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INTRODUCTION

Chiropractors\(^1\) are considered by the courts and legislatures to be limited practitioners of medicine,\(^2\) although not all chiropractors limit their practice solely to spinal and joint disorders.\(^3\) As practitioners of medicine, chiropractors are subject to malpractice actions by their injured patients. A chiropractic malpractice plaintiff, like any malpractice plaintiff, must prove that a chiropractor-patient relationship existed, that the chiropractor breached a duty which he or she owed to the plaintiff, that the breach of duty was the proximate cause of the plaintiff's injury, and that the plaintiff suffered actual damage.\(^4\) In order to make out this prima facie case, the plaintiff usually must rely on expert testimony to establish the chiropractor's negligence.\(^5\)

Many times the plaintiff chooses to use a physician's testimony to advance a case against the chiropractor.\(^6\) For the physician to testify, however, the

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1. Chiropractic has been defined as "a system of therapeutics based on the theory that disease is caused by abnormal function of the nervous system and which attempts to restore normal function through manipulation and treatment of the structures of the body, principally the spinal column." McCoid, The Care Required of Medical Practitioners, 12 Vand. L. Rev. 549, 560 n.62 (1959).

2. See, e.g., Klein v. Harper, 186 N.W.2d 426, 431 (N.D. 1971) (the practice of chiropractic equals the practice of medicine, in a restricted form); Leffler, Economic and Legal Analysis of Medical Ethics, 7 Law & Hum. Behav. 183 (1983). Leffler notes that "[c]hiropractors are licensed as primary health providers in all 50 states. However, to varying degrees they are "limited practitioners."" Id. at 186.

3. Besides treating spinal and joint disorders, some chiropractors also treat ailments such as headaches, gastrointestinal disorders, nervous disorders, respiratory conditions, hypertension, and emotional problems. C. Wilk, CHIROPRACTIC SPEAKS OUT 32 (1973).


5. E.g., Rosenberg v. Cahill, 99 N.J. 318, 325, 492 A.2d 371, 374 (1985) (stating that "in the ordinary medical malpractice case 'the standard of practice to which [the defendant-practitioner] failed to adhere must be established by expert testimony'") (citation omitted); Kerkman v. Hintz, 138 Wis. 2d 131, 147, 406 N.W.2d 156, 163 (Wis. Ct. App. 1987) (noting that "[w]ithout expert testimony, the jury has no standard for determining whether there has been a breach of the requisite duty of care"), aff'd in part and rev'd in part on other grounds, 142 Wis. 2d 404, 418 N.W.2d 795 (1988).

6. Physicians, unlike chiropractors, follow the allopathic school. Annotation, Competency of Physician or Surgeon of School of Practice Other Than That to Which Defendant Belongs to Testify in Malpractice Case, 85 A.L.R.2d 1022, 1024 (1962). Physicians believe "that when the body's workings deviate from normal, a counteracting procedure should be applied." N.
plaintiff must convince the court that the physician is qualified to give an expert opinion about some aspect of the case. This process can be troublesome and uncertain in state courts because the standards and rules for qualification of expert witnesses who are not members of the defendant’s profession or specialty vary and are riddled with exceptions.

Because of the extreme importance of expert testimony and the troublesome, uncertain nature of the rules presently followed concerning the qualification of such expert witnesses, state courts should follow a uniform standard of admissibility. This Note will discuss the traditional common law “same school” requirement which is being used by many state courts, as well as the exceptions to the same school rule. It will also propose that these courts should follow the approach used in the federal courts and in other state courts. Finally it will examine the effect which greater state use of Federal Rule of Evidence 702 will have on the parties of a chiropractic malpractice action and on chiropractic liability in general.

I. The Problem: Use of Inconsistent Standards by State Courts

State trial courts are not applying consistent rules to decide whether a physician is qualified to testify as an expert witness in a chiropractic malpractice action. The majority of courts follow the traditional common law same school requirement. This general rule is that a member of “one

ALTMAN, THE CHIROPRACTIC ALTERNATIVE: A SPINE OWNER’S GUIDE 63 (1981). The difference between the two schools is seen in their approaches to disease:
While allopathic medicine holds that germs and harmful bacteria are the primary cause of disease, chiropractic maintains that a body which is unhealthy in the first place is vulnerable to bacteria and germs. A [physician] prescribes a wide variety of drugs to inhibit or stimulate normal body functions. [A chiropractor] does not.

Id.


9. This Note does not attempt to discuss whether a chiropractor would in turn be qualified to testify as an expert witness in a medical malpractice action. However, using reasoning similar to that of this Note, it would appear that such testimony would be allowed. For decisions allowing a chiropractor’s expert testimony in personal injury actions, see Corbin v. Hittle, 34 Mich. App. 631, 192 N.W.2d 38 (1971) (chiropractor qualified to testify in a personal injury action concerning matters within the scope of his profession); Klein, 186 N.W.2d at 431 (chiropractor qualified to base his opinion testimony on reasonable medical certainty as to permanency of back injury).

