THE OFFENSIVE USE OF MEDICAL RECORD: WINNING TECHNIQUES IN CRIMINAL DEFENSE ©

EXCLUSIVE TO THE NACDL

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INTRODUCTION:[1]

In criminal defense, let's face it, winning is everything. Zealous representation requires that you do everything, within the bounds of legal ethics, to help your client get

an acquittal. Whenever, a case contains a medical component, the medical record analysis may hold the key to gaining this acquittal. This paper contains the secrets to this sort of specialized evidentiary analysis; the offensive use of medical records in the criminal defense.

Why is it so important to use medical records as a sword and as a shield? In criminal defense you can raise substantial reasonable doubt by using what appears to be the Prosecutor's own evidence.

Prosecutors do not, typically, understand much medicine; they are lawyers. If you can raise reasonable doubt through medical records or through the use of scientific points within investigative materials, you may be able to "make a pig fly."

THE RULES:

CREATING REASONABLE DOUBT:

1. What is the relationship between the charged crime and the medical records?
2. Are the medical records part of the crime or evidence of the crime?
3. What, exactly, are the medical records?
4. Are the medical records complete?
5. Is there spoliation?
6. Are there any confidentiality / medical privacy issues?
7. Having organized the medical records, what is the legal and medical foundation for any medical opinion?
8. Are there going to be any evidentiary gaps or chain of custody issues?
9. Is it science? What damaging evidence may the Defense exclude?
10. What will the Prosecutor attempt to exclude helpful evidence?

The goal here, at each point, is to consider creating reasonable doubt. In the medical area, reasonable doubt is something like, "If the glove doesn't fit, then you must acquit:" A reasonable, vivid, factual inconsistency.

Perhaps one of the best and most satisfying examples of this use is Barry Schect's Innocence Project[2] where attorneys find DNA inconsistencies and have been successful in gaining prison releases and full exonerations.

One of the problems Criminal defense attorneys face, is that few lawyers have sufficient medical background to really answer the medical questions. As a minimum you can guide your medical expert through these questions.

The principles of *Daubert*[3] are crucial to any medically related defense. The other curiosity about medical scientific evidence in criminal defense work is the paradox in which a Court makes decisions. Admissibility is everything in evidence law. Consider who decides what gets in and what doesn't! Typically, judges have little to no scientific training and they have attended a few courses about scientific evidence; … so they are experts. How does a judge, who knows nothing first hand about medicine or science, decide whether a scientific theory is science or medical mumbo-jumbo? … they listen to the experts … who have been primed and hand picked, curried, like racehorses … who then present their theories. And then the judge decides. It is for this reason that at the trial court level one may find some startling decisions.

Recently, an enthusiastic criminal defense attorney had a great medical theory about a child abuse case. The problem was that there was no medical basis for this great idea…god for a medical-legal thriller; but, as David Letterman says, "It won't float."

About expert witness selection: Never **tell** an expert witness what theory you wish to advance until after the expert witness reviews the medical records and gives you his analysis. In criminal defense, you only get one chance and typically there are no depositions or discovery opportunities in which you get to probe expert witnesses' theories. If you prime an expert witness with "your theory" you may find that the expert will adopt your idea and go with it where the expert does not understand the boundaries of *Daubert*. Expert witnesses often want money. This may come as no surprise to you. Some expert witnesses will stretch their integrity far to get money: be careful.

- **WHAT IS THE RELATIONSHIP BETWEEN THE CHARGED CRIME AND THE MEDICAL RECORDS? ARE THE MEDICAL RECORDS PART OF THE CRIME OR EVIDENCE OF THE CRIME?**

If there is no relationship between the charged crime and there are medical records, then the medical records will not become part of the relevant evidence. On the other hand, suppose the medical records contain the crime, as with Rush Limbaugh,[4] the medical records are at "ground zero," so to speak, they are part of the crime.

Another example might be where a health care provider is charged with some sort of crime regarding medical practice and the medical records, records of patient care, become part of the crime scene evidence.

Another important aspect here is medical evidence which, typically, the Prosecutor *creates* as evidence. This evidence is not primary medical record evidence but it is secondary medical record evidence. There is no privacy issue in secondary evidence since investigative materials prepared in anticipation of litigation are not private, protected, health care information.

