

Using Medical Literature on Direct Examination to Win the "Battle of the Experts"

by Jeffrey S. Badgley

Surviving the gauntlet of a hostile expert medical witness is an essential skill for any trial lawyer who litigates medical negligence and other types of personal injury actions. However, presenting your own expert as a credible authority is also crucial to prevailing on a contested issue of medicine. In a close case, winning this "battle of the experts" during trial can catapult your client to a successful outcome. The purpose of this article is to examine Florida law relating to the use of medical literature during direct examination of the medical expert at trial, and to suggest ways of maximizing the chances of getting this information before a jury.

Using Medical Literature

In the age of the Internet, lawyers and laymen alike have ready access to medical literature. There are free search engines¹ as well as paid Web sites² that make a vast body of medical literature available upon request. Additionally, various medical societies and subdivisions of the medical profession maintain Web sites,³ many of which publish standards of practice, guidelines for care, and ethics codes.⁴ These sources may be extremely helpful in understanding whether a client's case is supported by medical science. However, what use is all this information in court? Can you get it into evidence? The answers to these questions will be governed by the Florida Evidence Code.

A fine line may exist between improper bolstering and having a medical expert discuss relevant medical literature that he or she has relied upon to formulate an opinion.

The Florida Evidence Code

The use of medical literature at trial is governed primarily by two provisions of the Florida Evidence Code, §§90.704 and 90.706. Section 90.704 defines what an expert witness may rely upon to offer an opinion in court:

Basis for opinion by experts

The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to the expert at or before the trial. If the facts or data are a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.⁵

This section provides the platform for direct examination. Simply put, the expert can use any information to formulate an opinion to be offered at trial, provided that

the information is "of a type reasonably relied upon" by experts in the field. Inadmissibility of the information does not prevent the expert from expressing the opinion, provided this standard is satisfied.⁶

The purpose of this section, as discussed by the advisory committee note, is to permit experts to base their opinions on the same data they would ordinarily rely upon while rendering opinions in the course of their work.⁷ Although §90.704 permits the expert to base an opinion on inadmissible evidence, it is silent as to what, other than the opinion expressed, an expert may actually testify to at trial. As discussed below, the courts have imposed some limitations on the scope of testimony that the expert may offer at trial.

Section 90.706 of the evidence code addresses the use of medical literature in the context of cross-examination:

Authoritativeness of literature for use in cross-examination

Statement of facts or opinions on a subject of science, art or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative, or, notwithstanding non-recognition by the expert witness, if the trial court finds the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter.⁸

This section defines the standard by which an expert may be cross-examined with published literature

in the subject of his or her testimony. An expert may be cross-examined with any literature that is shown by the preponderance of the evidence to be authoritative.⁹

Under the Florida Evidence Code, medical literature is considered hearsay.¹⁰ In this respect, the Florida Evidence Code is different from the Federal Rules of Evidence, which contain a specific exception to the hearsay rule that permits, under certain circumstances, the admissibility of statements contained in medical literature and other "learned treatises."¹¹

The Prohibition Against "Bolstering"

As mentioned above, §90.704 of the Florida Evidence Code permits an expert witness to base an opinion on inadmissible facts or data, provided such "facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed."¹² However, the courts have placed limitations on the potentially wide scope of expert testimony suggested by §90.704. Many decisions have narrowed the scope of §90.704 by holding that an expert cannot be used as a "conduit" of inadmissible evidence.¹³ Other cases have prohibited experts from improperly "bolstering" their opinions by testifying that a medical treatise supports their position.¹⁴ Similarly, an expert may not testify that another expert has reached the same conclusion.¹⁵

The prohibition against "bolstering" an expert's opinion with medical literature warrants closer examination, particularly since this rule is not contained in the evidence code but has been created entirely by the courts. The opinions prohibiting such bolstering never define what it is or under what circumstances bolstering with medical literature is improper. Certainly, there is nothing inherently objectionable with the concept of trying to bolster a material aspect of a case with probative, admissible evidence. Florida case law contains many references to bolstering, terming it both proper and improper,¹⁶ but the case of *Tal-*

The *Mitchell* case has been cited by subsequent decisions that prohibit the use of medical literature during direct examination as improper bolstering.

