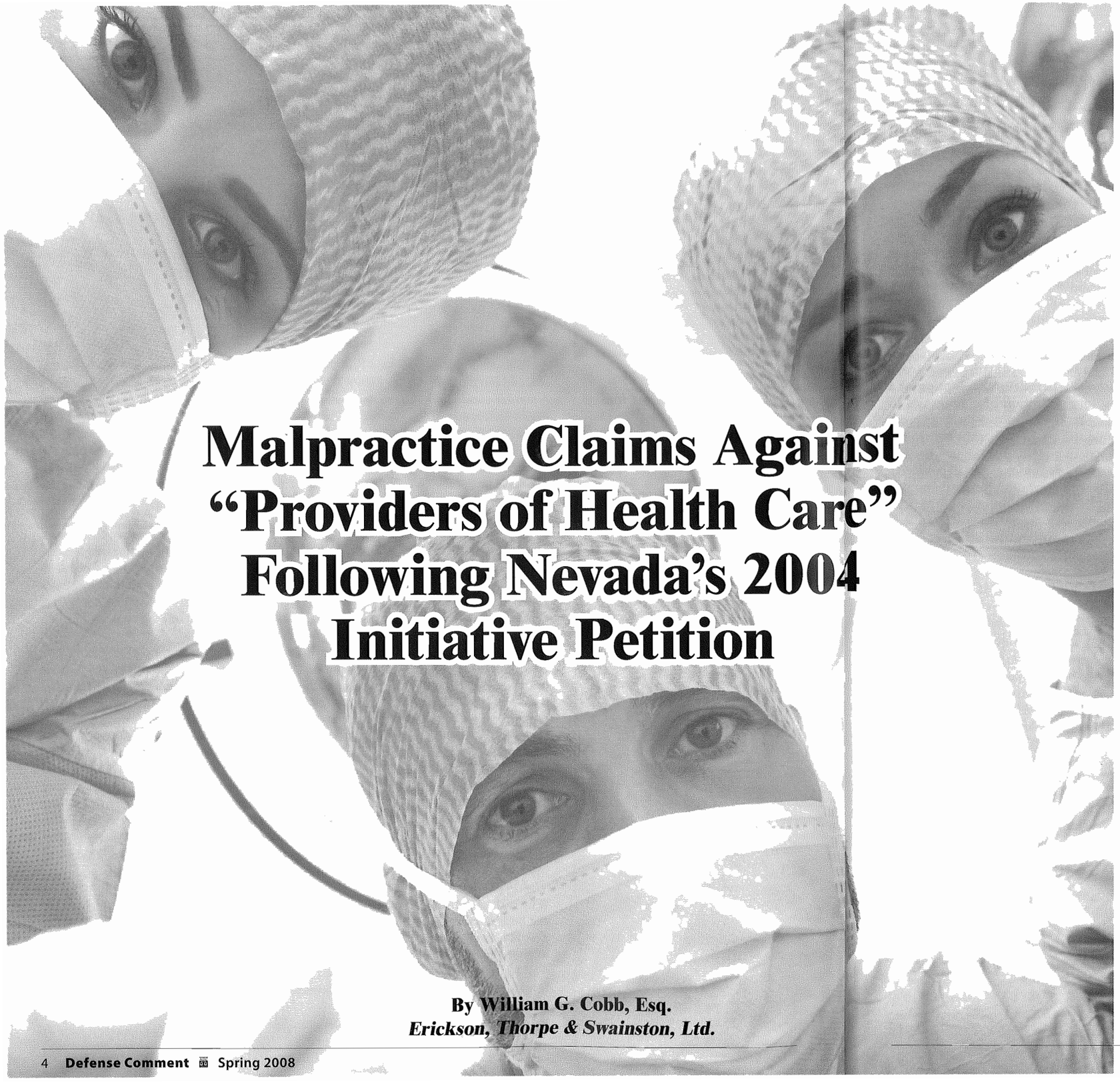

Malpractice Claims Against "Providers of Health Care" Following Nevada's 2004 Initiative Petition

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In the 2004 General Election, Nevada voters approved an Initiative Petition which amended certain provisions of Chapter 41A of the Nevada Revised Statutes ("Actions for Medical or Dental Malpractice"). Ballot Question No. 3, entitled "Keep our Doctors in Nevada" (*KODIN*),[1] was characterized as a measure which would ostensibly only allow persons who were "genuinely injured" by a physician's negligence to recover economic losses. The measure also embraced several liability, abolished the "collateral source" rule and capped noneconomic damages at $350,000 in malpractice actions. The stated intent of this ballot measure was to "stabilize medical malpractice premiums and [to] help your doctor stay in Nevada."[2]

The purpose of this article is not to comment on whether any implementation of Question 3 will indeed resolve the "full-blown medical liability crisis"[3] proponents of the Initiative contended it would. Instead, this article will discuss certain anomalies which are now inherent in the medical/health care malpractice arena as a result of *KODIN*.

