

Preparing a Medical Witness for Trial in a Personal Injury Action

By W. RUSSELL CORKER

Medical testimony is an essential part of every personal injury action. In many cases, this may be the climax of the trial as far as the jurors are concerned. They have heard the plaintiff's description of the injury and how it has affected his or her life, and they anxiously await the testimony of the doctor, the witness endowed with special knowledge, to enlighten them and lead them to a just result. Preparation of the medical witness is critical to success at trial.

Preparing for the Pretrial Meeting

Before the pretrial meeting, it is vital that you completely review all of the medical records in your file and organize them so that they can be easily accessed. A lot of valuable—and expensive—time is frequently wasted searching for pertinent medical records. It is best to go through all of the medicals, including, in many cases, lengthy hospital records, and make additional copies of only the most significant documents, such as records of emergency department visits, discharge summaries, consults, imaging studies, operations, consultants, and other testing, such as EMGs. These should be tabbed and arranged in chronological order. Of course, it is important to bring all of the medical records to the meeting, but having the most important ones organized together is much more efficient.

Do not assume that the plaintiff's doctor is familiar with all of the medicals in the case, since frequently other specialists have been involved in the client's medical care, and there may be prior or subsequent records that the doctor has not reviewed. There are always issues in the case for which the examining doctor needs to be prepared and which are not part of his or her treatment, such as the report of the defendant's examining doctor, or some other record from a treating doctor that is not part of your witness's file.

The attorney should also study the relevant medical literature before this meeting. It is as important to know the medical aspects of personal injury litigation as it is to know the legal aspects. This is a career-

long endeavor, so every case should be approached as if this type of injury will come up again, because it probably will. Attorneys are notorious for repeating work that they have previously done, wasting time and resources. In the precomputer days, I would keep a separate notebook for every type of injury or disease and transfer it to the next case in which that type of injury again came up, continuing to add to the notebook through the years. This job is now so much easier since the advent of computers. I now have separate folders saved on my computer for all of my medical issues. I cut and paste from this personal warehouse of information and use it to learn the medicine, as well as cross-examine witnesses at trial.

It is essential for the lawyer to be completely familiar with the medical vocabulary involved in the case, since many doctors speak only in "medicalese," and it is necessary to know what the doctor is talking about. The most fundamental of all medical vocabulary involves direction and location, such as *anterior*, *dorsal*, *ventral*, *superior*, and so forth. These elementary terms must be completely mastered before the pretrial meeting. If you are intimidated by the language, you will be unable to effectively communicate with the doctor. If an unfamiliar term should come up during the conference, make sure that you stop and ask for a definition. Looking intelligent is one thing; being intelligent is yet another.

Explain Legal Terms

Doctors are not legal scholars and cannot be expected to know the requirements of a *prima facie* case or the legal terms of art that have evolved through hundreds of years of common law; it is therefore the lawyer's job to ensure that the medical witness completely understands important terms. There is nothing worse than an ill-prepared doctor who creates ambiguity in the case when, on cross-examination, he or she concedes a remote "possibility" because he or she does not know the difference between *reasonable medical certainty* and *absolute medical certainty*. The following terms must be reviewed with the doctor to ensure that legally admissible medical

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testimony is elicited at trial. It is too late when, during trial, an objection is sustained and you cannot get from the witness important medical information because he or she does not understand legal concepts.

Reasonable medical certainty (or, in many jurisdictions, *reasonable medical probability*) is really both a medical and a legal concept. All medical opinions must be expressed with this degree of certainty to be admissible, so it is vital that the doctor understands the concept and uses it during the trial. In reality, it is the same standard doctors use during their medical practice. In discussing the concept with the doctor, use an analogy that is familiar to him or her, such as a clinical diagnosis of appendicitis. If the patient has the symptoms of pain in the right lower quadrant, guarding, rebound tenderness, and an elevated white blood count, a diagnosis of appendicitis can be made with reasonable medical certainty. However, it is not until the surgeon actually performs the operation that the diagnosis is known with absolute certainty, and even then it might have to await the report from the pathologist. This concept is essential when discussing the probability of future sequelae of the injury, such as arthritis and joint replacement, as well as discussing the most probable mechanism of injury, particularly where there is some type of preexisting condition. Make certain the doctor knows that he or she need not concede, on cross-examination, some remote possibility if he or she would not consider it so in regular medical practice.

The legal terms *causation*, *aggravation of a preexisting condition*, and *activation of a latent condition* also must be reviewed with the doctor before his or her appearance in court. Also, depending on your jurisdiction, it is important to review with the doctor terms of legal art, such as *more probable than not*, and encourage him or her to use these terms in answering whenever appropriate. If you are going to use a medical illustration, prime the doctor to affirmatively respond to your question asking whether the illustration would assist him or her in demonstrating or explaining a concept to the jury.

Use of the Narrative

Authorities have taught us, and most trial lawyers have learned firsthand, that

the average attention span of a jury is not that long. Consequently, it is essential that the major points your doctor is going to cover be delivered within the first half hour. The entire direct examination should be completed within 45 minutes, if at all possible. The only way to do this, and by far the most effective way, is to have the doctor give a narrative of his or her treatment, rather than plodding along through one boring office visit after another. Juries receive information best when it is presented in a story fashion. Having the doctor, in essence, read his or her office records, one visit after another, quickly loses the jurors' interest, and they have a difficult time distinguishing what is critical from what is not. The time it takes to prepare the doctor's narrative it is well worth it.

The attorney should also encourage the doctor to use analogies as often as possible. For instance, describing articulating cartilage as having the same properties as ice sliding on ice is much more meaningful to a juror's understanding of its importance when it has been traumatically damaged, leaving a roughened surface, than using technical medical terms. Every injury has some analogy that can be useful; work with the doctor to come up with an appropriate one.