Iahassee Memorial Regional Medical Center v. Mitchell, 407 So. 2d 602 (Fla. 1st DCA 1982), appears to be the first case to address improper bolstering with medical literature. In that case, the plaintiff sued a hospital, a doctor, and the Florida Patient's Compensation Fund alleging medical negligence. At trial, the hospital presented the testimony of an expert witness to opine that there had been no medical negligence. Immediately thereafter, the fund's lawyer conducted a "friendly cross-examination" of the hospital's expert witness. The lawyer did so by showing a medical book to the jury for the purpose of comparing photographs of X-rays in the book to photographs of the plaintiff's X-rays. Instead of a hostile cross-examination, the fund's lawyer used the co-defendant hospital's expert to provide testimony that was favorable to all of the defendants in the case.

The court agreed with the trial court judge that this cross-examination justified a new trial:

We are of the opinion that by calling the interrogation by the fund a cross-examination in this case, the two defendants together managed to introduce evidence which one alone could not have. The sole purpose of the medical book was to supplement the opinion of the doctor which had already been formed and testified to. Therefore, the book was not used for the purposes of "cross-examination" as that term is used in §90.706. Stated another way, the use of the book was an improper method of cross-exami-

nation in this case.¹⁷

Implicit in the court's reasoning is that the defendant offering this expert would not have been permitted to use the medical literature in this manner on direct examination. However, the opinion supplies no rule or analysis for determining when the use of medical literature constitutes an improper bolstering, other than the suggestion that the literature was used to "supplement an opinion that had already been formed."

The *Mitchell* case has been cited by subsequent decisions that prohibit the use of medical literature during direct examination as improper bolstering.¹⁸ In support of their holdings, most of these decisions have relied upon §90.706. Such analysis is faulty in that §90.706 pertains to cross-examination; it does not address the use of medical literature on direct examination.¹⁹ Rather, it is §90.704 that defines what an expert may rely upon as a basis for an opinion.

As discussed above, §90.704 permits experts to base their opinions on inadmissible evidence. What the code does not address is under what circumstances, and to what extent, an expert may testify concerning the inadmissible evidence that forms the basis of an opinion. Respected commentators of the Florida Evidence Code have suggested that the scope of direct examination, as defined by §90.704, should be limited by the balancing test of §90.403, and limiting instructions under §90.107.²⁰ Section 90.403 gives a trial court discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.²¹

This is the solution that has been adopted by the Federal Rules of Evidence. Federal Rule 703, which corresponds to §90.704, was amended in 2000 to expressly incorporate this balancing test when determining whether the jury should be permitted to hear the inadmissible data that forms the basis for an expert's

opinion.²³ Until the Florida Supreme Court adopts a similar revision of §90.704, the courts should employ the balancing analysis under §90.403 when ruling on what an expert may testify to when articulating an opinion that is based upon medical literature.

Section 90.403 should prevent an expert from discussing the contents of medical literature that forms the basis of an opinion if the prejudicial effect of such testimony substantially outweighs the probative value of allowing the expert to explain the data he or she relied upon to formulate the opinion.

Balancing Prejudice and Probative Value

There are several factors that should be given consideration by the court when applying the §90.403 balancing test to determine under what circumstances an expert may discuss or refer to medical literature during direct examination.

1) *Is the opposing party denied a fair opportunity to cross-examine?*

Court-imposed limitations on the use of medical literature on direct examination express a legitimate concern that expert testimony is used to introduce elements that are not subject to cross-examination at trial, and thus place the opposing party at an unfair disadvantage. On the other hand, the extensive discovery provided by the Florida Rules of Civil Procedure gives parties an adequate opportunity to fully explore an expert's reliance upon medical literature. Indeed, if an expert testifies that he has relied, at least in part, upon medical literature as a basis for his opinion, the expert may be subject to a challenge under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).²³

If an opposing party has equal access to published literature, and the opportunity to contest the expert's reliance on that literature, then there can be no claim of unfair surprise when medical literature is referred to during the direct examination of an expert's testimony. Thus, an expert should be permitted to refer to medical literature as

a basis for an opinion if the opposing party is able to adequately prepare for a cross-examination of the expert's testimony regarding it. However, when the expert testifies concerning matters that are not only hearsay, but for which the opposing party also has no opportunity to cross-examine, then the testimony should be prohibited.²⁴

2) *Is the medical literature a part of the expert's analysis?*

The court should also look to whether the expert is using the medical literature to actually form the data base from which the expert opines, or whether he or she uses the medical literature as additional support for an opinion reached independently of any statements in the medical literature. This factor was identified in *Mitchell*, the first opinion prohibiting bolstering, where the court expressed its concern that "[t]he sole purpose of the medical book was to supplement the opinion of the doctor which had already been formed and testified to."²⁵