A NEW DEFINITION OF "PROFESSIONAL NEGLIGENCE" NOW PERTAINS TO A BROAD RANGE OF HEALTH CARE PROVIDERS

Question 3 did not replace *in toto* Chapter 41A of the Nevada Revised Statutes, which previously only addressed actions for medical, osteopathic, dental or hospital malpractice.[4] Rather, the Initiative Petition amended Chapter 41A so that this chapter now pertains to a broader range of "providers of health care," including optometrists and dispensing opticians, chiropractors, registered physical therapists, licensed psychologists, doctors of oriental medicine and certain other health care professionals.[5]

Although "malpractice" also remains defined in Chapter 41A for doctors and dentists,[6] *KODIN* adopted a definition of what is called "professional negligence" which is extended to "providers of health care." Codified as NRS 41A.015, "professional negligence" is a "negligent act or omission to act ... in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death. * * *" What a "negligent act or omission to act" necessarily entails, however, is not defined by the Initiative Petition.

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Whether the authors of Question 3 intended the Initiative's definition of malpractice to supersede the prior statutory definitions of malpractice is unknown. However, not only did Chapter 41A previously include definitions of dental and medical malpractice before the passage of the Initiative, these definitions remain today as part of the statutory scheme found in Chapter 41A of the Nevada Revised Statutes.[7] For example, "dental malpractice" is defined in NRS 41A.004 as having "the meaning ascribed to ... 'malpractice' in NRS 631.075."[8] This statute (NRS 631.075) requires a showing the dentist failed to exercise the "degree of care, diligence and skill ordinarily exercised *by dentists in good standing in the community in which he practices*" (the issue of the "community in which he practices" is discussed *infra*).[9]

This definition of "dental malpractice" is not markedly different from the definition of "professional negligence" in *KODIN*. Nevertheless there are some noteworthy distinctions between NRS 41A.004/NRS 631.075 (dental malpractice) and NRS 41A.015 (professional negligence). For example, there is nothing in NRS 41A.015 which requires "professional negligence" to be established by comparison to the "care, diligence and skill" of other dentists in "good standing" (discussed *infra* is the requirement of expert testimony in medical/dental malpractice actions under NRS 41A.100).

Similar to dental malpractice, medical/osteopathic malpractice remains defined in Chapter 41A as the failure of a physician to exercise "reasonable care, skill or knowledge ordinarily used *under similar circumstances*."[10] This definition, like that of dental malpractice, currently co-exists in the Nevada Revised Statutes with the *KODIN* definition of "professional negligence."

"Professional Negligence" is defined in *KODIN* as being a "negligent act or omission to act."[11] But what is a "negligent act"? Presumably one has to return to the previously-discussed definitions of medical or dental malpractice in Chapter 41A which pre-existed this legislative initiative. These predecessor definitions more precisely delineated what constituted malpractice, at least for those professions.

Additionally, NRS 41A.100 requires that negligence in the performance of "*medical* care" must be established, generally speaking, with "expert *medical* testimony." A "provider of medical care" is defined in NRS 41A.100 to include a "physician, dentist, registered nurse or licensed hospital." In light of this definition, in a dental malpractice case, dental expert testimony would be required to establish dental malpractice, nursing expert witnesses in a nursing malpractice case, and so on.

But note the anomaly in the requirement for expert testimony under NRS 41A.100: this statute specifically addresses only medical, dental or nursing cases. Its plain language (and the requirement of expert testimony therein) does not apply to other "providers of health care," such as psychologists, dispensing opticians, physical therapists, etc., who are now brought within the scope of Chapter 41A. Compare, NRS 41A.100, requiring expert testimony in medical, hospital, dental and nursing malpractice cases, with NRS 41A.015, which defines the "negligence" of a broad spectrum of "health providers" is *silent* as to any expert testimony requirement. The question thus posed is this: Is it only medical, dental, nursing and hospital malpractice claims which must be established via expert testimony or does this requirement pertain to all "health care professionals"?