It is also important to review with the doctor the facts of the accident so that he or she can express an opinion that the type of event was capable of producing the type of injury at issue. This line of questioning frequently is overlooked, but it is particularly important if causation is an issue. The doctor should also be prepped on such issues as what medicine has to offer a person like the plaintiff, such as surgery or joint replacement, when the condition continues to deteriorate. If the plaintiff has declined surgery, have the doctor explain that he or she has recommended that the plaintiff defer having surgery for as long as possible and that, even with surgery, the condition may not improve; indeed, it could get worse. The risks of the proposed surgery should also be reviewed, particularly if the plaintiff is at greater-than-average risk, perhaps because he or she is a smoker or has high blood pressure. Make certain that the doctor is prepared to conclude his or her testimony with an opinion that the injury is permanent and, in many cases, progressive.

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Method of Presentation

Be sure to discuss with the doctor that the most important people in the courtroom are the jurors. The doctor must constantly remind himself or herself of the significance of communicating to them. If they do not understand a medical term, then he or she may as well not waste breath saying it. The doctor, whenever the opportunity arises, should look directly at the jurors and address them. Likewise, at some time during the course of his or her testimony, the doctor should be prepped to turn to the judge and request to step down from the witness stand to make a presentation directly to the jury. Nothing reinforces a doctor's stature more than having him or her standing directly in front of the jury box explaining an x-ray or reviewing an enlarged medical illustration. Most doctors are used to this type of presentation, and it makes them appear more professorial. Remind your medical witness to assume that the jury knows absolutely nothing about anatomy, physiology, or the particular condition being discussed. Doctors have assimilated their specialized vocabulary into their everyday manner of speaking, so it is frequently difficult to get them to realize that not every person knows the meaning of terms such as *anterior*.

The courtroom is not a familiar place for most doctors, and sometimes even the best of intentions, under the pressure of an adversarial cross-examination, cannot help maintain a witness's composure. Impress upon the doctor that the jury is evaluating not only what is being said, but the credibility of the person saying it. Where the two opposing experts reach opposite conclusions on the same set of facts, it is often credibility that prevails. If the jurors feel that the doctor is credible, they will accept his or her conclusions, although they may not fully understand all of his or her explanations. The doctor must be cautioned to maintain his or her composure at all times, even in the face of difficult situations, and never be perceived by the jury as anything less than professional and courteous.

Last-Minute Preparation

When the case approaches the trial date, the attorney must meet with the doctor in sufficient time for any last-minute preparations. Most jurisdictions require

that any new medical information be exchanged sufficiently prior to trial so as to not create any undue surprises.

If, for instance, a recent x-ray demonstrates a narrowing of the joint space, suggesting a progression of the plaintiff's condition, that information must be exchanged in sufficient time to permit the other side an opportunity to obtain a copy of the x-ray and submit it to their expert for review. Have the doctor make two copies, one for you and one for your adversary. It is always better practice to have copies of the significant imaging studies in your possession. Too many attorneys rely only on the printed report and do not work with the actual image. The x-ray, or MRI, can then be sent to a local photo shop (just about any camera shop has the necessary facilities to do this at a very reasonable cost), where a photograph can be made of the negative image and a positive image produced. Take this positive image to the doctor's office at the time of the pretrial meeting, and mark any positive findings with a grease pencil. These pictures can be used when discussing the case with the judge, during the pretrial conference, to graphically demonstrate the injury and the expert's planned testimony. The markings are helpful because sometimes a change of a few millimeters is the difference between a diminished joint space or herniated disc and a normal finding. It is also useful to have copies of the postaccident, pre-reduction x-rays made into positive images as well, both for the meeting with the doctor and for use at trial.

Make certain, if you obtained a copy of the doctor's records early in the litigation and have not gotten a recent update, that you check to ensure that you have a copy of all the doctor's office records. You must go over with the doctor what records he or she must bring to trial. If I had not seen it happen so often during the last 25 years, I might assume that a doctor would automatically bring his or her original office records to court. It is a mistake to make such assumptions; be safe and go over it with the doctor. There is nothing worse than when, before the doctor even takes the stand, there is a collateral point for cross-examination that might possibly create an issue where there really is none. Make certain that the doctor brings all of

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his or her medical records, including billing records, forms completed for insurance companies, correspondence, and imaging studies. Make certain that every document is reviewed with the doctor and that you have a copy of each of the records in your file. Check the diagnosis listed on the insurance forms, which are frequently completed by staff members and signed, en masse, by the doctor. Be prepared to explain any discrepancies. Also obtain a copy of the doctor's C.V. to assist you in qualifying him or her at trial.

Last Words

Find out what day of the week is best for the doctor to testify, and make certain that you know before you leave the doctor's office what his or her fee is. It is not uncommon for an expert to charge eight, ten, or even twelve thousand dollars for an appearance. If his or her fee is clearly out of line, discuss it then, not on the eve of trial. Doctors usually have anatomical

props in their offices. Make certain that your witness brings them to court, and if he or she doesn't have any, then you must provide them. Make certain you tell the doctor that he or she will be given as much advance notice as possible, but sometimes things unexpected do occur during a trial. Make certain to pay the doctor for the office consultation before you leave his or her office; do not expect to be billed later. It is not good to start the relationship with a misunderstanding over money. Make certain to thank the doctor for taking time out of a busy schedule to help his or her patient in a time of need.

W. Russell Corker is the senior trial attorney for the firm of Shayne, Dachs, Stanisci, Corker & Sauer in Long Island, New York, where he concentrates in the area of plaintiff's personal injury and medical malpractice litigation. He lectures extensively on medical-legal issues.