10. Burton v. Youngblood, 711 P.2d 245, 248 (Utah 1985) (the same school rule “has been judicially adopted in a majority of states”) (citing Annotation, supra note 6, at 1023).
school of medicine is not competent to testify as an expert in a malpractice action against a [member] of another school of medicine."

A. The General Rule

Tennessee is one state which strictly follows the same school requirement. In one recent case, Johnson v. Lawrence, the state appellate court held that the testimony of physicians was not competent in determining whether a chiropractor's manipulation of the plaintiff's neck caused plaintiff's stroke. Because the physician and the chiropractor belong to two different schools, Tennessee courts, as well as many other state courts, will not allow the physician to give expert testimony in chiropractic malpractice actions.

See also Lee v. Miles, 317 F. Supp. 1404 (N.D. Tex. 1970) (medical expert must be of the same school of practice as defendant); Sandford v. Howard, 161 Ga. App. 495, 288 S.E.2d 739 (1982) (dictum) (expert testimony against chiropractors, unlike podiatrists, must be given by chiropractors only); Dulan v. Galluzzo, 77 Ill. 2d 279, 285, 596 N.E.2d 13, 16 (1979) ("In order to testify as an expert on the standard of care in a given school of medicine, the witness must be licensed therein."); Creasey v. Hogan, 292 Or. 154, 637 P.2d 114 (1981) (medical expert must be member of same school as defendant).

11. Annotation, supra note 6, at 1023.

12. Also, Tennessee is one state which statutorily disallows an expert witness to testify in a malpractice action unless he is licensed to practice in some profession making the testimony relevant to the issue. Tenn. Code Ann. § 29-26-115(b) (1980).


14. One court has defined a school of medicine as having "rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case." Nelson v. Harrington, 72 Wis. 591, 598-99, 40 N.W. 228, 231 (1888). As one commentator noted:

The schools of medicine [other than chiropractic] which are mentioned most often in the cases are: "allopathic," a system using remedies which produce effects upon the body differing from those produced by disease; . . . "osteopathy," a school of healing which teaches that the body is a vital mechanical organism whose structural and functional integrity are coordinate and independent, the perversion of either constituting disease, the major means of treatment being manipulation, although surgery is also sometimes undertaken; . . . "Christian Science," a system of healing through prayer and the triumph of the mind over matter . . . ; [and] "drugless healing," a system of treatment involving no drugs or severing or penetration of body tissues except severing of the umbilical cord at birth.

McCoid, supra note 1, at 560 n.62. Examining the cases with a defendant in a school other than chiropractic is relevant to the topic of this Note because the same school rule is still applied and because often the school is treated similarly to the way chiropractic is treated. See 61 Am. Jur. 2d Physicians, Surgeons and Other Healers § 29 (1981) ("It has been held that for purposes of regulation, osteopathy and chiropractic are substantially the same system of treatment, the latter being comprehended within the former, so that a regulatory statute applicable in terms to osteopathy alone can be validly applied by the state to the regulation of chiropractic.") (citing State v. Hopkins, 54 Mont. 52, 166 P. 304 (1917)); but see Sandford,
Courts justify the same school rule in many ways. One recurrent rationale is that it is inequitable to judge the defendant by the standards of a different school: "The unfairness of permitting a practitioner of one school, who uses one method to cure an ailment, to measure the treatment and skill of a practitioner of another school, who uses a different method, must be . . . apparent." Since the defendant is not a physician, courts do not prefer to judge the chiropractor by a physician due to the differences between the two in education, training and beliefs.

A similar rationale for the same school rule is that since the plaintiff chose to seek treatment from a practitioner of one school, the plaintiff may not complain after the treatment that the practitioner did not conform to another school's standards. The Oregon Supreme Court stated that "a person seeking treatment from a practitioner of a given school agrees to accept the curative practices and belief of that particular school, and if the practitioner treats the patient reasonably skillfully in accordance with the teachings of his school he incurs no liability."

161 Ga. App. at 497-98, 288 S.E.2d at 750. The Sandford court stated:

[O]rthopedic surgeons may testify regarding the standard of care required of podiatrists in the diagnosis and treatment of flat feet. Their membership in a school of practice different from that of [defendant] may affect the weight given their opinions or evaluations but not the admissibility of those opinions. . . .

We herein recognize a difference between cases involving podiatrists and allopaths and cases involving chiropractors or naturopaths and physicians. Unlike podiatrists, the latter schools differ from the allopathic school of medicine in their belief as to the origin of discomfort and the means of relief, and such differences have been statutorily noted.

Id.

15. Creasey, 292 Or. at 161, 637 P.2d at 119 (quoting Sheppard v. Firth, 215 Or. 268, 272, 334 P.2d 190, 192 (1959)); see also Annotation, supra note 6, at 1023 (courts have "long recognized that there are different schools of medicine with varying tenets and practices, and that inequities would be occasioned by testing the care and skill of a practitioner of one school of medicine by the opinion of a practitioner of another school").


