DYNAMIC TECHNIQUES FOR USING EXPERT WITNESSES

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A. DETERMINING QUALIFICATIONS OF THE NEEDED EXPERT

1. Rule 702

In North Carolina the *sine qua non* for expert witness qualification in a medical negligence case is Rule 702, Rules of Evidence, which states, in pertinent part:

> (b) In a medical malpractice action . . . a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
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> b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
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> (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
>
> a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
>
> b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the

same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or the party on whose behalf the testimony offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

Subsection (e) of the rule permits the Court, upon motion, to allow a witness who does not meet the above criteria to testify in extraordinary circumstances, and who is “otherwise qualified,” if the Court determines that ends of justice are served by so doing.

Since Rule 9(j) of the Rules of Civil Procedure requires a certification that the records have been reviewed by a witness who is expected to qualify as an expert under Rule 702, Rules of Evidence, a cottage industry of litigation over whether an expert is qualified has grown up. Generally, this aspect of litigation focuses on the proposed expert’s familiarity with the community where the malpractice arose, but is sometimes centers on whether a particular witness is qualified by specialty.

2. **The "General Practice Provision of Rule 702(c)**

Particular problems exist with respect to a "general practitioner." The American Board of Medical Specialties does not recognize a specialty board in general practice. Perhaps the closest specialties would be Family Practice and perhaps Internal Medicine. It would seem then that Rule 701(c)(2), above, is totally superfluous, since no accredited medical schools or residency programs offer instruction in "general practice." Therefore, the only way an expert could qualify as a general practitioner would be through his or her active clinical practice. One might suspect that a "general practitioner" is a provider who either deigns to attempt board certification due to advanced age or was an unsuccessful applicant for board certification.

This problem was presented in *FormyDuval v. Bunn, 138 N.C. App. 381, 530 S.E.2d 96,* Rev. Denied without published opinion, *353 N.C. 262, 546 S.E.2d 93 (2000).* Defendant was a "general practitioner" who allegedly failed to inform plaintiff's intestate of a diagnosis and who allegedly failed to hospitalize decedent or to refer him to a specialist. Plaintiff offered three experts on the standard of care, none of whom were "general practitioners." The three were excluded after extensive *voir dire*, after which the Court directed a verdict in favor of plaintiff. The Court of Appeals looked to several sources and concluded that a general practitioner is a physician who holds no specialty qualifications and who does not restrict his practice to any particular field of medicine. On that basis, the trial court's ruling was affirmed. Apparently, the lesson to be learned from this case is that if the defendant is too stupid to pass his or her board exams, your expert must be equally stupid. Since the General Assembly, in its wisdom, chose to carve out a provision dealing directly with general practitioners, the Courts could not avail themselves of the provisions in Rule 702 that would allow testimony from a witness in a similar specialty which includes within its specialty the performance of the procedure that is the subject

of the complaint and have prior experience treating similar patients. The trial court obviously declined to exercise the saving provision of Rule 702 (d).

3. The Same or Similar Communities Requirement

Keep in mind as well that N.C.G.S. §90-21.12 provides that the applicable standard of care must be "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged [malpractice]." While a departure from the applicable standard of care is only one of three categories of malpractice, the others being the failure to use his or her best judgment and the failure to use reasonable care and diligence in the application of his or her knowledge and skill in the care of the patient. See, *Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).*

Only in exceptional circumstances will you find an expert in the defendant's own community to testify against him or her. Typically, an expert from some distance must be used by the plaintiff and, if there are allegations that defendant breached the applicable standard of care, the expert must be prepared to testify about sufficient familiarity with the community in which the malpractice occurred to allow him or her to express an opinion about the quality of medical care in that community.

In *Henry v. Southeastern OB-Gyn Associates, P.A.*, *145 N.C. App. 208, 550 S.E.2d 244 (2001)*, plaintiff's expert testified in deposition that he was unfamiliar with Wilmington, North Carolina and with the medical community there, where the alleged malpractice occurred, but that he was familiar with the applicable "national standard of care" and that the standard in Spartanburg, South Carolina, where the witness practiced, would be the same as the standard applied at Duke Hospital or at UNC Hospital. The court noted the absence in the record of any

evidence that the standard of care in Wilmington is the same as that practiced in Durham or Chapel Hill, "or that these communities are the 'same or similar'." The witness was disqualified.

