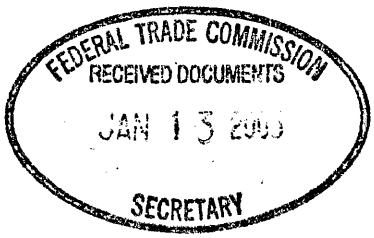
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	)	
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,	)	
and	)	Docket No. 9315
ENH MEDICAL GROUP, INC., Respondents.	)	

ORDER ON COMPLAINT COUNSEL'S MOTION *IN LIMINE* AND RESPONDENTS' MOTION TO STRIKE

I.

On December 20, 2004, Complaint Counsel filed a motion *in limine* to exclude certain testimony of Dr. Mark Chassin, a quality of care expert ("Motion *in limine*"). On January 7, 2005, Respondents Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc. (collectively "Respondents") filed their opposition to Complaint Counsel's motion ("Opposition to motion *in limine*").

On December 20, 2004, Respondents filed a motion to strike and to preclude redundant rebuttal expert testimony by Dr. Arnold Epstein, a quality of care expert, or, in the alternative, for leave to file a sur-rebuttal report ("Motion to strike"). On January 7, 2005, Complaint Counsel filed its opposition to Respondents' motion ("Opposition to motion to strike").

For the reasons set forth below, Complaint Counsel's motion *in limine* is **DENIED** and Respondents' motion to strike is **GRANTED IN PART AND DENIED IN PART**.

II.

A.

Complaint Counsel seeks a motion *in limine* to exclude certain testimony of Chassin which Complaint Counsel contends merely recites hearsay statements. Motion *in limine* at 4. Complaint Counsel argues that Chassin's report and his anticipated testimony fail to meet the expert opinion standards set forth in FRE 702 and related legal doctrine; Chassin should be

precluded from testifying to statements made known to him through interviews with Respondents' employees and associated physicians; and three specific sections of Chassin's report highlight the methodological and hearsay problems with his work. *Id.* at 4-12.

Respondents contend that experts may base their opinions on inadmissible evidence such as hearsay. Opposition to motion *in limine* at 2. Respondents argue that Chassin may rely on the testimony of trial witnesses to support his opinions; Chassin may rely on hearsay interview statements to support his opinions; and Complaint Counsel's cries of prejudice are unfounded. *Id.* at 7-24.

B.

Respondents move to strike and to preclude the rebuttal expert testimony of Epstein or, in the alternative, for leave to file a sur-rebuttal report. Motion to strike at 1. Respondents describe Epstein as Complaint Counsel's second rebuttal witness on quality of care issues who merely repeats opinions presented by Complaint Counsel's primary quality of care expert, Dr. Patrick Romano. *Id.* Respondents argue that Epstein should be precluded from testifying at the hearing and his rebuttal report should be stricken because his proffered testimony is unduly cumulative and because Epstein's proffered testimony would not assist the trier of fact to understand the evidence or to determine a fact in issue. *Id.* at 3-11.

Complaint Counsel contends that Epstein's testimony should not be excluded as cumulative or duplicative; Epstein's testimony is proper expert testimony that will assist the court in understanding the evidence and determining the facts in issue; Epstein does not attempt to usurp the role of the fact-finder; and Respondents should not be allowed leave to file a sur-rebuttal report. Opposition to motion to strike at 4-11.

III.

A.

"Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp.*, 1999 FTC LEXIS 207, at *1 (July 21, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. Am. Home Products*, 231 F. Supp.2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toeppen*, 1998 WL 102702, at *2 (N.D. Ill. 1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also SEC v. U.S. Envtl., Inc.*, 2002 WL 31323832, at *2 (S.D.N.Y. 2002).

Complaint Counsel's quality of care expert, Romano, primarily relies on administrative data to support his expert opinions while Respondents' quality of care expert, Epstein, relies on a variety of sources, including personal interviews. Motion *in limine*, exhibits A, B. Complaint Counsel objects to Epstein's methodology, specifically the use of interviews Epstein personally conducted with Respondents' staff and affiliated physicians, which Complaint Counsel argues do not follow the parameters necessary to ensure reliability and validity. Motion *in limine* at 1, 4, 6-7.

