

February 2007

**LIMITATION ON EXPERTS' TESTIMONY**  
**by Ted Babbitt**

In Linn v. Fossum, 31 Fla. L. Weekly D741 (Nov. 3, 2006), the Supreme Court of Florida was faced with the issue as to the extent to which an expert can testify on direct examination that the expert relied on consultation with colleagues or other experts in forming the expert's opinion. The case came up for review as a result of a conflict between the underlying First District Court of Appeal's decision in Linn v. Fossum, 894 So. 2d 974 (Fla. 1<sup>st</sup> DCA 2004) and the case of Schwarz v. State, 695 So.2d 452 (Fla. 4<sup>th</sup> DCA 1997).

The Linn case arose out of a medical malpractice action brought on behalf of a plaintiff who alleged that her surgeon accidentally cut her ureter. The defense expert testified on direct examination that she believed the defendant doctor met the prevailing professional standard of care, because she had had a conference with several other urologists whom she regarded as representatives of the general urologic community who, when presented the facts, hypothetically agreed that the doctor had met the standard of care. She also testified that she had presented the same facts to physicians at the University of Missouri with the same result. The trial court permitted the testimony to go in over an objection that the testimony constituted hearsay and the use of the witness as a conduit for hearsay from other physicians.

After the resulting defense verdict, the trial court denied a motion for new trial and was affirmed by the First District.

In the Schwarz case, supra, a forensic pathologist testified on direct examination that he had consulted with several other physicians in forming his opinion about the cause of death of the decedent. The Fourth District reversed on the basis that such testimony impermissibly bolstered the expert's opinion.

Experts, unlike lay witnesses, can rely on "facts or data" that are not admissible in evidence to support their opinions under Fla. Stat. 90.704 so long as the facts or data are of a type reasonably relied upon by experts to support their opinion.

In Linn, supra, at 743, the Supreme Court draws the line on what an expert may use as the basis for his or her opinion.

"Usually, experts can testify that they formed their opinions in reliance on sources that contain inadmissible information without also conveying the substance of the inadmissible information. However, when the sources are the expert witness's colleagues who have responded to a case-specific inquiry by the expert, source and substance are blended. Informing the jury that the expert formed his or her opinion from consultations of this nature indicates a group consensus based on hearsay that would not be conveyed by testimony that the expert relied on records, tests, or reports from the patient or other medical providers directly involved in the diagnosis or treatment of the patient.

Further, opinion testimony by consensus is essentially immune to challenge. The opposing party is unable to cross-examine the nontestifying experts who participated in the consultation. Moreover, there is no way for the trial court to assess whether the consulting expert, upon whom the testifying expert relied on in whole or in part, is herself qualified or had a proper foundation upon which to base an opinion. For example, did the testifying expert provide the expert or experts with all the pertinent facts and records? Also, there

are no clear limits on how far consultations could extend. Would an expert be able to solicit opinions over the internet? Would the battle of the experts become a battle over how many other experts were consulted?"

The Supreme Court concluded that permitting an expert to testify about what other witnesses have said allows the presentation of otherwise inadmissible hearsay merely because the expert claims to have relied upon it in forming his or her opinion. In addition, the admission of such evidence under Fla. Stat. 90.403 permits the introduction of testimony, the probative value of which is substantially outweighed by the danger of unfair prejudice.

At Page 743, the Court concludes as follows:

"We conclude that referring to consultations with other experts creates the danger of bolstering the credibility of the testifying expert's opinion without providing the opposing party the ability to effectively cross-examine the expert as to the basis for the opinion. Allowing the expert to testify on direct examination that he or she relied on consultations with other experts creates 'too much of a possibility of an inference being drawn that these experts agreed' with the testifying expert. *Schwarz*, 695 So. 2d at 455. We therefore hold as a matter of law that under the Florida Evidence Code an expert is not permitted to testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion.'

This opinion breaks the tie between the First and Fourth District on this subject and makes it clear that no expert can testify as to inadmissible hearsay with respect to others' opinions as part of the testifying expert's direct examination.