Disputes often arise when a medical expert testifies that there is a "national" standard of care. The North Carolina courts have consistently rejected the concept of a national standard of care. See, *Page v. Wilson Memorial Hospital, 49 N.C. App. 533, 272 S.E.2d 8 (1980)*, in which the Court of Appeals stated: "By adopting the 'similar community' rule in N.C.G.S. §90-21.12, it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care." Prior to the enactment of the statute, North Carolina recognized that some types of conditions lent themselves to uniform medical or surgical treatment without regard to locality. See, *Rucker v. High Point Memorial Hospital, 285 N.C. 519, 206 S.E.2d 196 (1974)* [care and treatment of gunshot wounds]. In *Leatherwood v. Ehlinger, 151 N.C. App. 15, 564 S.E.2d 883 (2002,* cert. denied, *357 N.C. 164, 580 S.E.2d 368 (2003),* plaintiff's expert testified that he believed there was a national standard of care. However, he also testified that he was familiar with the community in which the malpractice had occurred and that community met the national standard of care. This was sufficient to meet the requirement of the locality rule.

In *Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003)* the Court reversed a Judgement NOV, holding that plaintiff's expert was qualified to testify because he practiced in a hospital similar in size to that of defendant, and because his community was similar to defendant's "with respect to board-certified physicians, sophisticated lab services, x-ray departments, anesthesia services, hospital certification, and access to specialists."

B. Savvy Ways to Find the Expert You Need

Experts are everywhere, all you have to do is look for them. Sources include expert location firms, attorney referrals, jury verdict reporting services, directories, society membership

rosters, trade associations, regulatory bodies and private consulting firms.

There are pros and cons associated with each of these sources.

Location services have the benefit of saving time. You simply tell the service what type of expert you need and it will, for a fee, provide one or more names. Some services will present a case summary to the expert, or even a complete set of medical records, and present you with a report. The fee paid includes the report, which may actually be verbal and transmitted by an employee of the service. It is then up to the lawyer to contact the expert for more detailed discussions, including negotiation of the expert's fee for continued service.

There are some negatives associated with using a service. The cost of an expert found through a service is usually more expensive. The service charges a fee for its services and the expert must be paid. Once the money is spent to secure the expert, it is gone and if subsequent consultations with the expert prove unsatisfactory, the process must start all over. Then there is the inevitable question at deposition or trial about whether the expert works for the service. Some lawyers believe there is a stigma attached to an expert who is located by a service. Of course, there are some services that insist on exclusivity contracts with participating experts and in that event there may actually be some credibility problems.

You can always ask other lawyers for suggestions about experts. The "lawyer grapevine" may well be the best way to locate an suitable expert. Verdict or settlement reporting services frequently name experts in a case. *Lawyer's Weekly* can be a good source for experts.

As part of the lawyer's grapevine, professional negligence list serves are a good place to start. An e-mail to the other participants asking about a potential expert will probably result in several suggestions.

Check the literature in the field in which you need an expert. Find out who has written

on the subject. If you have an intriguing fact situation, even someone who is predisposed against getting involved in a court case may be induced to serve as an expert.

The internet is an excellent source of information on potential experts. If you know the specialty you need, a Google or Yahoo search should give you access to organizations related to that specialty. For example, if you need an earn nose and throat doctor, you will find the American Academy of Otolaryngologists (www.entnet.org). From there, you can link to each state where you will find some resumé-like information for each member. You will then have at least some information about the potential expert before you initiate contact. Web sites for medical schools and major teaching hospitals will usually direct you to the appropriate department, and then on to the web page for that department where the physicians in the department are listed, often with fairly detailed *curriculum vitae.*

The first determination, of course, is the type of expert you will need. By this, I mean whether you want an expert from an academic institution or someone who is in a private clinical practice setting. University hospitals are usually good sources for experts, as faculty there has probably written extensively. The difficulty may be that these doctors usually are extremely busy, not only with their instructional and clinical duties, but also in research and speaking at medical meetings. However, if you can persuade a doctor at a medical school to review the case, you will generally have found an excellent expert, for these doctors, above all else, are teachers.

In my experience, it is generally better to make direct contact with the potential expert, preferably by a telephone call, or at least e-mail. A “cold” letter will probably find its way into the trash can but if that’s the way you have to proceed, make it short. If you can’t summarize the medical issues into a concise paragraph, you may have problems with the case.

