

Sometimes “Blind” is Better!

Anthony J. Breschi and Christina N. Billiet



More information is always good, right? The traditional thinking among the medical malpractice defense bar (and usually for good reason), is the better informed your expert witness, the less vulnerable he will be to cross examination and the more he will shine in front of a jury. Toss that thinking aside for now.

A 2010 study concerning medical/legal expert reviews exposes a huge problem with the “more is better approach.” The study, published by the American Journal of Roentgenology, examined a radiology medical malpractice case where the defendant radiologist was alleged to have “missed” a 1 mm symmetric widening of the facet joints at T10 on CT scan.¹ The plaintiff retained four radiology experts, each of whom testified that the standard of care required identification of this finding by the defendant radiologist.

Following settlement of that case, researchers had thirty-one independent radiologists review the CT scan in question in the normal course of business, with no knowledge of the patient’s outcome or the litigation. The result was that *none* of the thirty-one radiologists made the finding identified by the plaintiff’s expert witnesses. In other words, all thirty-one radiologists “missed” the 1 mm widening of the facet joints at T10. This suggests that the plaintiff’s expert radiologists — either intentionally or unintentionally — applied an unrealistic standard of care in reviewing the CT scan in question.

So what is the problem and, more importantly, how can you solve it to the benefit of your client? The answer is twofold:

- (1) Obtain “blind reviews” of your case by potential defense expert witnesses to ensure a fair review; and

- (2) Expose the failure of plaintiff’s experts to perform blind reviews and, as a result, the application of an inappropriate standard of care.

What is a blind review and when can the blind review process be utilized? There are many versions of the “blind review,” which can be tailored to fit nearly any type of medical malpractice case.

The “blind review” is most often used in radiology cases, and for good reason. CT scans, MRIs and other imaging studies often lend themselves to a “Where’s Waldo?” approach to litigation. *No matter how obscure or difficult the finding may be, once the expert is told where that finding is, it becomes obvious!* We have all experienced this phenomenon in everyday life, and medical/legal experts are no different. So, how can the blind review combat this?

CASE EXAMPLE: A fifty-year-old male Patient presents to his primary care physician with a cough. The physician suspects pneumonia and orders a chest x-ray. The Radiologist interprets the chest x-ray as indicative of pneumonia and reports that finding. Fast forward a year and a half — the Patient is diagnosed with Stage 3 lung cancer. The allegation is that the Radiologist missed early indicators of lung cancer on the chest x-ray, thereby depriving the Patient of earlier treatment options and the opportunity for a better outcome.

THE ULTIMATE BLIND REVIEW: The defense team anonymously contacts a radiology Expert and does not inform her whether they represent the plaintiff or defendant, or provide any information about the case at issue. The Expert is provided a CD with 15 *de-identified, HIPAA-protected* imaging studies for 15 different patients — x-rays, CT scans, MRIs — and is asked to review each and state whether the accompanying report is accurate.

THE KEY: This type of blind review most closely imitates the “normal course of business” for a radiologist. While not perfect, it eliminates potential bias and allows the Expert to review and interpret the study just as she would at any other time.

The “level” of blind review performed can be simplified in several ways — the expert

can be provided several *HIPAA-protected and de-identified* cases to be reviewed at the same time, and not told which is the subject of a medical malpractice action.

CASE EXAMPLE: A pregnant woman presents for genetic testing due to her advanced maternal age and accompanying increased risk for genetic defect. Chromosomal analysis performed on the fetus is reported as normal. When the child is born, however, he is diagnosed with a rare genetic disorder that, according to plaintiffs’ experts, was evidenced by a micro-deletion in chromosome 17. The allegation is that the maternal-fetal medicine Specialist who performed the chromosomal analysis should have identified the micro-deletion and its significance, thereby providing plaintiffs the opportunity to terminate the pregnancy.

THE BLIND REVIEW: The defense team retains multiple maternal-fetal medicine Experts and provides them with four HIPAA-protected and de-identified chromosomal fetal analyses, one of which is the chromosomal analysis at issue. The Experts are provided only with the background information that they would be given in the normal course of business. The Experts are asked to review each chromosomal analysis and draft a report confirming his/her findings.

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Expert Information Inquiries

The next time you receive an e-mail from our Executive Director, Kathleen Shemer, containing an inquiry from one of our members about an expert, please respond both to the person sending the inquiry and Mary Malloy Dimaio (mmdimaio@comcast.net). She is compiling a list of experts discussed by MDC members which will be indexed by name and area of expertise and will be posted on our website. Thanks for your cooperation.

To check out the **MDC Expert List**, visit www.mddefensecounsel.org and click the red “Expert List” button in the left hand corner of the home page or access it from the directory menu.

¹ Semelka, et al., *Objective Determination of Standard of Care: Use of Blind Readings by External Radiologists*, AJR 2010; 195: 429-431.