This factor is also identified in the short opinion of *Kloster Cruise, Ltd. v. Rentz*, 733 So. 2d 1102 (Fla. 3d DCA 1999), where the trial court permitted an expert to base his opinion on weather data that was not independently admissible. In affirming this ruling, the court distinguished its holding from cases that prohibit experts acting as conduits for admission of evidence because "the underlying data was the beginning point for analysis, but some further analysis was required by the expert in order to apply the data."²⁶

3) *Has the medical literature been excluded for other reasons?*

If the expert intends to rely on medical literature or other published data that has been expressly excluded for other reasons, then the balancing required by §90.403 should lean toward exclusion of such testimony. This factor has been considered in cases where the courts have concluded that an expert was improperly used as a conduit for inadmissible evidence.²⁷

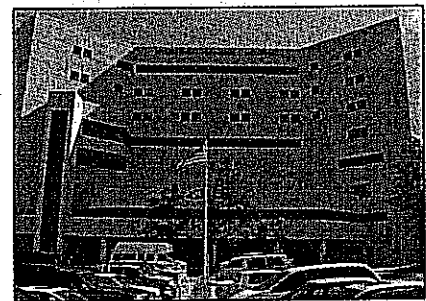
4) *Will the opposing party cross-examine?*

Florida has thus far refused to

adopt the majority position of permitting learned treatises to be used as substantive evidence.²⁸ Thus, the proponent of a medical expert may be placed in the uncomfortable position of not being permitted to "soften the blow" of an anticipated cross-examination with medical literature, by asking the expert about his or her consideration of the literature before the hostile cross-examination begins. There certainly

Florida Detox

Medical Detox Under Anesthesia



8 Story State-of-the-Art Facility

Oxycontin

Lorcet

Vicodin

Percocet

Methadone

- Avoid major withdrawal symptoms
- Complete confidentiality

Call: 727-945-9198 or
1-888-775-2770

www.FloridaDetox.com

seems to be a lack of congruity in a practice that prohibits an expert from making any reference during direct examination to a published authority on the subject of this testimony, but then requires that expert to submit to a vigorous cross-examination with that same material.

Under these circumstances, the court should exercise its discretion under §90.403 to permit the expert on direct examination to identify pertinent medical literature that has been rejected in his analysis. This factor has not been discussed in Florida case law, but it is mentioned in the advisory committee note to the newly amended Federal Rule of Evidence.²⁸ Even if the court prohibits an expert from referring to medical literature during direct examination, once an opposing party opens the door by cross-examining the expert with medical literature, the party offering the expert should be permitted to rehabilitate the expert by appropriate questioning regarding the literature.³⁰

5) *Can an instruction by the court cure any prejudice?*

Section 90.107 permits the court to inform the jury that certain evidence is offered for a limited purpose. Such an instruction would inform the jury that medical literature should not be considered as substantive evidence, but only serves as the basis upon which an expert is rendering an opinion. A similar instruction is required when a party offers evidence of an industry standard or

custom; the court is required to instruct the jury that such evidence does not establish a standard of care, but should only be considered as evidence of the standard of care.³¹

6) *How probative is the medical literature?*

Florida courts have long permitted litigants to introduce evidence of industry standards and custom to prove a standard of care for the defendant's conduct.³² Even a defendant's own internal standards and policy manuals are admissible for proving a standard of care.³³ For example, in *Moyer v. Reynolds*, 780 So. 2d 205 (Fla. 5th DCA 2001), the court stated: "As in negligence cases in general, the courts permit a claimant in a medical malpractice action to establish that the health care provider breached his or her own rule of practice or violated an industry standard as evidence of the standard of care." *Id.* at 208. (Emphasis added.) Thus, a medical expert should not be prohibited from describing, as a basis for his or her opinion, published professional standards that other physicians rely upon as guidance for determining proper care for a patient.

Conclusion

In practical application, there may be a fine line between improper bolstering and having a medical expert discuss relevant medical literature that he or she has relied upon to formulate an opinion. When presenting the testimony of an expert who has relied upon medical litera-

ture to render an opinion, it is crucial to lay the appropriate foundation to show that the literature constitutes information that is reasonably relied upon by experts in the field of study. The probative value of allowing the expert to discuss or refer to medical literature that forms the basis of an opinion should be balanced with the prejudicial effect of such testimony. □

¹ See www.ncbi.nlm.nih.gov/entrez.

² See <http://home.mdconsult.com>

³ See, e.g., www.ama-assn.org (American Medical Association); www.acr.org (American College of Radiologists); www.facs.org (American College of Surgeons); www.fascrs.org (American Society of Colon and Rectal Surgeons); www.sages.org (Society of American Gastrointestinal Surgeons).

⁴ For an excellent search engine that locates published standards of medical and surgical care, see www.guidelines.gov.