Once you have identified a likely expert, investigate him or her. There are some doctors

who testify frequently, and there is a two-fold risk involved in using such a witness. First, the doctor may have given testimony in a prior case that is at odds with the opinion expressed in your case. Don't believe for one minute that opposing counsel won't have a boxful of the witness's prior depositions. Second, the witness may be perceived as a "professional witness," a gun for hire to the highest bidder, casting doubt on his or her credibility. That said, don't exclude an otherwise potentially good witness simply because he or she is a frequent witness. Unless there is a skeleton in the closet, a witness with vast experience may handle himself or herself quite well, having pretty much seen it all before.

If the witness has testified before, find out for whom he or she testified. Check with that lawyer for his or her impressions of the witness. A witness can sound simply wonderful as you discuss the issues in the case, but if that witness is a kluttz on the witness stand, you'd better find out early. Too, witnesses sometimes are extraordinarily cooperative in the early stages of the investigation, but when it's time for a deposition, they may not be willing to make themselves available. Another lawyer who suffered through such an experience can give you some good information.

Academic or other qualifications are great, but if the witness can't communicate well, or may turn off a jury, that witness may not be acceptable. For that reason, as soon as the witness has agreed to review the case, the lawyer should arrange a face to face meeting. The witness's personal appearance, demeanor, or even accent may negate his or her opinions. This meeting will also allow a freer give and take conversation than a telephone call.

There are a number of matters that MUST be established at the outset:

- There must be complete honesty between you and the expert. If there is something in the case that might affect the expert's opinion adversely, disclose it.

If there is something in the expert's background that might affect his or her credibility, insist on disclosure.

- Remember that YOU, not your client, retained the expert. Make sure you understand the expert's fee schedule at the outset and pay promptly.
- Make sure the expert will be willing to be available for a deposition and, if necessary, for trial testimony.

The failure to get this clarified from the outset will result in melancholy down the road.

C. USING THE EXPERT TO WIN YOUR CASE - PLAINTIFF'S PERSPECTIVE

1. Preparing the Witness to Testify

There is a difference between testimony given in a discovery deposition, and that given at trial. In the former, the inquisition is far more wide ranging and exploratory, while in the latter brevity may be the soul of discretion.

Once the expert has been chosen, he or she must be prepared to testify in the case. The first step is to make sure the expert can comply with the requirements of the "locality rule." Here are some suggestions of the type of materials furnished to an expert to educate him or her on the standards of medical practice in the community:

- A copy of the pattern jury instruction in which the standard of care is described.
- A copy of the most recent applications for license renewal by local hospitals. This can be obtained from the Division of Facilities Services in Raleigh. You may request it over the internet at www.facility-services.state.nc.us.
- A copy of regional or county health statistics from Shep's Center at the University of North Carolina. You can find this a www.shepscenter.unc.edu/data/nchpds/.
- Print out information from the local hospital web site. This will contain

information about the number of beds in the hospital, the level of care the hospital is capable of providing, the medical specialties on staff. Hospitals are aggressively marketing themselves and there may be some very useful descriptive statements on the site.

- The local Chamber of Commerce web site will have information on the demographics of the area, as will the U. S. Bureau of Labor Statistics.
- Photocopy, if possible, yellow pages from the local telephone book covering the physicians practicing in the area, including specialties.
- Since the expert will need some knowledge on the level of defendant's knowledge and training, print defendant's information from the N.C. Medical Board, found at www.ncmedboard.org. You can link to the N.C. Medical Board and other state medical boards at AIM Doc Finder, www.docboard.org. There may also be information on the Doctor Find section of the American Medical Association website, www.ama-assn.org/aps/amahg.htm.
- Certainly, if the defendant doctor or his practice maintains a website, download and print it for your expert.
- If the defendants are residents, get information about the hospital's residency program. Many medical centers have detailed descriptions of these programs on their web sites.
- If your expert practices in a community similar in size to that where the claim arose, get comparable demographic information.

Finally, I suggest you make a "reference sheet" for the witness, with a list of 10 to 12 pieces of information to be used to exhibit the necessary familiarity. Encourage the witness to use it. If

the locality issue is handled well at deposition, it is highly unlikely to arise at trial.

