Civil Trial Certification
Sample Exam Question

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Plaintiff sued Dr. Silver, a gynecologist, for medical malpractice, involving a delay in diagnosing breast cancer, which plaintiff alleges resulted in the death of his wife. Counsel for Dr. Silver challenged the Plaintiff's expert, Dr. Gold's, expertise as an oncologist to testify on the standard of care of a surgeon in failing to timely diagnose breast cancer and in failing to perform a biopsy. Dr. Gold testified to his familiarity with the standards concerning when a biopsy should be performed on a patient with a suspicious lump. He stated that he is involved in breast cancer screening, as well as teaching breast self-examination to the patients at the cancer center where he works. He examines patients for breast cancer and regularly refers patients, when necessary, to surgeons. He is knowledgeable about when a breast examination requires a biopsy to determine the existence of breast cancer. He has been qualified as an expert on previous occasions to testify on standard of care as to when to perform a biopsy. However, he testified that he does not perform biopsies, and that he could not tell a surgeon to perform the biopsy or what technique to use. Based on his concession that the surgeon makes the ultimate determination as to whether to perform a biopsy, the trial court excluded the portion of Dr. Gold's testimony on standard of care.

Consequently, during the plaintiff's case in chief in the trial, Plaintiff read parts of the depositions of Defendant's witnesses and attempted to introduce testimony concerning the standard of care as set forth in the "American College of Obstetricians and Gynecologists" bulletin. Portions of the bulletin were read in the questioning of the Defendant's witnesses during their depositions. These portions were read into evidence and referred to during the trial. The Defendant objected.

Question A:
How should the court rule on the objection to testimony of the contents of the bulletin? Please explain the basis for your answer.

Model Answer A:

First, pursuant to Rule 90.706, Florida Rules of Evidence, authoritative publications may only be used during cross-examination of an expert, which was not done in this instance. On this basis it should be excluded. Second, an authoritative source cannot be used to bolster the credibility of an expert or supplement the opinion of an expert, which was already formed. Pursuant to Rule 90.706, statements within a learned treatise cannot be used as substantive evidence since the treatise is hearsay. For the aforementioned reasons, the objection should be sustained.

Question B:
Would the ruling be the same in Federal Court? Please explain your answer.

Model Answer B:

Contrary to State court, in Federal court, the statements contained in the bulletin may be read into evidence if the Defendant's experts established it as a reliable authority. And it is not necessary that the testimony and treatise be elicited on a cross examination of a witness.

"[t]o the extent called to the attention of the expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets . . . established as a reliable authority by the testimony or admission of a witness . . . may be read into evidence. Rule 803(18) Federal Rules of Evidence.

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Question C:
Was the Court correct in excluding the testimony of Dr. Gold?

Model Answer C:

The Court was not correct in excluding the testimony. In a medical malpractice action, the requirements for an expert to testify in judgment of another health care provider's actions or inactions are defined by section 766.102, Florida Statutes (1991). Pursuant to this statute, experts are limited to those individuals who are "similar health care providers" and those individuals who are "not a similar health care provider" but "have sufficient training, experience and knowledge in a related field." A requirement, added by the 1985 amendments to the medical malpractice statute, is that the individual's training, experience or knowledge be a result of "active involvement in the practice or teaching of medicine" within the five years preceding the incident. § 766.102(2)(c)(2), Fla. Stat. (1991). The clear purpose of the subsection is to restrict experts who claim to possess expertise on the gamut of medical problems and specialties and to eliminate those experts who are no longer actively involved in medicine. The statute does not exclude a specialist in one field from testifying against a specialist in another field. Dr. Gold was qualified by training, education and experience in the diagnosis of breast cancer and possessed knowledge about the standards relating to when a biopsy should be performed, gained through experience, background and training. He has been actively involved as a cancer specialist within the past five years. This case did not involve a claim of negligent performance of a biopsy, which might involve different expertise inherent to a surgeon. [2] The trial court improperly excluded Dr. Gold's testimony concerning the issue of standard of care in failing to diagnose breast cancer, as well as his opinion on whether a biopsy was indicated.