⁵ FLA. STAT. §90.704 (2001).

⁶ See *Sikes v. Seaboard Coastline Railroad Company*, 420 So. 2d 1216 (Fla. 1st D.C.A. 1983) (accident expert permitted to present opinion based on inadmissible evidence).

⁷ 6C FLA. STAT. ANN. §90.704, Law Revision Council Note (1976).

⁸ FLA. STAT. §90.706.

⁹ See generally *Kirpatrick v. Wolford*, 704 So. 2d 708 (Fla. 5th D.C.A. 1998).

¹⁰ See 6C FLA. STAT. ANN. §90.704, Law Revision Council Note (1976) ("This section does not provide that the learned treatise is admissible to provide the truth of the contents of the treatise."). See also *Rice v. Clement*, 184 So. 2d 678 (Fla. 4th D.C.A. 1966) ("Medical works cannot be read or introduced before juries as independent, substantive or affirmative proof").

¹¹ See generally *Weissenberger*, FED. R. EVID. §803.70 (2d ed. 1995).

¹² FLA. STAT. §90.704 (2001).

¹³ See *Ross v. Dress for Less, Inc.*, 751 So. 2d 126 (Fla. 2d D.C.A. 2000); *Costanzo v. Agency Rent-A-Car, Inc.*, 560 So. 2d 265 (Fla. 4th D.C.A. 1990); *Erwin v. Todd*, 699 So. 2d 275 (Fla. 5th DCA 1997); *Nixon v. Slate*, 694 So. 2d 157 (Fla. 4th D.C.A. 1997); *Riggins v. Mariner Boat Works, Inc.*, 545 So. 2d 430, 432 (Fla. 2d D.C.A. 1989); *Kuryinka v. Tamarac Hosp. Corp., Inc.*, 542 So. 2d 412 (Fla. 4th D.C.A.), *rev. denied*, 551 So. 2d 462 (Fla. 1989).

¹⁴ See *supra* note 18.

¹⁵ *Schwartz v. State*, 695 So. 2d 452 (Fla. 4th D.C.A. 1997); *Gerber v. Iyengar*, 735 So. 2d 1181 (Fla. 3d D.C.A. 1999); *Bunyah v. Clyde J. Yancey and Jones Dairy, Inc.*, 438 So. 2d 891 (Fla. 2d D.C.A. 1983).

¹⁶ See, e.g., *Ivory v. State*, 821 So. 2d 1258 (Fla. 4th D.C.A. 2002) (expert's tes-

On The Web — Use It Today!

- Search for previously published *Bar Journal* and *Bar News* articles.
- Search for Florida Bar members in a specific city.
- Link to other legal sites.
- Pay annual dues.
- Search for a job in the *News* classified ads.

www.FLABAR.org

timony did not improperly bolster credibility of arresting officer); *Kellam v. Thomas*, 287 So. 2d 733 (Fla. 4th D.C.A. 1974) (witness' testimony may not bolster testimony with prior consistent statements); *Turner v. Frey*, 81 So. 2d 721 (Fla. 1st D.C.A. 1964) (defendant's testimony properly bolstered by witnesses); *Fields v. State*, 94 Fla. 490, 114 So. 317 (Fla. 1927) (false statement in perjury action may be intended to bolster witness' testimony).

¹⁷ *Mitchell*, 407 So. 2d at 602.

¹⁸ *Erwin v. Todd*, 699 So. 2d 275 (Fla. 5th D.C.A. 1997); *Costanzo v. Agency Rent-A-Car, Inc.*, 560 So. 2d 265 (Fla. 4th D.C.A. 1990) (per curiam); *Chorzelski v. Drucker*, 546 So. 2d 1118 (Fla. 4th D.C.A. 1989); *Medina v. Variety Children's Hospital*, 438 So. 2d 138 (Fla. 3d D.C.A. 1983) (per curiam); *Quarrel v. Minervini*, 510 So. 2d 977 (Fla. 3d D.C.A. 1987) (per curiam); *Green v. Goldberg*, 630 So. 2d 606 (Fla. 4th D.C.A. 1994).

¹⁹ See *Liberatore v. Kaufman*, 27 Fla. L. Weekly D1459 (Fla. 4th D.C.A. July 3, 2002) (court prohibited use of published guidelines for obstetrical care during direct examination of experts; court cited to §90.706, but made no reference to §90.704); *Green v. Goldberg*, 630 So. 2d 606, 609 (Fla. 4th D.C.A. 1993) ("under §90.706, Florida Statutes (1991), authoritative publications can only be used during the cross-examination of an expert and not to bolster the credibility of an expert or to supplement an opinion of the doctor which has already been found").