Here are some suggestions for preparing the expert:

- Ask the expert to prepare a differential diagnosis, considering all the plausible causes of plaintiff's condition and eliminating all but one. The failure of an expert to consider an alternative diagnosis or course of treatment, and to cogently explain his or her reasons for rejecting the alternatives, can ruin the expert's viability. Note, the focus here is on <u>plausible</u>, not necessarily <u>possible</u>, causes. If a cause is remote, the expert should be able to say so, and explain why.
- If the expert has referred to any medical literature in forming his or her opinion, make sure you are made aware of, and familiar with, it prior to the deposition.
- Caution the expert about the following defense techniques:
  - Opposing counsel may try to put the alleged malpractice into terms of a simple difference in judgment between two physicians. The case should be framed in the context of good/acceptable judgment vs. bad/unacceptable judgment.
  - "That's just your opinion, isn't it?"
  - Beware the "retrospectroscope." Medical malpractice expert opinions may be attacked because they are based on "20-20 hindsight." The expert should be able to testify that he or she, to the extent possible, considered the case based on what the defendant knew or should have known at the time. Hospitals and managed care organizations use this type of review regularly to monitor quality of care. The expert should explain how this is done and how his or her work in your case used the same type of analysis.

- Make sure your expert is comfortable with the magic words of "probability," "likelihood," and "more likely than not." Avoid "possibility" and other terms that may carry his or her opinion into the realm of speculation. Make sure he or she understands that a "reasonable degree of medical certainty" can be less than iron clad.
- Caution the expert about examination techniques that attempt to "sum up" the witness's testimony in a way that makes it sound favorable to the opposition.
- Make sure the witness knows not to argue with examining counsel.

If you have a well-qualified and/or effective witness or witnesses, who have performed well at deposition, your chances of settling the case should be pretty good.

More at trial than at deposition, your witness will be a teacher. His or her job is to educate the jury. Toward that end, make sure he or she understands the need to "put the jam on the bottom shelf so the little folks can reach it." Everyday language should be used instead of medical jargon (this goes for lawyers, too). In preparing for trial, involve your expert in the preparation of demonstrative exhibits. At trial, have the expert use the exhibits to enhance his or her education of the jury. Keep the presentation as simple as possible. If the expert uses a medical term, have him or her explain the meaning.

In direct examination, remember the rules of primacy and recency. Oversimplified, these are that people will retain beliefs they form early in the trial (or examination) and they will retain memory of facts they heard most recently. For that reason, you must do two things with your expert early in the direct examination. First, make sure the jury understands his or her qualifications. This is especially true if your witness has an impressive CV. However, don't bore the jury with a lot of detail from the CV. Mark the CV as an exhibit, make sure each juror

has a copy, and simply have the witness point out those items on the CV that have bearing on his opinion in the case. Second, at the earliest possible time, get the witness's opinions out there for the jury to hear, along with his or her reasons for the opinions. Jurors should hear this when they are at their most interested and attentive moments.

There will be some problems with the case. Deal with those problems on direct examination, but do it somewhere in the middle. Don't ignore the problems, you can bet your opponent won't forget to spend a lot of time on them, especially if you have spent no time on them. Many cross examinations focus on witness bias and compensation. Anticipate this during direct exam.

You will know, by having taken the defense experts' depositions, what the defense theory is. If your expert is able to debunk the opponent's arguments, have him or her do so. This usually fits nicely toward the end of direct. The jury will have reclaimed a degree of attentiveness if they sense the end of the direct is approaching.

If there is particularly helpful literature, or a particularly helpful text, if he or she will do so ask your expert if they are authoritative. You can then use them to cross-examine the defendant and the defense experts, who will have been instructed to deny authoritativeness.

In asking questions on direct, try to avoid the use of all the legal jargon the courts have imposed on us. Start this way:

Q: Doctor, I'm going to be asking you about some opinions you have in this case. When you give those opinions, will you only give us those opinions you hold to a reasonable degree of medical certainty?

Q: Also Doctor, will those opinions be based on the standard of care in Greensboro, North Carolina, or similar communities?

Once those formalities are out of the way, simply ask the witness his or her opinion:

Q: Doctor, do you have an opinion as to whether [defendant's] care and treatment of

[plaintiff] fell below the acceptable standard of care?

Q: Doctor, do you have an opinion as to whether [defendant] used reasonable care and diligence in his or her treatment of [plaintiff]?

Q: Explain to the jury why you believe that.

Q: What should [defendant] have done instead?

Q: Why?

Finally, don't overlook causation evidence. This is often the crucial element of the case. A jury may find negligence, but conclude that the case is one of "no harm, no foul."

Remember, a good expert won't necessarily win your case, but a bad expert sure can lose it for you.