Investigative materials are not medical records under Fed. R. Ev. 803(4), although they may look and feel like medical records. These, really, are business records: Fed. R. Ev. 803(6).

- **WHAT, EXACTLY, ARE THE MEDICAL RECORDS?**

This is important. To emphasize; investigative reports are NOT medical records. That being said, these are records generated through health care practitioners so, loosely, we can refer to them as medical records.

There are two types of medical records: primary; secondary. Primary records are patient care records. These medical records are created according to the usual course of medical practice, Fed. R. Ev. 803(4) and (6), and are protected by all of the privacy concerns, including HIPAA.

You must obtain these in the legally correct manner. These records may include hospital and clinic records or any sort of patient care records generated to further health care.

Secondary records come "after the fact." Forensic autopsies, generally, are not protected by privacy concerns, because there is no surviving privacy interest: the patient is dead. In this setting, a patient may not assert a privacy right when dead…there is no further health care which must be fostered by privacy rights.

Other *medical records* might include crime scene investigations; witness statements; laboratory testing; any sort of medically generated data or scientific evidence is secondary evidence: DNA, blood reports. There are no privacy rights to this sort of information and, typically, the Prosecution is required to turn over this information without much of a fuss.

Now, as Hunter S Thompson once said, "when the going gets tough, the weird turn pro." It is at this point where the Prosecutor may have medical documents and may — quite unintentionally — forget to turn over just one page or one paragraph — which could be pretty interesting. It is important to make an appropriate legal discovery request to get all the medical records.

That being said, it is often helpful to get an expert witness who knows the inside of the system to tell you whether the records you get are indeed complete. Evidence which is often missing in either primary or secondary medical records include photographs, pathology specimens and / or slides, reports from third-party institutions (AFIP[5]), other bits of data which may not be readily available: actual x-rays; fetal monitor strips.

Missing evidence may inculpate or exculpate your client so be careful and get it all according to appropriate legal procedures.

One word about medical expert witnesses and their comprehension of the law and of the criminal prosecutory process: they may not understand it. In general, do not expect doctors to understand law any more than one would anticipate a lawyer to understand medicine.

Doctors are … doctors … not lawyers. If you have a savvy forensic pathologist who testifies 100 times a year, that doctor knows the system and may be able to guide you through some of the medical record issues…but not the law. Your garden variety physician, in general, has no legal[6] concept of *Daubert*, of the competency or admissibility of evidence or what may constitute legally reasonable doubt. You must hone your skills in these areas.

SPOLIATION: PHYSICAL AND CONTENT

Is there spoliation? Spoliation of evidence is evidence tampering. Spoliation of evidence is professional fraud and an attempt to influence the analysis of the information within medical records. When intentional, in some states, health care providers may be subject to criminal penalties for intentional spoliation of evidence.

In medicine, health care providers create the evidence so they can put two types of spin on the evidence: physical spoliation; content spoliation. Physical spoliation means that the evidence is gone; folded, spindled or mutilated…somehow there is a physical alteration … WHITE OUT® is a good example of physical spoliation which has content overtones … a mixed form of spoliation. Physical alteration of a medical record is physical spoliation and, since there is an intent to influence the content, what information the record imparts, then there is content spoliation, as well.

All forms of spoliation influence medical communication and may interfere with the legal connotations of medical records when these records wind up as part of litigation.

Content Spoliation is sometimes impossible to detect. Content spoliation occurs where an health care provider puts some spin on medical facts. For instance, following a surgery a doctor dictates an operative report. Six months later, after medical calamity has struck, the doctor removes the first operative report and replaces it with … (a) nothing; or (b) a retroactively dated revised, new and improved version of the operative report … which tends to exculpate the physician.

A skilled medical-legal analyst may detect this sort of fraudulent document because the facts within the document may not line up with other events in other parts of the chart.

Medical records are admissible under Fed. R. Ev. 803(4); statements made for the purposes of medical care and under Fed. R. Ev. 803(6) because the evidence is created at the time of medical care and in the usual course of business. The converse is also true under Fed. R. Ev. 803(7): absence of entry rule. If it "ain't there, it didn't happen." This is important because absences of information in an autopsy, for instance, if not done, if not tested, mean that "it wasn't there."

These two rules of evidence, when used in tandem can bring a very bright light to medical evidence when you know how to focus the beam.