18. Creasey, 292 Or. at 160, 637 P.2d at 118 (quoting Sheppard, 215 Or. at 271-72, 334 P.2d at 192 ("[A] person professing to follow one system or school of medicine cannot be expected by his employer to practice any other, and if he performs a treatment with ordinary skill and care in accordance with his system, he is not answerable for bad results.") (citation omitted).

Whether the plaintiff knew that the tenets of chiropractic differ from other schools of medicine when he consulted his chiropractor is unlikely to influence a same-school court. This is because an "actual knowledge of the tenets" standard is not present in these courts' decisions. See, e.g., id.; Porter v. Puryear, 153 Tex. 82, 87, 262 S.W.2d 933, 936 (1953) ("when a patient selects one of the several recognized schools of treatment, he thereby adopts and accepts the kind of treatment common to that school") (citation omitted). However, a question of informed consent conceivably is an issue the plaintiff could raise. See Annotation, Modern Status of Views as to General Measure of Physician's Duty to Inform Patient of Risks of Proposed Treatment, 88 A.L.R.3d 1008 (1978).
A third rationale is that the jury would be confused if an expert witness were allowed to testify against a member of a different school. The "inability of the jury to evaluate the merits of each school's tenets and principles or to determine which [has] the preferable mode of treatment" may lead a court to refuse to allow a physician to testify against a chiropractor.

**B. The Overlap Exception**

Many courts purporting to follow the same school requirement rely on the many exceptions which have been developed to circumvent its requirements, and thus allow a physician to testify against a chiropractor. The major exception to the same school rule is the "overlap" exception. If there is an overlap—an area of knowledge or treatment common to both schools—these courts will allow a physician to testify against a chiropractor regarding the subject matter of the overlap.

In *Rosenberg v. Cahill*, the New Jersey Supreme Court recognized and applied this overlap exception in a malpractice action against a chiropractor. The plaintiff alleged that the chiropractor was negligent in his reading of

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20. When the court does this, it is not making a value judgment that one school (chiropractic) is preferable to another school (allopathic) and therefore the testimony of a physician should not be allowed. Instead, as the *Creasey* court stated: "[I]t is apparent the courts are not concerned with the merits of the various systems that seek to relieve human ailments. It is sufficient to state that many of our citizens believe in the efficacy of drugless treatments and secure the services of those practicing them." 292 Or. at 160, 637 P.2d at 118 (citation omitted).

21. Some of the exceptions to the same school rule are: (1) "[w]here the method of treatment in defendant's school and the school of the witness is the same," Annotation, *supra* note 6, at 1026 (the so-called "overlap" exception); (2) "[w]here the method of treatment in defendant's school and the school of the witness should be the same," *id.* at 1028; (3) "[w]here testimony of witness is based on knowledge of defendant's own school," *id.*; (4) "[w]here testimony of witness is as to matters of common observation and experience," *id.* at 1029; (5) "[w]here in administering treatment defendant adopts methods of another school," *id.*; (6) "[w]here defendant seeks to justify his course of treatment by the standards of another school," *id.* at 1030; (7) where the witness "give[s] his opinion as to diagnosis," *id.*; (8) where the witness "testif[i]es as to the use of X ray," *id.* at 1031; and (9) "[w]here defendant's school is not recognized." *Id.* at 1032. For a more complete discussion of the various exceptions to the same school rule, see Note, *supra* note 8, at 750-57.

22. *E.g.*, Durflinger v. Artiles, 727 F.2d 888 (10th Cir. 1984) (under Kansas law, a psychologist may testify in a wrongful death action against a hospital and physician); *Creasey*, 292 Or. at 156, 637 P.2d at 116 (orthopedic surgeon may testify against a podiatrist "[w]here the principles, techniques, methods, practices or procedures [of the one school] concur or are generally the same" as the other school); Sutton v. Cook, 254 Or. 116, 458 P.2d 402 (1969) (physician may testify against chiropractor if the procedures of both schools are substantially the same); Hart v. Van Zandt, 399 S.W.2d 791 (Tex. 1965) (osteopath may testify against a physician because the subject matter of the litigation was recognized in both schools); *Burton*, 711 P.2d at 245 (member of one school may testify against a member of another school if the methods of the two schools are identical).

an x-ray and in his failure to refer the plaintiff to a physician. The court declared a medical doctor competent to testify regarding the "chiropractic use of x-rays and the diagnosis of physical conditions," limiting its decision to the facts of this case. The court stated:

[I]t is clear from the statutory and regulatory scheme that there is an overlap between the medical and chiropractic professions with respect to both the use of x-rays and the diagnosis of conditions that may require medical attention. In these areas, a licensed medical practitioner would therefore possess the requisite training and knowledge to express an opinion as an expert.

Other courts which recognize the overlap exception allow physicians to testify not merely concerning the chiropractic use of x-rays and diagnosis, but also concerning the chiropractic standard of care. For example, if the plaintiff can show that a "similarity in procedures or techniques" exists or that the subject matter of the suit is recognized in both schools, a physician may be declared a competent expert witness, despite the otherwise wide variation between the schools.