E. HIPAA IMPLICATIONS

The Health Insurance Portability and Accountability Act of 1996 required the Department of Health and Human Services (HHS) to promulgate regulations governing the privacy of a patient's health information. The "Privacy Rules" were published in 2000. Under these rules, "protected health information" (PHI) is defined as any information that relates to a patient's physical or mental health condition in the past, present or future. The Privacy Rule forbids the release of any PHI relating to a specific individual, regardless of the form in which it is released.[1] Penalties for noncompliance can be steep, and include both civil and criminal penalties for violations. A person who knowingly discloses information in violation of HIPAA can face a criminal fine of up to $50,000, together with one year in prison. These penalties apply with like force to persons who knowing *receive* protected information.

Obtaining medical records and information is moderately more difficult now than pre-HIPAA. Authorizations signed by clients must comply, and in many instances providers insist

[1] 45 C.F.R. § 160.103

on the use of their own particular forms.

One interesting aspect of HIPAA is its provision that allows a patient to amend his or her records for the purpose of correcting errors, even long after the visit to the doctor's office giving rise to the record. Of course, nothing prevents the provider from adding his or her own comment to any attempted amendment by the patient. Nevertheless, HIPAA provides a legal remedy for an injured patient who feels his or her records do not reflect reality.

Under the HIPAA Privacy Rule, some records may be obtained without the patient's authorization. There are two general types of disclosure without authorization: mandatory and permissive.

There are two types of mandatory disclosure. The first is if the individual patient, or personal representative personally requests it. The second is a request by HHS. The first form of mandatory disclosure is important to plaintiff counsel.

Be warned that there are permissive disclosures. The downside to a permissive disclosure is that the provider is not required to disclose the information, even if it is allowed to do so. Most of the permissive disclosures are:

1. The disclosure is required by law. That is, a statute, regulation or court order requires the disclosure. However, the title is misleading. Even if the disclosure is "required by law," it is nevertheless permissive and the provider can, but is not required to, disclose the information.[2]

[2] 45 C.F.R. §164.502(a)(1)

2. Judicial and Administrative Proceedings: Hospitals may disclose information in response to a subpoena. If a subpoena is used, HIPAA requires that it be accompanied with: 1) a written statement that proper notice has been given to the patient, 2) a statement that a reasonable attempt has been made to secure a protective order, or 3) a protective order.[3]

As mentioned above, if information contained in medical records is inaccurate, or incomplete, the patient has the right to request providers to amend his or her health information.[4] Once submitted, the provider can either accept or deny the request. If it is denied, the provider must provide the patient with a written denial and give the patient an opportunity to submit a statement of disagreement. If the amendment is accepted, the provider must make reasonable efforts to provide the amendment to persons the patient has identified as needing it, and to persons the provider knows might rely on the information.

HIPAA does not to alter pre-existing North Carolina prohibitions against *ex parte* communications by defense counsel with treating witnesses.[5] Wily defense counsel have frequently found a way around *Crist* in medical malpractice cases. Through "channels," the treating physician's own liability is contacted and advises its insured, the treater, that a lawyer provided by the insurer should be present at any interview by plaintiff's counsel. Following the meeting, the treater's carrier-supplied lawyer then discusses with defendant's lawyer the substance of the meeting. Without regard to the ethics of this maneuver, it would appear to be a HIPAA violation. It is a *knowing* attempt to both gain and receive protected information. Guilty

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[3] 45 C.F.R. §164.512(e)

[4] 45 C.F.R. § 164.526

[5] *Crist v. Moffat,* 326 N.C. 326, 389 S.E.2d 41 (1990)

parties are most likely the two attorneys involved in the exchange.

A treating physician may decline to meet with plaintiff's lawyer to discuss plaintiff's condition. The argument can be made that the lawyer, armed with an authorization signed by the plaintiff, is the patient's *alter ego* and that such a meeting is a mandatory disclosure, because it is requested by the patient. If that is the case, the treater may be violation of HIPAA and at least subject to civil penalties. However, threatening the provider with those penalties may not be a good idea for a lawyer seeking the provider's cooperation in preparing or presenting the client's case.

Retained expert witnesses are not "covered entities" since they do not provide health care as defined by HIPAA. These "forensic" services do not consitute health services. They serve a legal, not a medical, purpose, even though such services may involve forming a diagnosis or recommending a course of treatment. Even though experts are not covered entities, they "maintain or transmit health information" and are therefore subject to the HIPAA Security Standards.