Statements made ABOUT the circumstances of a crime within the context of medical records, under Fed. R. Ev. 803(4) MAY be admissible to prove the truth of the matter assert IF they are significant to support diagnosis or treatment.

"Bob stabbed me in the chest," is inadmissible to prove that Bob did the stabbing. The reason is that the medical care — a chest wound — is independent of who did the stabbing.

Consider this, however, "Bob put his mouth and pee pee in me." This statement may be admissible to prove that Bob is the perpetrator because, if Bob left DNA or had a STD, then the perpetrator's identity becomes material … TO MEDICAL CARE, making a difference to the health care providers about the identity of the person who has influenced the MEDICAL CARE.

GENERAL RULE: THE CLOSER A STATEMENT IN THE MEDICAL RECORDS COMES ABOUT THE CRIMINAL CASE FACTS TO SUPPORTING MEDICAL CARE DECISIONS, THE CLOSER IT WILL BECOME TO ADMISSIBILITY AS AN HEARSAY EXCEPTION.

A word about a special document: Death Certificates. What is a Death Certificate in the medical evidentiary anlaysis? A Death Certificate is inadmissible as a medical document. It is admissible as a vital statistic document to support that someone is dead, however … but not to the medical diagnoses contained in the three boxes. Fed. R. Ev. 803(9) Often courts make mistakes in admitting a Death Certificate as part of a medical record when parties stipulate to admission of the medical records for the purposes of litigation. A death certificate, however, is not a medical record … and generally you will not find a death certificate in a hospital medical record because the hospital does not generate a Death Certificate.

You will find Death Certificates wherever the State maintains vital statistics.

WHEN A PROSECUTOR ATTEMPTS TO PROVE CAUSE OF DEATH BY USING A DEATH CERTIFICATE, OBJECT! IN MANY JURISDICTIONS, ALMOST ANYONE MAY COMPLETE A DEATH CERTIFICATE! THE CAUSES OF DEATH ARE NOT STATEMENTS MADE TO FURTHER MEDICAL CARE AND MAY HAVE NO CORRELATION TO MEDICAL ACCURACY.

In a medical negligence case, a man died from an opiate overdose. The cause of death appeared on the Death Certificate as "myocardial infarction;" heart attack. The person who completed the Death Certificate was the County Coroner in Idaho, a rancher who ran for election who knew more about tractors than about medicine.

There are two important principles in medical record analysis:

- **ALWAYS CONSIDER THE MEDICAL RECORD TO BE TRUE;**
- **ALWAYS CONSIDER THAT THE MEDICAL RECORD HAS BEEN ALTERED**

At all turns in a medical criminal case, consider that someone attempted to put spin on the content of the medical records. Why not? Humans are only human and they cheat and lie when it suits their purposes.

IMPORTANT MEDICAL PRIVACY ISSUES:

Tread lightly here. Know all about HIPAA.[7] All states and the federal government have layer upon layer of medical privacy rules and regulations. You must learn the usual ones but, in essence, if a patient is living, you need that patient's consent, perhaps through Court Order, to obtain medical records for the purpose intended … and you must return the medical records when you are done.

If a patient is dead, but the records you seek were created as part of medical care and treatment, you will need a release signed by someone with legal authority to release the information since medical confidentiality and privacy survive indefinitely. This is not true of an autopsy done by the Medical Examiner for a forensic purpose. This may be true, however, if the patient requested autopsy as part of medical care or, sometimes, if the family requested autopsy as part of the medical care. These decisions are very fact specific. Obviously, the closer any record gets to a direct patient care use, the more procedures will be required to obtain the record.

In terms of criminal investigations, may a court issue a subpoena so the Prosecutor can get protected health care information *without* the patient's knowledge? This was the question for Limbaugh in Florida. There is no generally agreed upon answer and state and federal statutes influence the analysis. One may anticipate that the federal appellate courts will tackle this question soon.

On the other hand, in general, whenever there is a crime, there is no trump card to allow obfuscating wrongdoing. If the Prosecution relies on any medical information in its case, that information must be released. On the other hand, as in the case of Kobe Bryant, in general, getting a victim's private medical records may be a considerable problem where a defendant wishes to find its defense within those medical records. Again, judges spend countless hours trying to unravel these conundra.