The Nevada Supreme Court in a 1991 decision set forth elements of a negligence claim brought as a malpractice action. In *Lopez v. Las Vegas Medical Center*, the Court stated that to prevail on a medical negligence claim, the plaintiff generally must show that "(1) the defendant had a duty to exercise due care towards the plaintiff; (2) the defendant breached the duty; (3) the breach was an *actual* cause of the plaintiff's injury; (4) the breach was the *proximate* cause of the injury; and (5) the plaintiff suffered damage."[12]

The cause of action in *Lopez* arose before the Legislature's adoption of a statutory definition of malpractice in 1985.[13] Yet these *Lopez* elements of proof should still be applicable not only to the pre-existing legislative scheme but the Initiative's definitions of malpractice as well, particularly with regard to the burden of establishing the duty of care. The issue becomes, as will be discussed next, how the duty of care and any breach of such a duty are to be established.

IS EXPERT TESTIMONY REQUIRED FOR PROFESSIONAL NEGLIGENCE ACTIONS AGAINST "PROVIDERS OF HEALTH CARE"?

Prior to the public's vote on *KODIN*, Nevada law had long held that medical malpractice must be established through expert medical testimony demonstrating a deviation from the standard of care.[14] NRS 41A.100 codified that obligation, at least, as noted above, as to certain other professions (*i.e.*, dental, hospital and nursing malpractice). The Initiative's definition of "professional negligence"[15] does not explicitly adopt what is called the "professional standard" (which requires expert testimony to establish professional negligence) for all of the professionals identified as "providers of health care." However, one assumes an Initiative Petition which stated its goal was to "stabilize malpractice premiums" and

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to help doctors "stay in Nevada" was not intended to make it *easier* for a plaintiff to establish malpractice.

The recent decision of the Nevada Supreme Court in *IGT v. Second Judicial District Court* addressed the issue of statutory interpretation.[16] Although its analysis was not done in the context of a ballot initiative impacting a previously codified statute, nevertheless *IGT's* instructions provide guidance on how Chapter 41A might be construed in light of these amendments:

> When interpreting a statute, a court should consider multiple legislative provisions as a whole. The language of a statute should be given its plain meaning unless, in so doing, the spirit of the act is violated. Thus, generally, a court may not look past the language of a facially clear statute to determine the legislature's intent. An ambiguous statute, however, which contains language that might be reasonably interpreted in more than one sense or that otherwise does not speak to the issue before the court, may be examined through reason and considerations of public policy to determine the legislature's intent.[17]

Presumably, therefore, if a Court were faced with the interpretation of a *KODIN* issue, that "considerations of public policy" would govern. As such, the pre-existing statutes and *KODIN* amendments would presumably be interpreted harmoniously to fulfill the "public policy" espoused by *KODIN*, *i.e.*, to "stabilize medical malpractice premiums" and to keep "our doctors in Nevada." Accordingly, *KODIN's* provisions would likely be liberally construed.

Inasmuch as "professional negligence" must be established with expert testimony in medical and dental malpractice actions, presumably malpractice actions against the other "providers of health care" – who are now brought within the scope of Chapter 41A – would face similar requirements. This reciprocal requirement of expert testimony would at least apply to those "providers of health care" whose professions have specific statutes defining "malpractice". Examples of such statutes which specifically define negligence for that respective profession (in addition to doctors and dentists) would be the statutory provisions applicable to psychologists and homeopathic physicians. The definitions for these professions, not so coincidentally, basically parallel the definition of dental malpractice discussed above.[18]

Certainly as to dentists, medical doctors and doctors of osteopathy, any action asserting malpractice generally required expert testimony by reason of the terms and provisions of Chapter 41A.[19] Until 2004, and prior to *KODIN*, it was an open question whether the standard of care in a malpractice action against a provider

of health care who was not covered by Chapter 41A must be established by expert testimony. This issue, however, was resolved by the Nevada Supreme Court's decision in *Bronneke v. Rutherford*.[20] In this case, the Court extended the requirement of establishing professional medical negligence with expert testimony to actions against chiropractors. *Bronneke* reviewed the statutory definition of chiropractic malpractice found in NRS 634.017 (which is similar to the definition of "dental malpractice" found in NRS 631.075). This statute states that chiropractic malpractice is determined by examining whether the chiropractor "exercise[d] the degree of care, diligence and skill ordinarily exercised by chiropractors in good standing in the community in which he practices." Based on this definition, the Nevada Supreme Court observed that even though "...NRS 41A.100 is limited to the medical profession, expert chiropractic testimony would still be necessary to establish malpractice * * * "[21]

One would thus presume that the *Bronneke* rationale would necessitate testimony in a professional negligence action from an expert in the particular field in which the health care professional practices. This interpretation would certainly be appropriate as to those health care professions where the legislature has actually defined "malpractice" relative to those professions, such as with chiropractors,[22] dentists,[23] homeopathic physicians[24] and psychologists.[25] In each of these professions, comparison to the "care, diligence and skill" exercised by professionals in the professional's field would be required by statute in order to establish "malpractice."

