

Medical Expert Testimony: A View From the Utah Supreme Court

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by Karen McCall

A recent decision by the Utah Supreme Court in the state's master asbestos litigation has clarified the role of out-of-state experts preparing testimony within the framework of the Utah Medical Practice Act.

Carbaugh v. Asbestos Corporation Limited, 2007 UT 65, 167 P.3d 1063, as appealed from Third District Court in Salt Lake City, involved four cases and forty-seven plaintiffs, all of whom had been diagnosed with asbestos-related illnesses after an examination by Dr. Alvin Schonfeld. Dr. Schonfeld, who is licensed to practice medicine in eleven states but not in Utah, had been designated by the plaintiffs as a medical expert witness and was prepared to offer testimony on the cause(s) of the plaintiffs' medical conditions.

The defendants sought summary judgment in these cases on the grounds that, in conducting his examinations on these plaintiffs, Dr. Schonfeld practiced medicine without a license, in violation of the Utah Medical Practice Act (UMPA), Utah Code Ann. §§ 58-67-101 to -803 (2002 & Supp. 2005). The district court granted summary judgment and dismissed the plaintiffs' cases, concluding that Dr. Schonfeld's testimony had been obtained illegally, as the UMPA does not permit a medical expert to conduct pre-testimony examinations.

However, in an opinion issued August 24, 2007, the Utah Supreme Court reversed the district court's decision, ruling that, while there is no question Dr. Schonfeld practiced medicine without a license in these cases, he did so within an "expert testimony exception" to the UMPA, *Id.* U.C.A. § 58-67-305(8). The court agreed with the plaintiffs' broad interpretation of this exception, stating that it not only allows medical experts to offer opinions while seated in the witness chair, but to perform medical evaluations and similar acts in preparation for their testimony.

Addressing the defendants' contention that the expert testimony exception is meant only to allow medical experts to hold themselves out as physicians while offering testimony, the court pointed out that experts who solely testify in legal proceedings do not "practice medicine" as defined by the UMPA. Medical experts giving testimony would only orally state beforehand that they are physicians licensed in other states, a practice not prohibited by the UMPA. Therefore, because offering expert testimony in a legal proceeding does not violate the UMPA independent of the expert testimony

exception, the court concluded that the exception permits experts to conduct preparatory examinations. In its ruling, however, the court cautioned that unlicensed medical experts' activities must be reasonably related to their testimony, and that they must not exceed the scope of the expert testimony exception by taking on matters of treatment and disease management customarily unrelated to the duties of an expert.

The full text of the Utah Supreme Court's decision involving Dr. Schonfeld can be found at www.utcourts.gov/opinions/supopin/Carbaugh082407.pdf.

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