THE GENERAL RULE HERE IS THAT AS THE NEED FOR THE PRIVATE MEDICAL RECORDS ASYMPTOTICALLY INCREASES IN ORDER TO BRING THE CASE, WHETHER FOR THE STATE OR FOR THE DEFENDANT , THE PRIVILEGE INTEREST DECREASES.

For instance, suppose there is some criminal case where a scar is at issue. "The guy who did XYZ had an appendectomy scar," says the complainant. Does the fact of the appendectomy or how he got the scar have any relevance to anything? NO! So a judge probably will permit a physical inspection so the complainant can identify the scar but will refuse access to medical records to see if the scar arose from appendectomy. The complainant either identifies the scar or not; it is irrelevant how the scar arose.

In the Kobe Bryant case, a very important case to thoroughly understand, Bryant's defense arose through medically related facts: the woman had allegedly engaged in sexual conduct with other men within a time period related to the charges Bryant faced. For that reason, Bryant argued, he should be able to access her medical records to prove these other contacts, thus raising reasonable doubt as to who caused her injury…which the Prosecutor claimed Bryant caused.

Without this information, Bryant argued, he couldn't defend against the charges. The Colorado Supreme Court[8] sustained the lower court's decision to allow access to the woman's medical records. The woman then decided not to participate in the trial and the judge dismissed the charges.

The defense team achieved this dismissal only, in this observer's opinion, because they clearly understood the above enunciated principle: **THE CLOSER THE MEDICAL RECORDS STAND TO THE CRIME FACTS, THE MORE LIKELY IT IS THAT A JUDGE MUST ADMIT THE MEDICAL RECORDS.**

Look at this privacy exclusion another way. How did exclusion of these medical records affect Mr. Bryant's constitutional right to defense? … and, from the accusor's viewpoint, look at her intended testimony, without the medical records: Bryant did it … But with the medical records: Bryant did it …but so did others.

Had the woman had sex, say two weeks before, the Colorado Rape Shield law would have precluded release of the medical records because, hypothetically, a two week delay would have erased any signs of other contacts. Here, Bryant argued, she had sex within hours with others.

MEDICAL PRIVACY IS A SWORD BUT NEVER A SHIELD.

HAVING ORGANIZED THE MEDICAL RECORDS, WHAT IS THE LEGAL AND MEDICAL FOUNDATION FOR ANY MEDICAL OPINION?

In an Kansas case, a man was charged with first degree murder of his infant son. The body was a mess; bruises; fractured liver; ruptured duodenum. The case facts were terrible until, as a consultant, I spoke with the man, who was very upset, and he told me exactly what happened in intimate detail.

The boy was not breathing and the man did CPR: ADULT CPR — not infant CPR. Eventually, the man was acquitted. He had learned CPR for adults … all conduct consistent with everything seen on the autopsy.

The ME testified that the injuries supported child abuse and the man faced LWOP. This case exemplifies the principle that you need a cohesive medical theory consistent with the case facts which include the medical records.

IN GENERAL, IT IS IMPOSSIBLE TO "BUCK" THE SCIENCE IN MEDICAL RECORDS. YOU CAN INTERPRET THE MEDICAL RECORDS BUT NOT IGNORE THEM.

In an Arizona case, there was a party and the morning after the party, a cute little 4 year old told her mommy that, "Joe licked her puppy." Joe was a friend at the party. Mommy plunged the child into a warm bath and scrubbed her up and then took her to the E.R. where a well intentioned Intern adopted what the Social Worker wrote: Sexually abused. The medical record included NO statement from the child and the mother died prior to trial. The judge did not permit the child to testify as incompetent.

The medical exam evidence at the E.R. disclosed NOTHING … other than a 2 millimeter vaginal skin crack, very superficial, which could have been due to the warm bath and vigorous handling by Mommy. The bottom line was that there was NO medical evidence to tie Joe, whose name was Salvador, to the puppy licking, so he was acquitted. By the way, there was a new puppy in the home, a Black Lab … named Max.

ARE THERE GOING TO BE ANY EVIDENTIARY GAPS OR CHAIN OF CUSTODY ISSUES?