C. Variant Application

Whether a physician is competent to testify in a chiropractic malpractice action may be the determinative factor in a plaintiff's case. Therefore, the rules regarding admissibility of expert witnesses ought to be uniform so that cases which are similar in every way except the state in which they were brought will be decided similarly. A plaintiff in a state such as Tennessee should not be forced to rely solely on chiropractic expert testimony because her state strictly follows the same school rule, while a plaintiff in New Jersey is able to introduce testimony by a physician, provided the subject matter falls within one of the exceptions to the same school rule. Further, the result of strict adherence to the same school rule can be carried to extremes, as one dissenting judge hypothesized:

The holding of the license is held to be the touchstone of expert qualification. No matter how well qualified through education, training

24. The plaintiff alleged that defendant x-rayed plaintiff, but did not notice soft tissue abnormalities which appeared on the x-ray of plaintiff's spine, and did not refer plaintiff to a physician "competent to diagnose and treat these abnormalities." Rosenberg, 99 N.J. at 323, 492 A.2d at 373.

25. Id. at 334, 492 A.2d at 379.

26. Id. at 331-32, 492 A.2d at 378.

27. Creasey, 292 Or. at 163, 637 P.2d at 120; see also Sutton, 254 Or. at 123, 458 P.2d at 405 (physician may testify against a chiropractor if the procedures of both schools are substantially the same).

28. Hart, 399 S.W.2d at 797.

29. See Note, supra note 8, at 757 ("the ostensible ruination of an individual's life is often contingent upon the credibility of an expert's testimony").

30. See supra note 21.
and experience the prospective witness may be, the trial court has no discretion to allow expert testimony unless the witness is the holder of a license. . . .

. . . Under the holding a physician would be unable to testify to nursing standards of care even though nurses operated under his supervision or to testify to standards for midwives, and this because the physician was not licensed as a nurse or a midwife.\(^3\)

Although courts are sometimes able to avoid the incorrect and unjust results dictated by strict adherence to the same school rule, this may not always be possible. If, for example, a plaintiff is not able to convince the court that a new exception should be recognized or an old exception should be applied, an incorrect or unjust result may still be reached.

Rules of evidence, developed years ago and applicable supposedly to all witnesses, absorbed with questions of admissibility and not with proof, persuasion and the discovery of truth, are being imposed in many jurisdictions to prevent that free and full use of basic facts necessary to reach a correct and just solution of a case involving a medical issue.\(^2\)

Unfortunately, this situation has changed little in state courts. To prevent further incongruous decisions concerning the standard of admissibility of a physician's expert testimony,\(^3\) state courts continuing to use the common law approach should change the common law, reject the same school requirement and its many exceptions, and adopt a more consistent rule.

II. THE SOLUTION: GREATER STATE COURT USE OF FEDERAL RULE OF EVIDENCE 702

The state courts should begin using a standard similar to that used in federal courts and a minority of state courts\(^4\) to determine the admissibility

\(^{31}\) Dolan, 77 Ill. 2d at 286-87, 396 N.E.2d at 17 (Ward, J., dissenting) (criticizing the majority's holding a physician incompetent to testify against a podiatrist because he was not licensed in defendant's school).


\(^{33}\) A second reason for rejecting the same school requirement is that its continued application could arguably force chiropractors out of business. This argument, which is explained more fully in Part III of this Note, develops from the possibility of chiropractors being judged by the higher standard of care expected of a physician. This could occur if a physician has no knowledge of the chiropractic standard of care, and yet testifies as to the chiropractor's negligence because of the presence of some exception to the same school requirement. This would result in the chiropractor being held to the higher standard of care for physicians. If chiropractors are frequently held to this higher standard of care, they may become unduly hesitant in their treatment. They may also choose to leave the practice of chiropractic, rather than face the possibility of a malpractice judgment based on a higher standard of care than that which traditionally is applied to their particular profession.

Whether this result is a rationale for or against rejecting the same school requirement depends on one's view of chiropractors. The public's opinion concerning chiropractic varies widely. Some believe that "[t]he only difference between chiropractors and witch doctors is that chiropractic is legal." Keerdoja, A New Medical Marriage, NEWSWEEK, Aug. 12, 1985, at 69, 69 (citation omitted). On the other hand, some claim, "Sometimes I think my chiropractor is God." Id. While this Note takes the position that chiropractors should not be forced out of business, it is recognized that some may view a contrary result as more desirable.

\(^{34}\) See supra note 10.
of a physician's expert testimony in a chiropractic malpractice action. Federal Rule of Evidence 702, which governs the admissibility of expert testimony, states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." The advisory committee which promulgated the Federal Rules of Evidence intended that this requirement be viewed broadly, allowing many different types of expert witnesses to testify, provided the witness has the necessary qualifications.