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THE KEY: When performing their reviews, the Experts do not know which of the four cases is in litigation, or what the plaintiffs' criticisms are. As a result, they do not unfairly "focus" their review on chromosome 17, thereby applying a standard of care influenced by knowledge of the outcome.

The easiest way to implement a blind review is by simply withholding from your potential expert the "end of the story."

CASE EXAMPLE: A 70-year old male Patient presents to the Emergency Department with back and chest pain after running 100 yards. The Patient is worked-up by the Hospitalist, who suspects a musculoskeletal issue, but admits the Patient for cardiac monitoring overnight, to be safe. Just prior to Patient A's scheduled stress test the following morning, he suffers a fatal heart attack. The allegation is that the Hospitalist failed to appreciate and treat Patient A's evolving cardiac condition with medication and an emergent cardiac catheterization.

THE BLIND REVIEW: The defense team retains a hospitalist Expert and provides her with all records relating to Patient A's history, presentation, work-up, diagnosis and plan for treatment. The Expert is not provided any information regarding Patient A's heart attack or death. The Expert is asked to opine whether the Hospitalist's work-up, diagnosis and treatment plan complied with the standard of care.

THE KEY: When performing her review, the Expert knows only what the Hospitalist treating Patient A knew at the time of treatment. The Hospitalist did not have the "benefit" of knowing Patient A's ultimate outcome, and in order to provide a fair, pro-spective review, the Expert should not, either.

In our experience, presenting a jury with an expert who performed a true blind review — and found that the Defendant Doctor complied with the standard of care — gains the defense credibility. You are able to argue that your expert applied the true "standard of care." The plaintiffs' expert, by contrast, "knew the end of the story" and, as a result, was biased in his or her review.

A 2010 New York University Law Review article studied the impact of blind expert reviews in many types of cases, including medical malpractice. The author reported that experts who perform blind reviews are more likely to "reveal a truthful opinion" at trial and exhibit accompanying "truth signals" to the jury.² By contrast, an expert who does not perform a blind review may appear to be a "hired gun" and earn less credibility with the jury.

You may be thinking — what is the downside to obtaining a blind review? There are some, although we believe all are outweighed by the benefits gained:

- (1) **It's extra work!** Obtaining a blind review requires defense counsel,

often in conjunction with the client, to create a blind review "package." This means — on the easy end — excluding certain records and ensuring you do not reveal critical information to the Expert, and — on the complicated end — compiling numerous HIPAA-protected, de-identified case files for the Expert's review.

- (2) **You don't always get the opinion you want.** When you remove bias, you remove bias. If you have a tough case, a "defense-oriented" Expert may offer the greatest opportunity for obtaining a positive review and Certificate of Qualified Expert. We suggest attempting a blind review and, if that does not result in a positive review, moving on to a traditional review with a different Expert.

The blind review is, overall, a relatively simple tool that defense counsel has in just about every medical malpractice case. The potential benefit in terms of jury appeal is huge, and we think it is clear that sometimes, Blind is Better!

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² Robertson, Christopher, *Blind Expertise*, NYU Law Review, Vol. 85: 174–257, 220 (2010).

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respect the privacy and autonomy of their employees while also maintaining a sense of professionalism in online networking. In summary, law firm social media policies should encourage employees to abide by the following three (3) principles: **Disclose** — an employee's presence in social media

must be transparent; **Protect** — take extra care to protect the firm, its clients, and the employee; and **Use Common Sense** — remember that professional, straightforward, and appropriate communication is always best. *When in doubt, leave it out!*

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ADDITIONAL SOURCES

See also NATIONAL LABOR RELATIONS BOARD, MEMORANDUM 12-31, REPORT OF THE GENERAL COUNSEL (Jan. 24, 2012); *Echostar Technologies, LLC*, Case No. 27-CA-066726 (N.L.R.B. Div. of Judges, Sept. 20 2012) (finding that the social media policy provision at issue could be reasonably interpreted to interfere with the right of union and non-union employees to engage in protected concerted activity under Section 7); *COSTCO Wholesale Corporation and United Food and Commercial Workers Union, Local 371*, 358 NLRB 1, 2012 WL 3903806 (Sept. 7, 2012) (same); *Knausz BMW and Robert Becker*, 358 NLRB No. 164, 2012 WL 4482841 (Sept. 28, 2012) (upholding the discharge of an employee for "his unprotected Facebook postings about an auto accident" at an adjacent dealership, which did not relate to his own terms and conditions of employment); USER NAME AND PASSWORD PRIVACY PROTECTION AND EXCLUSIONS ACT, SB 433 (eff. Oct. 1, 2012) (forbidding Maryland employers from: (1) requesting or requiring that an employee or an applicant for employment, provide access to personal social media accounts; and (2) discharging, disciplining, penalizing or threatening an employee for refusing to disclose such information); Jennifer S. Lubinski, *A Real Danger of Speech in the Social Media Era: Employment Termination*, Md. Bar. J. (November 2013).