Recall the OJ "chain of evidence" problem. When there is secondary medically related evidence, always ask about authenticity? How was it obtained? Who obtained the

evidence? Was the evidence properly obtained in terms of any Fourth Amendment violations? Was the evidence properly obtained in terms of any incompetence — a crime scene tech who didn't turn over the evidence … for a few days, those kinds of issues? Was the gap in custody, handling, or in obtaining the evidence disclosed? Did these omissions or commissions influence the integrity of the samples? Do the facts about the evidence pass any sort of "smell test?" At each stage, one may insert reasonable doubt. Look for backdating, logging evidence in and out, bench jottings, all of those factors affect the reliability of the evidence.

IS IT SCIENCE? WHAT CAN THE DEFENDANT EXCLUDE, WHICH IS DAMAGING TO YOUR CASE? WHAT WILL THE PROSECUTOR ATTEMPT TO EXCLUDE WHICH IS HELPFUL TO YOUR CASE?

First, always consider whether the evidence is science or medicine…or junk. If so, what is the analytic standard? Can you exclude on purely scientific basis: junk science?[9]

There is nothing special about medically related evidence. If not probative, it is not relevant: exclude.

Even relevant, highly probative evidence may be excluded where it does not pass a Fourth Amendment analysis. In medical terms, look for violations of medical privacy, as in Rush Limbaugh.

Typically, you would not seek to exclude evidence which helps your case although the Prosecutor will try to do that. You would, however, seek to exclude medical evidence which may damage your client's case. Here, in additional to Fourth Amendment issues, always think *Daubert* with a motion in limine. Repressed memory testimony is

popular these days. You may find yourself arguing either side of the argument depending upon what you need in a case.

Now, and here is something Hunter S. Thompson would have appreciated, it may be better to allow into evidence exactly that which the Prosecutor seeks to use to harm your client, if you can show how preposterous it is: if the glove don't fit, you must acquit!

Suppose there is some medical evidence which the Prosecutor believes dashes your client's story to bits … but you have a great medical explanation which may have the converse effect? Suppose the Prosecutor doesn't understand the medicine or has a witness who you know is ill prepared or not as prepared as your are and you feel confident, by using your expert witnesses well, of showing that the Prosecutor's medical theory is absurd? If you are certain as to where you are going, go for it!

In a recent case, the Prosecutor had an autopsy done by a medical resident, third year. The Supervising Forensic Pathologist, literally, stamped his name on the document in a pro forma approval…but never took part in the autopsy or in any of the protocols within the hospital to "supervise" this resident. The autopsy was very bad, lacking organ weights, lacking the correct sides — the right kidney was mixed with the left — lacking electron microscopic analysis and corroboration; lacking appropriate stains in order to see some important details; failing to take any pictures; the causes of death were based on pure speculation since there was NO scientific evidence to support their case theory.

If you are certain about your medical evidence, allow the Prosecutor to put on a great dog and pony show … which the Defense will dismantle, item by item. The Defendant, in the above example, showed that the cause of death was something quite

different than what the ME placed on the death certificate and what the autopsy purported to show.

The defense did not call the underling resident and the ME was required to testify repeatedly, "I don't know; I didn't do it" when asked over and over if he personally saw various critical parts of this autopsy. The jury acquitted since it doubted the cause of death.

Finally, consider the medical negligence defense. In a New Mexico case, the Prosecutor charged first degree murder for five gunshot wounds to the victim's torso … but the man died because of a lack of blood for transfusion in the E.R.. The wounds themselves were not lethal. Medical negligence may be an excellent defense. One will need excellent expert witnesses to support this case theory.

CONCLUSION:

The key to using medical evidence to defend you client is preparation. You can't put together something like this medical legal analysis overnight. You need time with your expert; you need time with your client; you need time … with yourself. Medical evidence is not tainted by which side brings it in; it is objective. You may use it effectively in criminal defense to raise reasonable doubt if you understand all the implications.

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[1] See, generally, Elliott B. Oppenheim, The Law of Evidence and the Medical Record© (Terra Firma, Santa Fe, NM 1997) (ISBN# 1-930263-01-5) 115+ pages; 325+ footnotes; * Scientific Evidence in Personal Injury Litigation: Daubert's Ghost© (ISBN# 1-930263-04-X) 240 pages; 900+ footnotes. Also, See, ELLIOTT B. OPPENHEIM, THE MEDICAL RECORD AS EVIDENCE (Lexis 1998) (2004 Supplement) 800-416-1192.