Despite stating the standard for admissibility of expert testimony, "[n]either [the Federal Rules of Evidence] nor any other rule or precedent . . . sets forth a specific method by which the trial judge must determine the qualification of an expert." Instead of detracting from the workability of the standard, this is one of the advantages of the federal approach. Unlike the rigid same school test, Federal Rule of Evidence 702 looks not only to the expert witness's license or profession, but also to the possibly relevant information the witness possesses.

One court which applied Federal Rule of Evidence 702 stated:

An expert need not have certificates of training, nor memberships in professional organizations. Nor need he be . . . an outstanding practitioner in the field in which he professes expertise. Comparisons between his professional stature and the stature of witnesses for an opposing party may be made by the jury, if it becomes necessary which of two conflicting opinions to believe. But the only question for the trial judge who must decide whether or not to allow the jury to consider a proffered expert's opinions is, "whether his knowledge of the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth."

In order for the trial judge to answer this question, the proponent of the expert witness must lay a proper foundation, showing that the physician

35. FED. R. EVID. 702.
36. FED. R. EVID. 702 advisory committee's note. The advisory committee intended that: [T]he expert [be] viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Id.
38. Cf. Comment, supra note 7, at 69 ("A physician who is familiar with the problem at issue and can give a competent opinion on the standard of care based on education, training, and experience should be permitted to testify against the specialist.").
40. If this foundation is not laid, the physician will not be allowed to give his expert
is qualified to testify in the chiropractic malpractice action. "The admissi-
ability of [expert] evidence depends in large measure upon the foundation
laid. The expertise of the witness, his degree of familiarity with the necessary
facts, and the logical nexus between his opinion and the facts adduced must
be established." 41

A Virginia case, Maxwell v. McCaffrey, 42 is a good illustration of how a
standard similar to Federal Rule of Evidence 702 would be applied. In
Maxwell, the Virginia Supreme Court refused to allow an orthopedic surgeon
to testify as an expert witness on the issue of chiropractic standards of skill
and care. 43 Although the orthopedic surgeon had studied manipulation
intensively for one year and belonged to the North American Academy of
 Manipulative Medicine, 44 he knew nothing about the training, education,
and certification of chiropractors, nor did he have any contact with chiro-
practors in his area. The orthopedic surgeon admitted that, although the
manipulative techniques which he used were similar to those used by
chiropractors, "each discipline manipulated on a 'completely different the-
ory' and that chiropractors 'use other modalities' with which he was
unfamiliar." 45 After considering these factors, the court held that this
particular physician did not possess "sufficient knowledge, skill or experi-
ence to make him competent to testify as an expert" on the issue of the
standard of care required of chiropractors. 46
If the proponent of an expert witness can show the witness' familiarity with an issue involving another school of medicine, a court following Federal Rule of Evidence 702 would admit the expert testimony. The trier of fact is then free to determine the credibility of the testimony.\textsuperscript{47} "The fact that the physician is not a specialist in the field in which he is giving his opinion affects not the admissibility of his opinion but the weight the jury may place on it."\textsuperscript{48} If the jury determines that despite the plaintiff's foundation, the physician's testimony is not very determinative of the chiropractic malpractice, it can choose to discount the testimony's value. However, using the standard of Federal Rule of Evidence 702, the jury—not the judge—will weigh the testimony, provided the physician's minimal familiarity with the issue is first established.

Using this method to determine the admissibility of expert testimony in a chiropractic malpractice action will not be difficult for those state courts currently adhering to the traditional common law same school requirement or for those recognizing the many exceptions to that rule. Some state courts already use such an approach.\textsuperscript{49} This recent trend should be encouraged in order to unify the standard of admissibility of this evidence which often is determinative of the success of the plaintiff's prima facie case.

\section*{III. The Effect: A Change in Chiropractic Malpractice Actions}

Greater adherence to Federal Rule of Evidence 702 by state courts will affect chiropractic malpractice actions in three ways. First, three substantive areas of chiropractic liability will change: treatment, referral, and diagnosis. Second, plaintiffs who bring chiropractic malpractice actions will have a potentially greater pool from which to choose their expert witnesses. Finally, the practice of chiropractic will change in the following ways: (1) chiropractors who meet the chiropractic standard of care will be secure in their practice; and (2) chiropractic educational and licensure requirements may be increased.