F. APPLYING CURRENT CASE LAW

1. Apparent Agency

One of the most troubling situations encountered in medical malpractice cases arises out of the relationship between providers such as radiologists, anesthesiologist and emergency physicians and the hospitals where they work. In the typical case, a hospital will contract with a radiology group (for example) and that group is given exclusivity for all radiology at the facility. Frequently, the hospital may even have recruited the group (or individual radiologist if it is a small facility) and the hospital may even guarantee a minimum annual income. The hospital provides all the equipment and resources for the radiology practice, including employing

radiology technicians. The films are read in a room at the hospital. Typically, the radiology group will not even have an office outside the hospital, and its billing is done by a private billing agency. When the patient presents to the hospital for an MRI, mammogram, x-ray or some other radiological study, the patient plays no role in the selection of the radiologist who will interpret the films.

Is the radiologist who misinterprets the films the agent of the hospital, or is he or she an independent contractor? The most recent case on the subject of **apparent** or **ostensible** agency is *Diggs v. Novant Health, Inc.,* 628 N.C. App. 851, *** S.E.2d *** (2006), in which the Court of Appeals found an anesthesiology group to be the apparent agent of the hospital. The contract between the anesthesia group and the hospital specifically provided that the hospital "shall neither have nor exercise any control or direction over the methods by which [the group] or any Physician shall perform it or his work and functions; the sole interest and responsibility of [the hospital] are to assure that the services covered by this Agreement shall be performed and rendered in a competent . . . manner."

The group did its own billing, hiring and scheduling. Its doctors could practice outside the hospital. However, the physicians of the group were required to be members of the hospital staff and to comply with rules and regulations governing staff privileges. The hospital could approve and credential nurse anesthetists employed by the group, and the hospital had the right to require the group to remove from the hospital's anesthesia service any physician for specified grounds. The Court of Appeals found that the terms of the agreement were insufficient to impose agency.[6] However, after a lengthy consideration of the history of the doctrine, both in North Carolina and in other jurisdictions, the Court of Appeals imposed the following test to be

[6] See, *Hoffman v. Moore Reg. Hosp.,* 114 N.C. App. 248, 441 S.E.2d 567 (1994)

met by a plaintiff alleging apparent agency: 1) the hospital holds itself out as providing medical services, 2) the plaintiff looked to the hospital rather than to an individual provider to perform the services, and 3) the patient accepted those services in the reasonable belief that the services were being provided by the hospital. The hospital can avoid liability by providing "meaningful notice" to a patient that care is provided by an independent contractor.

In *Diggs* the evidence showed that the hospital had a Department of Anesthesiology with a Chief of Anesthesiology and a Medical Director, the hospital contracted with the group on an exclusive basis and members of the group filled the above positions, the plaintiff testified that she was unaware that the nurse and anesthesiologist were not employed by the hospital, and the surgical consent form was on a hospital form that did not indicate that the anesthesiologist was an independent contractor.[7]

There can be representations made to the patient leading to the imposition of apparent agency. In one case, a brochure given to a patient by an anesthesiologist noted that the anesthesiologist worked jointly with plaintiff's surgeon and the evidence showed that the defendant anesthesiologist served as the primary anesthesiologist for all of the surgeon's patients and the surgeon even scheduled surgery based on the availability of the anesthesiologist. The court found this sufficient to establish agency.[8]

In hospital cases, it might be a good idea to have a hospital administrator qualified as an expert on the relationship between the facility and the physician.

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[7] As of this writing, August 8, 2006, there is a pending petition for discretionary review in the N. C. Supreme Court. The Court of Appeals decision was unanimous.

Sometimes, the contract between the physician and the hospital can create an agency. See, *Rucker v. High Point Mem. Hosp.,* 20 N.C. App. 650, 202 S.E.2d 610, aff'd 285 N.C. 519, 206 S.E.2d 196 (1974).

[8] *Noell v. Kosanin, et al.,* 119 N.C. App. 191, 457 S.E.2d 742 (1995).

2. Liability of doctor who "signs off" on nurse or PA notes

One recent case in the Western District of North Carolina dealt with the liability of an emergency physician who "signed off" on a physician assistant's notes.[9] Plaintiff went to the emergency room after suffering a leg injury. There, he was seen by a PA who irrigated and sutured the wound. The patient was released, and within two weeks developed a severe infection. The physician, a family practice doctor who had not seen the patient, signed off on the PA's notes as required by hospital protocol, since she was "on call" when the episode occurred.. She testified that sometimes she only signed off on these notes once a month.

Expert physician assistants or nurse practitioners can testify about the requirement that each is "supervised" by a physician and physician experts should testify about the significance of "signing off" on a note by a physician extender.

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[9] *Barton v. Ingledue* [N.C. Lawyer's Weekly No. 06-04-0840]