2 See, http://www.innocenceproject.org/. "The Innocence Project is a non-profit law clinic providing pro bono services to our clients. We are a tax exempt organization … " In addition: "The Innocence Project at the Benjamin N. Cardozo School of Law was created by Barry C. Scheck and Peter J. Neufeld in 1992. It was set up as and remains a non-profit legal clinic. This Project only handles cases where postconviction DNA testing of evidence can yield conclusive proof of innocence. As a clinic, students handle the case work while supervised by a team of attorneys and clinic staff. Most of our clients are poor, forgotten, and

have used up all of their legal avenues for relief. The hope they all have is that biological evidence from their cases still exists and can be subjected to DNA testing. All Innocence Project clients go through an extensive screening process to determine whether or not DNA testing of evidence could prove their claims of innocence. Thousands currently await our evaluation of their cases. DNA testing has been a major factor in changing the criminal justice system. It has provided scientific proof that our system convicts and sentences innocent people -- and that wrongful convictions are not isolated or rare events. Most importantly, DNA testing has opened a window into wrongful convictions so that we may study the causes and propose remedies that may minimize the chances that more innocent people are convicted. As forerunners in the field of wrongful convictions, the Innocence Project has grown to become much more than the "court of last resort" for inmates who have exhausted their appeals and their means. We are now helping to organize The Innocence Network, a group of law schools, journalism schools, and public defender offices across the country that assists inmates trying to prove their innocence whether or not the cases involve biological evidence which can be subjected to DNA testing. We consult with legislators and law enforcement officials on the state, local, and federal level, conduct research and training, produce scholarship, and propose a wide range of remedies to prevent wrongful convictions while continuing our work to free innocent inmates through the use of postconviction DNA testing." http://www.innocenceproject.org/about/index.php..

[3] See, E. Oppenheim, SCIENTIFIC EVIDENCE IN PERSONAL INJURY LITIGATION: DAUBERT'S GHOST© (ISBN# 1-930263-04-X) 240 pages; 900+ footnotes. (800-416-1192)

[4] Paper enclosed with these materials.

[5] Armed Forces Institute of Pathology, AFIP, is somewhat of the "Supreme Court" in the American pathology hierarchy. It is the ultimate source for many pathology opinions since pathologists nationwide, submit slides to AFIP for "the final word." Typically, AFIP pathologists will not act as expert witnesses.

[6] Many doctors get quite sophisticated in "learning the lingo" but, unless a doctor is trained in both professions, they may be able to " talk the talk, but not walk the walk," so to speak …

[7] What? Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (amending, Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001-1461 (1994) (hereinafter cited by ERISA, rather than U.S.C. section), Public Health Service Act, 42 U.S.C. 201-299 (1994) (hereinafter cited by PHS, rather than U.S.C. section), and Internal Revenue Code of 1986, 26U.S.C. 1-9806 (1994 & Supp. 1996) (hereinafter cited by I.R.C., rather than U.S.C. section)). Contact *coMEDco, Inc.™* for: Elliott B. Oppenheim, WHERE MAY THE 500 POUND HIPAA SIT? HIPAA ENACTED 14 APRIL 2003. (discussing HIPAA).

[8] See, http://www.courttv.com/trials/bryant/; "Just two weeks ago, the Colorado Supreme Court rejected prosecutors' appeal of a lower court decision to allow details of the accuser's sex life into evidence. Bryant's lawyers said DNA evidence shows the woman had sex with another man soon after the time she claimed Bryant raped her." http://www.courttv.com/trials/bryant/090104_ctv.html#continue. "District Attorney Mark Hurlbert told Ruckriegle Wednesday that the woman did not want to testify or otherwise participate in the trial." *Id.*

[9] See, eg, State v. Torres, 127 N.M. 20; 1999 NMSC 10; 976 P.2d 20; 1999 N.M. LEXIS 55; 38 N.M. St. B. Bull. 10 (NM 1999). Always consider whether the evidence is **based on principles of medicine and science not readily understandable to the jury**. If so, this evidence is science, requires a foundation and an expert witness. See, also, Banks v. IMC, 133 N.M. 199; 2003 NMCA 16; 62 P.3d 290; 2002 N.M. App. LEXIS 108; 42 N.M. St. B. Bull. 41 (NM App. 2002).