\subsection*{A. Changes in Chiropractic Liability}

The three main areas of chiropractic liability which will be affected through greater use of Federal Rule of Evidence 702 by state courts are the

\textsuperscript{47} See, e.g., Comment, supra note 7, at 70.
\textsuperscript{48} Payton, 780 F.2d at 155 (citation omitted).
\textsuperscript{49} See, e.g., supra text accompanying notes 42-46. See also Kerkman v. Hintz, 142 Wis. 2d 404, 423, 418 N.W.2d 795, 803 (1988) ("one who is not licensed to practice chiropractic may testify regarding the standard of care for a chiropractor if qualified as an expert in the area in which testimony will be given").
EXPERT TESTIMONY

1. Failure to treat properly

First, following Federal Rule of Evidence 702 would have an effect on determining whether the chiropractor treated the patient with the proper skill. This was at issue in Johnson v. Lawrence, the Tennessee case discussed in Part I. The Johnson court applied a same school analysis and found the testimony of medical doctors to be incompetent when offered against a chiropractor. If the court would have used an analysis similar to Federal Rule of Evidence 702, it would have required that the medical doctors have specialized knowledge of the standard of skill required of chiropractors, and not that the expert witnesses be licensed chiropractors. However, looking at the facts of the case, it is probable that the testimony still would not have been admitted. The physicians admitted that they were unfamiliar with the chiropractic standard of care, and were therefore incompetent to express an expert opinion regarding the defendant's manipulation of the plaintiff's neck. However, if the plaintiff in Johnson had produced a physician with knowledge of the appropriate standard of care, the physician would have been allowed to testify under Federal Rule of Evidence 702.

A physician might also be required to know the basic tenets of the branch of chiropractic to which the chiropractor adheres. There are two branches of chiropractic. The first branch is known as "straights." Straights only use their hands when treating patients. The second branch is known as "mixers." Mixers use not only their hands to treat patients, but also light,

52. See supra notes 12-14 and accompanying text.
53. Johnson, 720 S.W.2d at 54.
54. Id.
55. See Kerkman v. Hintz, 138 Wis. 2d 131, 144 n.8, 406 N.W.2d 156, 161 n.8 (Wis. Ct. App. 1987), aff'd in part and rev'd in part on other grounds, 142 Wis. 2d 404, 418 N.W.2d 795 (1988), where the court did not require that the defendant's branch of chiropractic be familiar to the expert witness. However, the court left open the possibility that this factor might be required in the future if additional evidence is shown to necessitate this "legal component of the standard." Id.
56. Stutt, supra note 50, at 24. Stutt believes that "this dichotomy is simplistic in that there are numerous chiropractic schools which offer more than two approaches to the student. The practitioner may use treatment modes such as acupressure or kinesiology which were learned at seminars or in later reading." Id.
vitamins, heat and electricity.\textsuperscript{57} Depending on the professional standard of the treating chiropractor's branch, a particular treatment may or may not be deemed appropriate.

By requiring a physician to have specialized knowledge of the appropriate standard of care for chiropractors in general, a court following Federal Rule of Evidence 702 ensures that the defendant-chiropractor will be held to the standard of care of a reasonable chiropractor, not that of a reasonable physician. However, a court following Federal Rule of Evidence 702 is not limited to admitting only chiropractic expert testimony on the issue of standard of care; the court may also admit a physician's testimony in certain circumstances. The reasonable chiropractor standard should govern in these cases, assuming the plaintiff chose to seek treatment from a chiropractor,\textsuperscript{58} aware that chiropractic treatment and philosophy can differ from medical treatment and philosophy.\textsuperscript{59}

2. Failure to refer to a physician

Second, following Federal Rule of Evidence 702 would have an impact on proving whether a chiropractor should have treated the plaintiff's injuries. In cases where the plaintiff claims that the chiropractor negligently failed to refer the plaintiff to a physician, the plaintiff's expert witness will be required to have specialized knowledge of what injuries and diseases the chiropractic profession is able to cure.\textsuperscript{60} Failure to refer was one cause of action relied on by the plaintiff in \textit{Rosenberg v. Cahill},\textsuperscript{61} discussed in Part I of this Note. Using the overlap exception, the court declared a physician competent to testify regarding the conditions that require medical attention.\textsuperscript{62}

If the \textit{Rosenberg} court had used Federal Rule of Evidence 702, it would

\footnotesize{\begin{itemize}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} For a more complete discussion of the underlying issue of informed consent, see Annotation, Chiropractor's Liability for Failure to Refer Patient to Medical Practitioner, 58 A.L.R.3d 590 (1974).
\item \textsuperscript{59} \textit{See supra} notes 1-3, 6 and accompanying text.
\item \textsuperscript{60} For a collection of cases finding a cause of action for a chiropractor's failure to refer a plaintiff to a medical doctor, see Annotation, \textit{supra} note 18.
\item \textsuperscript{61} 99 N.J. 318, 492 A.2d 371 (1985).
\item \textsuperscript{62} \textit{Id.} at 331, 492 A.2d at 378. \textit{See also supra} text accompanying notes 21-26.
\end{itemize}}
not have had to find an overlap between the schools in order to declare the physician competent to testify. Applying Federal Rule of Evidence 702, if the injury or disease is outside of the reach of chiropractic, a physician with knowledge of the appropriate reach of chiropractic would be allowed to testify.63

3. Failure to diagnose correctly

A third area of chiropractic liability which adoption of Federal Rule of Evidence 702 will affect is the duty to diagnose a patient’s condition properly.64 If the plaintiff claims that the chiropractor failed to diagnose a problem correctly, the plaintiff’s expert witness will be required to have specialized knowledge about diagnosis in general. As the New Jersey Supreme Court explains, specialized knowledge about chiropractic diagnosis is not necessary:

With respect to . . . diagnosis, there is a commonality of education, training, and licensure between the chiropractic and medical professions. . . . Chiropractic licensure . . . contemplates considerable education and knowledge on the part of the chiropractic practitioner with respect to the general field of diagnosis, presumably covering conditions that fall within the field of chiropractic as well as those more properly attributed to other licensed healing disciplines.65

Some chiropractors might argue that it is unfair to allow a physician to judge a chiropractic diagnosis because chiropractors do not receive as much training and education in diagnosis as physicians do.66 There are two responses to this argument.