WILL ACTIONS AGAINST OTHER HEALTH CARE PROVIDERS NOT INCLUDED UNDER KODIN'S DEFINITION REQUIRE EXPERT TESTIMONY?

But what about those providers brought within the scope of Chapter 41A by the Initiative Petition for whom the Legislature has not specifically defined "malpractice" within that profession? While dispensing opticians, optometrists, registered physical therapists, podiatric physicians and doctors of Oriental medicine were included among the *KODIN* definition of "providers of health care,"[26] the respective chapters of the Nevada Revised Statutes regulating these professions do *not* have corresponding definitions of what constitutes "malpractice" for these providers. While each chapter governing these professions notes that "malpractice" or "repeated malpractice" may be grounds for professional discipline,"[27] there is no specific corresponding definition of "malpractice" for these professions. Accordingly, there is no expression of legislative intent regarding whether any negligence of this group of professionals

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must be determined by examining the "degree of care, diligence and skill ordinarily exercised" by health care providers in that profession who are in good standing in the community (as the Legislature did for chiropractors, dentists, psychologists, etc.).

And to carry this rhetorical question one step further, what of those health care professionals who were *not* brought under the umbrella of the *KODIN* definition of providers of health care? Health care professions which were omitted therefrom include homeopathic physicians, occupational therapists, athletic trainers,

massage therapists, social workers and marriage or family therapists. All of these professions are governed by Title 54 of the Nevada Revised Statutes, as are doctors, dentists, chiropractors, etc., yet each was excluded from the Initiative's definition of a "health care provider."

The issue thus becomes, whether after *KODIN*, expert testimony would be required to establish deviation from the acceptable "degree of care, diligence and skill" which would be ordinarily exercised by similar providers. While there has been no case reported in Nevada where this issue has arisen, one could reasonably assume, certainly as to those professions who were included in *KODIN*'s definition of health care providers, that establishing professional negligence in that field will require expert testimony. This should also hold true where the profession in question has a statutory definition of malpractice which incorporates the concept of a deviation from the "care, diligence and skill" exercised by other providers in that profession, particularly after *Bronneke* (such as to chiropractors, psychologists, etc.) Moreover, in light of the Court's rationale in *Bronneke*, embracing what is called the "professional standard" which requires expert testimony to establish a deviation from the standard of care,[28] one could assume such a requirement might be imposed as to all such actions against *any* provider of health care.

THE ROLE OF MATERIAL RISK IN "INFORMED CONSENT" CASES

The requirement of expert testimony would also pertain to professional negligence actions based on "informed consent." Of course, in the medical arena, consent of the patient to a surgical procedure or other treatment is required.[29] Whether the medical doctor deviated from the obligation to discuss a risk sufficiently material so as to require disclosure is also the subject of expert testimony in medical malpractice actions.[30] A patient need not be apprised of the risk of treatment "if the procedure is simple and the danger remote and commonly appreciated to be remote."[31] Whether a risk is material is also the subject of expert witness testimony.[32] Nevada embraced this rationale in the *Bronneke* decision and extended the expert witness requirement to informed consent claims as it previously held applicable in standard malpractice actions.[33]

One final comment about the interplay between the "locality rule" – which has found its way into certain definitions of "malpractice" appearing in the Nevada Revised Statutes -might be in order. In several of the statutes defining professional malpractice, the deviation which must be demonstrated is determined by testimony from one who is in good standing "in the community" (which is the definition as to psychologists)[34] or even one who is in "good standing *in the community in which he practices*" (which is basically the definition of dental and chiropractic malpractice).[35] These "community" requirements seemingly smack of the "locality rule."

Nevada, of course, overturned the "locality rule" as applied to medical specialists in *Orcutt v. Miller*.[36] In *Wickliffe v. Sunrise Hospital, Inc.*,[37] the Court embraced a "national standard" in an action against a hospital. In the *Bronneke* decision, although not specifically an issue on appeal, the Court similarly adopted a national standard for adjudicating claims of chiropractic malpractice.[38] Thus, it appears to be a reasonable assumption, in spite of restrictive language in certain statutory definitions of professional negligence, that where the deviation from the standard of care must be established by a professional from "the community in which he practices," that "community" will be a national one.

