v. Rothenberg*, 74 P.3d 413(I) (Colo.Ct.App.2003) (affirming admission of personal practices testimony). See also *Hartel v. Pruett*, 998 So.2d 979(I)(E) (Miss.2008) (no abuse of discretion in permitting expert personal practices testimony); *Walker v. Sharma*, 221 W.Va. 559, 655 S.E.2d 775, 782-783 (W.Va.2007) (where physician qualified as expert, personal practices as to procedures on which expert opinion offered relevant for purposes of assessing credibility). Though not all jurisdictions have followed this trend, see, e.g., *Vititoe v. Lester E. Cox Med. Centers*, 27 S.W.3d 812(III) (Mo. Ct.App.2000) (affirming exclusion of personal practices testimony); *Carbonnell v. Bluhm*, 114 Mich.App. 216, 318 N.W.2d 659(III) (1982) (same), admissibility of personal practices testimony appears now to be the prevailing view.

Finally, though defendants assert that allowing expert personal practices testimony is likely to confuse the jury by conflating the standard of care with an expert's personal protocols, we find that such potential for prejudice does not as a general rule outweigh the usefulness of such information in evaluating an expert's credibility. Moreover, any potential confusion created by the admission of such evidence may be remedied through the use of careful jury instructions. Such instructions should, for example, clearly define the legal meaning of standard of care; enunciate the principle that a mere difference in views between physicians does not by itself prove malpractice, see, e.g., *Brannen v. Prince*, 204 Ga.App. 866(2), 421 S.E.2d 76 (1992), overruled on other grounds by *Gillis v. City of Waycross*, 247 Ga.App. 119, 543 S.E.2d 423 (2000); and clarify concepts such as burden of proof and credibility of witnesses. In addition, the party whose expert has been cross-examined will have the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care. Armed with complete information regarding the expert's opinion and personal practices, jurors can make intelligent judgments about the reliability of the expert's testimony.

The rationale of these modern authorities, especially compared to the pro forma arguments in favor of exclusion, is both multifaceted and unassailable. These authorities provide a series of justifications, supported by something more than counsel's self-serving conclusions, any one of which would defeat the motion.

Moreover, there are even more arguments in favor of admissibility that have not yet been mentioned in these modern authorities. For one example, many physicians, especially those who are not professional testifiers, will commonly refer to their "personal practices" when referring to the standard of practice; this is simply a common shorthand among doctors who focus on practicing medicine and not performing in the legal arena. In fact, barring legally inexperienced doctors – who tend to be less active than the defense experts – from using such language is confusing and disorienting; this is the way they talk.

Additionally, if the defense position that there is a real difference between "personal practices" and the prevailing standard of practice is correct – a dubious prospect at best – then the standard of practice is something different from that actually done by actual members of the community, including expert witnesses who are members of that community. Disassociating the standard practice from community standards is always, by definition, wrong: What doctors do in their day-to-day practice *is* the standard of the relevant community,[2] not just what the defense expert is willing to concede.

The importance of evidence of the personal practices of members of the relevant professional community can be decisive. This demonstrates, in the first instance, that the standard of practice relates to the real world where careful and prudent doctors actually care about their patients and not just their frequently lucrative, no-risk, popular-in-their-community careers peddling their opinions.

Undoubtedly, these experts count themselves as both careful and prudent and will find it embarrassing to testify that they adhere to the unreal lower – and injury-causing – standard offered by defense counsel. Moreover, for such experts to opine that other community members are less prudent and careful, or that the standard of practice permits such lower standards for other doctors or patients, is demonstrably arrogant, false and incredible. And that can't help an expert's credibility in peddling the same standard of practice that injured the damaged plaintiff. ■

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[1] A search of all reported California cases through 2013 revealed only one case (*Executive Aviation, Inc. v. National Insurance Underwriters, Inc.* (1971) 16 Cal.App.3d 799, 807-808, 194 Cal.Rptr. 347) which even mentions the term "personal practices." This case has no relevance to this point.

[2] See my previous article on that point. "Operating Room: The Real Meaning of 'Standard of Care' in Malpractice Litigation," *Los Angeles Lawyer Magazine* (Los Angeles County Bar Association), Nov. 2009, p. 26. The article is available at my website, www.kapplaw.com, or www.lacba.org.