First, at least one study has found that “the education and training of a registered chiropractor are sufficient to enable him to determine whether there are contraindications to spinal manual therapy in a particular case, and whether the patient should have medical care instead of or as well as chiropractic care.”67 This suggests that while the education and training in

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63. Not all courts will recognize, however, that a chiropractor has a duty to refer a patient to a physician when chiropractic is not able to help the patient. For example, in Kerkman v. Hintz, 142 Wis. 2d 404, 421, 418 N.W.2d 795, 802 (1988), the court held that a “chiropractor does not have a duty to refer [a] patient to a medical doctor” when the patient’s problem is not within the realm of chiropractic cure. The court found that “implicit in a requirement that a chiropractor refer a patient to a medical doctor is the imposition on the chiropractor to make a medical determination that the patient needs medical care.” Id. It then concluded that “such a determination could not be made without employing medical knowledge,” which the chiropractor is not licensed to do. Id. at 421, 418 N.W.2d at 802-03.

64. This was a second cause of action set forth in Rosenberg v. Cahill, 99 N.J. at 331, 492 A.2d at 377-78 (footnote and citations omitted).

65. Rosenberg, 99 N.J. at 331, 492 A.2d at 377-78 (footnote and citations omitted).

66. See N. Altman, supra note 6, at 93 (chiropractors “do not receive the same amount of training in symptomatology as medical doctors” receive).

67. Id. (citation omitted).
diagnosis may be different for chiropractors and physicians, they are not so different that a chiropractor's diagnosis and decision to treat a plaintiff should not be judged by a physician.

Second, if chiropractors feel disadvantaged in their education and training in diagnosis, chiropractic colleges should require that their graduates devote more class hours to diagnosis. This would lead to several positive results. Chiropractors' education and training in diagnosis would be more similar to physicians', making it seem more equitable to use a physician's testimony to evaluate a chiropractor's diagnosis. More importantly, chiropractic patients will be better protected from an incorrect diagnosis due to their chiropractor's insufficient training.68

B. Changes in Plaintiff's Presentation of Evidence

Greater state court use of Federal Rule of Evidence 702 will also have an effect on the plaintiff's ability to present expert testimony in a chiropractic malpractice action. Plaintiffs will be encouraged to establish negligence through a chiropractor's, rather than a physician's, expert testimony. This will occur because the foundation for an expert witness who is a chiropractor necessarily will be easier to lay than that of a physician. Instead of having to convince the court that, although not a chiropractor, the witness is familiar with the chiropractic issue at hand, the plaintiff using a chiropractor as an expert witness will only have to show that the witness is a chiropractor.69

While the plaintiff may find the testimony of a chiropractor easier to introduce, Federal Rule of Evidence 702 will not exclude valuable testimony by physicians whom the plaintiff can prove to be qualified to testify. If the plaintiff were forced to rely on expert testimony by chiropractors, it is possible that he could not find a chiropractor who would agree to testify against another chiropractor.70 This might be due to a "conspiracy of silence" which may exist among chiropractors,71 as some claim about physicians.72 As one commentator explains:

68. This Note does not suggest that a chiropractor's education and training must be equal to that of a physician. However, by receiving more training and education in diagnosis than they currently do, chiropractors will perhaps "know enough not to injure their patients and to recognize cases where their limited methods are inefficacious and the services of a doctor are required." Rosenberg, 99 N.J. at 333, 492 A.2d at 378 (quoting Kelly v. Carrol, 36 Wash. 2d 482, 492, 219 P.2d 79, 85, cert. denied, 340 U.S. 892 (1950)).

69. If for some reason the chiropractor is not competent to testify, it would then be the task of the defendant to expose that incompetence.

70. Stutt, supra note 50, at 24.

71. See id.

72. See, e.g., Note, Malpractice and Medical Testimony, 77 Harv. L. Rev. 333, 336 (1963). The author quotes a dissenting judge who criticized:
Chiropractors may be unwilling to testify concerning the negligence of a fellow chiropractor. The absence of in-state teaching professors secure in their jobs and free from professional repercussions contributes to this hesitancy. The courts have not adequately dealt with such a cloak of silence in a uniform way. Justice is denied to an injured patient if his rights can not be vindicated because of proof standards which fail to account for the realities of the marketplace. The collegial nature of these drugless healers seems to predominate over any motion [sic] that proper chiropractic care takes an effort to speak out when such care is not provided.  