²⁰ See ELEANOR & WEISSENERGER, *FLORIDA EVIDENCE 2001 COURTROOM MANUAL*, §90.704 (2001); EARHARDT, *FLORIDA EVIDENCE*, §704.1, pp. 619-612 (2002).

²¹ FLA. STAT. §90.403 (2001).

²² See FED. R. EVID. 703. See generally WEINSTEIN, *FEDERAL EVIDENCE* §703.05.

²³ See generally *Holy Cross Hospital, Inc. v. Marrone*, 816 So. 2d 1113 (Fla. 4th D.C.A. 2002); *Kaebel Wholesale, Inc., v. Soderstrom*, 785 So. 2d 539 (Fla. 4th D.C.A. 2001).

²⁴ See *Gerber v. Iyenger*, 735 So. 2d 1181 (Fla. 3d D.C.A. 1999) (trial court improperly permitted expert to testify about conversation he had with the author of

the treatise, who purportedly disclaimed the accuracy of his own published statements in the treatise).

²⁵ *Mitchell*, 407 So. 2d at 602. See also *Erwin v. Todd*, 699 So. 2d 275 (Fla. 5th D.C.A. 1997) (medical literature "cannot be used to bolster the credibility of an expert or to supplement an opinion of the expert which has already been formed").

²⁶ *Rentz*, 733 So. 2d at 1102.

²⁷ See *Riggins v. Mariner Boat Works, Inc.*, 545 So. 2d 430, 432 (Fla. 2d D.C.A. 1989); *Erwin v. Todd*, 699 So. 2d 275 (Fla. 5th D.C.A. 1997) (trial court improperly permitted expert witness to refer to inadmissible medical records during direct examination). Cf. *Flores v. Miami-Dade County*, 787 So. 2d 955 (Fla. 3d D.C.A. 2000) (expert permitted to testify that he rendered opinion on the basis of medical records which were not admitted into evidence, but which also had not been excluded from evidence.).

²⁸ According to Professor Wigmore's treatise on evidence, 35 states have currently adopted this exception to the hearsay rule. See 6 WIGMORE, *EVIDENCE*, §1693 (Cum. Supp. 2002).

²⁹ See FED. R. EVID. 703, Advisory Committee Note, 2000 Amendments. See generally WEINSTEIN, *supra* note 22, §703.05[1].

³⁰ See generally *Dorfman v. Schwabl*, 777 So. 2d 427 (Fla. 5th D.C.A. 2001)

(counsel opened door to evidence excluded *in limine* by questioning expert witness).

³¹ See cases cited in notes 32 and 33, *supra*.

³² See 6 FLA. PRAC., *PERSONAL INJURY & WRONGFUL DEATH ACTIONS*, §24.10 (2001 - 2002 ed.). See *Jackson v. H.L. Bouton Co.*, 630 So. 2d 1173 (Fla. 1st D.C.A. 1994) (industrial standards published by American National Standards Institute.); *Lake Hospital and Clinic, Inc. v. Silversmith*, 551 So. 2d 538 (Fla. 4th D.C.A. 1989) (standards established by Joint Commission of Accreditation of Hospitals); *Seaboard Coast Line Railroad Company v. Clark*, 491 So. 2d 1196 (Fla. 4th D.C.A. 1986) (standards of the American Association of Railroads); *Cadillac Fairview of Florida, Inc., v. Cespedes*, 468 So. 2d 417 (Fla. 3d D.C.A. 1985) (OSHA standards).

³³ See *Steinberg v. Lomenich*, 531 So. 2d 199 (Fla. 3d D.C.A. 1988); *Marks v. Mandel*, 477 So. 2d 1036 (Fla. 3d D.C.A. 1985) (error to exclude evidence of hospital's procedure manual relating to on-call physicians for emergency room); *Nesbitt v. Community Health of South Dade, Inc.*, 467 So. 2d 711 (Fla. 3d D.C.A. 1985) (evidence of customary practice at other hospital improperly admitted without cautionary instruction that evidence of custom is not determinative of standard of care.).



**We
Locate
Missing
Heirs**

"Nobody's Faster.
No one's Better.
And, no firm is more
qualified... Bar None."SM

— SINCE 1939 —

HARVEY E. MORSE P.A.

International Genealogical Research
2435 South Ridgewood Avenue • Daytona Beach, Florida 32119

"Locating the missing... A Morse Family Tradition Since 1939"SM

Toll Free: 1-800-410-4347

Fax: 1-800-410-5665

© H. E. Morse 2001

www.probate.com