CONCLUSION

Despite adopting a new definition of "professional negligence," which is silent as to any requirement of establishing a duty and the breach thereof through expert testimony, it appears that an action against a provider of health care in Nevada (with certain exceptions) must still be established by expert testimony demonstrating the deviation from the standard of care. This requirement applies not only to medical doctors and dentists but likely to all providers of what is considered health care in Nevada.

ENDNOTES

1 The text of the Initiative may be found at *http://www.leg.state.nv.us/72nd/bills/IP/IP1.pdf.*

2 Argument in favor of Question 3, Nevada Secretary of State's Office.

3 *Id.*

4 *See* NRS 41A.004 (definition of "dental malpractice"), NRS 41A.009 (definition of "medical malpractice," which includes hospitals) and NRS 41A.013 [defining "physician" to include those persons licensed under Chapter 630 (mainly medical doctors and physician assistants) and under Chapter 633 (osteopathic physicians)].

5 NRS 41A.017.

6 NRS 41A.009 & NRS 41A.004.

7 NRS 41A .004 & 41A.009.

8 NRS 41A.004.

9 NRS 631.075; emphasis added;

10 NRS 41A.009 and NRS 41A.013; emphasis added.

11 NRS 41A.015

12 107 Nev. 1, 4, 805 P. 589, 590-91 (1991; citation omitted; emphasis in the original).

13 *See* Laws of Nevada, 1985, p. 2006; amended, 1989. p. 425.

14 *See* e.g., *Beattie v. Thomas*, 99 Nev. 579, 584, 668 P. 2d 268, 271 (1983); *Brown v. Capana*, 105 Nev. 665, 666-697, 782 P. 2d 1299, 1300-01 (1989); NRS 41A.100(1).

15 NRS 41A.015.

16 *IGT v. Second Judicial District Court*, 127 P. 3d 1088 (2/9/06).

17 *Id.* 1102 (internal footnotes omitted).

18 NRS 641.024: "...the failure on the part of a psychologist to exercise the degree of care, diligence and skill ordinarily exercised by psychologists in good standing in the community." NRS 41A.004 and NRS 631.075: "...the failure to exercise the degree of care, diligence and skill ordinarily exercised by dentists in good standing in the community." NRS 630A.060, "...the failure to exercise the degree of care, diligence and skill ordinarily exercised by homeopathic physicians in good standing in the community in which he practices."

19 NRS 41A.100 requires expert testimony in an action against a provider of *medical* care, unless one of five exceptions is demonstrated (e.g., foreign substance left in surgical site, unintended burn, etc.).

20 120 Nev. 230, 89 P. 3d 40 (2004).

21 *Id. at* p. 46

22 NRS 634.017.

23 NRS 631.075.

24 NRS 630A.060.

25 NRS 641.024.

26 NRS 41A.017.

27 *See e.g.*, grounds for discipline against nurses [NRS 632.320(7)(e)]; against dispensing opticians [NRS 637.150(L)]; against podiatrists [NRS 635.130(i)]; against optometrists (NRS 635.295 & NRS 636.303).

28 *Bronneke, supra*, 89 P. 3d at p. 45-47.

29 *See generally*, NRS 449.700 *et seq.* and NRS 41A.100. *See also Brown v Campagna*, 105 Nev. 665, 666-67, 782 P. 2d 1299, 1300-01 (1989); *see also*, "Patient Rights," NRS 449.700 *et seq.*

30 *Id; See also Smith v Cotter*, 107 Nev. 267, 272, 810 P. 2d 1204, 1207 (1991).

31 *Cobbs v. Grant*, 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P. 2d 1, 12 (1972).

32 *See, e.g., Canterbury v. Spence*, 464 F. 2d 772, 778 (D.C. Cir. 1972).

33 *Bronneke v. Rutherford*, 89 P. 3d 40, 46 (2004). For a more comprehensive discussion of the informed consent doctrine and the requirement of expert testimony, *see*, Cobb, defending the informed consent case, *The Defense Counsel Journal*, Vol. 72, No. 4, p. 330.

34 NRS 641.024

35 Chiropractic malpractice, NRS 634.017; dental malpractice, NRS 631.075 (emphasis added). Note, however, the definition of the "community" in which the dentist practices is not necessarily "local."

36 95 Nev. 408, 414, 595 P. 2d 1191 (1979).

37 101 Nev. 542, 548-49, 706 P. 2d 1383, 1387-89.

38 *Bronneke, supra*, 89 P. 3d at p. 46.