When ruling on the admissibility of expert opinions, courts traditionally consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue. *See, e.g., Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153-54 (1999); *In re Stouffer Foods Corp.*, 118 FTC 746, 799 (1994). Pursuant to Federal Rule of Evidence 702:

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FRE 702; *In re South Carolina State Bd. of Dentistry*, 2004 FTC LEXIS134, at *4 (Aug. 9, 2004).

Complaint Counsel's expert, Romano, in his rebuttal expert report details his concerns with Chassin's use of personal interviews. Motion *in limine*, exhibit B. Romano objects not to the use of personal interviews but rather to how the interviewees were selected and how interviews were conducted. Motion *in limine*, exhibit B, at ¶¶ 3, 6-8. These criticisms relate to the weight rather than the admissibility of the opinions and do not form a sufficient basis for excluding the proposed testimony.

In addition, an expert opinion is not required to be based upon admissible evidence. Pursuant to Federal Rule of Evidence 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be

> disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

FRE 703. Because personal interviews are reasonably relied upon by experts in the field in forming opinions or inferences on quality of care, Chassin is entitled to rely on them in developing his opinions. *See* Motion *in limine*, exhibit B, at ¶¶ 6-7. Moreover, Complaint Counsel has not demonstrated that the probative value of the evidence is substantially outweighed by its prejudicial effect in the context of a bench trial. Accordingly, Chassin's testimony will be admitted, subject to cross-examination, and accorded its due weight.

B.

Respondents move to strike the rebuttal expert report of Epstein and to preclude Epstein from testifying or, in the alternative, for leave to file a sur-rebuttal report. Motion to strike at 1. Complaint Counsel proposes that Epstein will provide testimony regarding the methodologies used by Chassin and Romano and will provide "some guidance on nationwide initiatives to improve hospital quality of care in the health care industry." Opposition to motion to strike at 3.

The admission of relevant evidence by the Administrative Law Judge ("ALJ") is governed by Commission Rule 3.43(b)(1), which states in part that:

> Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

16 C.F.R. § 3.43(b)(1). The Commission has explained that:

> Rule 3.43(b) [was] amended to incorporate relevant language in Rules 403 and 611 of the Federal Rules of Evidence regarding the exclusion of cumulative evidence. The amended rule is intended to make clearer to litigants that the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally relevant materials that merely burden the record and delay the trial. This clarification is intended to enhance the ALJ's ability to assemble a concise and manageable record.

61 F.R. 50640, 50644 (Sept. 26, 2996).

The parties primary quality of care experts, Romano and Chassin, each explain the methodologies used and critique the methodology used by the opposing expert. Motion to strike, exhibits 1, 2, 4. The majority of Epstein's report summarizes his qualifications and experience, issues addressed in the report, information relied upon, general approaches to measuring quality of care in hospitals, data sources used to analyze quality of care in hospitals, comparison of the approaches of Chassin and Romano, and comments on Chassin's conclusions. Motion to strike, exhibit 4, at 1-10. These sections of the report address the same issues addressed by Romano (i.e.: his methodology and his critique of Chassin's methodology) and do not provide additional assistance in determination of the material issues. A little over one page of Epstein's report addresses nationwide initiatives to improve hospital quality of care. Motion to strike, exhibit 4, at 7-8. This testimony is not cumulative and may be admitted if it is relevant and within the scope of proper rebuttal.

IV.

For the above-stated reasons, Complaint Counsel's motion *in limine* is **DENIED** and Respondents' motion to strike is **GRANTED IN PART AND DENIED IN PART**. Epstein's testimony, if he is called, will be limited to the issue of nationwide initiatives to improve hospital quality of care. Based on the ruling on the motion to strike, the request, in the alternative, for leave to file a sur-rebuttal report is **DENIED**. Specific objections to irrelevant, unreliable, cumulative or otherwise inadmissible evidence will be entertained at trial.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: January 13, 2005