By allowing physicians familiar with chiropractic to testify against a chiropractor, this conspiracy among chiropractors can be circumvented, helping the plaintiff to prove his case. This may also encourage chiropractors themselves to break the alleged conspiracy. Faced with the prospect of a member of their profession being judged by a physician, chiropractors may be more willing to testify for the plaintiff in a chiropractic malpractice action.

C. Changes in the Practice of Chiropractic

State court use of Federal Rule of Evidence 702 would also have an effect on the practice of chiropractic. First of all, any "chilling effect" on chiropractors, which might cause them to be unnecessarily cautious in treating their patients, may be reduced. Because the chiropractor will be judged by a chiropractor or a physician with chiropractic knowledge, the chiropractor will not be judged by the potentially higher standard of care expected of physicians.

This standard of care is attractive because it measures a chiropractor's actions against other reasonable and ordinary chiropractors who are also

Anyone familiar with cases of this character knows that the so-called ethical practitioner will not testify on behalf of a plaintiff regardless of the merits of his case. . . . But regardless of the merits of the plaintiff's case, physicians who are members of medical societies flock to the defense of their fellow members charged with malpractice and the plaintiff is relegated, for his expert testimony, to the occasional lone wolf or heroic soul, who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners and the cancellation of his public liability insurance policy.

Id. (quoting Huffman v. Lindquist, 37 Cal. 2d 465, 484, 234 P.2d 34, 46 (1951) (Carter, J., dissenting)). See also Mason v. Ellsworth, 3 Wash. App. 298, 309, 474 P.2d 909, 917 (1970) (recognizing a "so-called 'conspiracy of silence'"); Annotation, Medical Malpractice: Necessity and Sufficiency of Showing of Medical Witness' Familiarity with Particular Medical or Surgical Technique Involved in Suit, 46 A.L.R.3d 275, 278 (1972) ("Locating an expert to testify for the plaintiff in a malpractice action is known to be a very difficult task, particularly because, in many cases, a doctor is reluctant and unwilling to testify against a fellow practitioner . . . .").

73. Stutt, supra note 50, at 24, 47.
restricted in their treatment by the four corners of the chiropractic license. This standard of care also provides sufficient protection for the patient public because it ensures that a chiropractor will perform reasonably within the chiropractic field or face malpractice liability. Moreover, if a chiropractor performs outside the practice authorized by the chiropractic license into other areas of the healing arts, the chiropractor assumes the same standard of care mandated for practitioners in those areas and the corresponding potential for liability.

Knowing that they will be held to this standard of care, chiropractors conforming to the chiropractic standard of care will be more secure in their practice than under current state rules of admissibility. Chiropractors will thus not be overly hesitant in their treatment or diagnosis.

A second effect on the practice of chiropractic, suggested above, may be the modification of the requirements of either chiropractic education or licensure. In order that chiropractors not be routinely held liable for failure to make proper diagnosis, chiropractic colleges may decide to increase the number of classroom hours spent in diagnosis training. This will bring the chiropractor's education closer to the physician's in the diagnosis area and may ensure that chiropractors "know enough not to injure their patients and to recognize cases where their limited methods are inefficacious and the services of a doctor are required."

**CONCLUSION**

The time has come for uniformity among state court standards governing the admissibility of expert testimony by physicians in chiropractic malpractice actions. Federal Rule of Evidence 702 appears to be the best solution to the debate over the appropriate guidelines to use in making this determination. By allowing a physician to testify once his familiarity with the relevant chiropractic issue has been established, justice will be better served. Injured plaintiffs will not be denied redress when a chiropractic expert

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74. Kerkman, 138 Wis. 2d at 144-45, 406 N.W.2d at 162 (citation omitted) (explaining why the correct standard should be that of a reasonable chiropractor and not that of a reasonable member of a medical profession). The Wisconsin Supreme Court agreed with the court of appeals that the correct standard was not that of a reasonable medical professional, but believed that the standard should be limited even more than that proposed by the court of appeals. The supreme court's standard "recognize[d] limitations imposed by the legislature upon chiropractors." Kerkman, 142 Wis. 2d at 420, 418 N.W.2d at 802. Its standard was thus even more beneficial to the chiropractor than the court of appeals' "reasonable chiropractor" standard.

75. See supra note 68 and accompanying text.

76. Id.

77. Rosenberg, 99 N.J. at 333, 492 A.2d at 378 (quoting Kelly, 36 Wash. 2d at 492, 219 P.2d at 85). For a related view, compare Note, supra note 8, at 761, which advocates "legislative scrutiny and the revamping of chiropractic licensing laws." Id.
cannot be found. Chiropractors will not be able to hide behind a veil of silence or avoid being held liable by refusing to testify against one another. Nor will chiropractors be forced out of business by being held to the standards of physicians. Uniform decisions in this area of common public concern are desirable, and will be best achieved through nationwide use of Federal Rule of Evidence 702.

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