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Evidence and Admissibility: What Gets in and What Doesn't

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In any courtroom, there is always the chance that you will not be allowed to testify on certain subjects. Frequently there is no way to know beforehand what these limitations, if any exist, will be. However, **illustrative evidence** (i.e., charts, graphs, posters, models, drawings, etc.) is particularly compelling in a court of law or at arbitration, and the general rule of thumb is: **try everything**. The worst that can happen is that you will not be allowed to use the evidence. Even in that case, you will still get some credit from the jury for at least thinking to bring the materials to court and taking the effort to assist them in understanding the often rather complex subject of your testimony. In some cases, being denied access to certain materials can actually work to your advantage, because you can then allude to those materials nonspecifically but cannot be cross-examined on them. Since you did bring them, the jury will usually assume that your testimony is based on the material anyway.

I always try to remind doctors that some personal injury attorneys have had very little trial experience, preferring instead to settle most cases out of court. Many are not skilled trial attorneys. And many are less familiar with the workings of chiropractically managed personal injury trials. This is an unfortunate reality, but something to keep in mind because attorneys will frequently tell you that certain evidence will not be admissible in a trial. They'll discourage you from bringing those materials to court. I have acted as both a treating doctor and expert witness in hundreds of trials, including one in which the plaintiff received over \$4.7 million. I think it's fair to say that you **never know** what will work until you try it. Evidence I considered very unlikely to be allowed has sometimes gone through without objection. But what is evidence anyway?

Generally, **evidence** is something provided to the triers of fact (the jury) which can then accompany them into the jury room and be available to them for review during deliberations. As a result, disputes arising as to the **admissibility** of evidence (i.e., what item or testimony will be admitted into evidence) are common in trials. However, this is rarely the case with diagrams, models, posters and other **illustrative material** that

experts use to assist jurors in understanding such complex topics as anatomy or pathophysiology.

Illustrative material is seldom offered as, or entered into, evidence. As a result, it is not held up to the same scrutiny as other forms of evidence. The term **demonstrative evidence** is sometimes used in place of **illustrative material** to distinguish it from **substantive evidence**, but this can be very confusing because **demonstrative evidence** is already used in certain cases of **real** evidence (i.e., **substantive evidence**). Murder weapons, for example, are often referred to as **demonstrative evidence**. For evidence to be admissible, it must pass a test (or tests) of admissibility.

The so-called **general acceptance** test for scientific evidence has been applied since it was first brought down in the courts (*Frye v. United States*, 293 F. Suppl. 1013 (D.C. 1923)). It is generally referred to as the Frye ruling and states that for a scientific deduction to be ruled into evidence, "**The scientific principle or discovery ... from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.**"

In 1993, in the now famous *Daubert v. Merrel Dow Pharmaceuticals, Inc.* (breast implant) case, the Supreme Court ruled that an unpublished analysis was a proper basis for expert testimony, even though not generally accepted by the scientific community and not, therefore, meeting the Frye standard. It was sufficient, instead, to merely meet the federal rules of evidence. As a result, the court need no longer rely on the surveying of scientific opinion but may, instead, judge for itself the admissibility or validity of evidence.

In the past, critics of the Frye general acceptance test have contended (from both points of view) that it was problematic. On the one hand, if you define the scientific community in sufficiently specific or narrow terms, almost anything might be considered acceptable. For example, the community of astrologists would consider astrological readings scientific and acceptable. On the other hand, other critics have argued that if the court requires a head count, the pioneers of science (Newton, Galileo, etc.) are not available to voice their opinion.

The first use of computer animation occurred over a decade ago (*State v. McHugh*, 476 N.Y.S. 2d (Sup. 1984)). Although many exhibits you might choose to use during your testimony are not computer animations, they may well have been created with a computer. The *McHugh* case may be helpful in illustrating the general spirit of the law's intention concerning this kind of evidence. McHugh had hired an accident reconstructionist (AR) to defend himself against criminal charges in a case in which several persons were killed in a single car accident. The prosecution objected to the computer animation produced

by McHugh's AR, arguing that it constituted scientific evidence and thus needed to be examined on the basis of the Frye general acceptance test. The McHugh court wrote the following:

"The evidence sought to be introduced here is more akin to a chart or diagram than a scientific device. Whether a diagram is hand drawn or mechanically drawn by means of a computer is of no importance ... What is important is that the presentation be relevant to a possible defense [**which, of course, was the side calling it here, but would apply equally for the plaintiff**], that it fairly and accurately reflect the oral testimony offered, and that it be an aid to the jury's understanding of the issue." (brackets mine.)

To further enhance the likelihood that, upon challenge by opposing counsel on the basis of admissibility or relevance, you might use such charts, posters or diagrams during your direct testimony, you should consider showing them to the patient during your report of findings in order to help them understand their injuries. When the treating physician has shown the materials to the patient as part of the report of findings, the plaintiff attorney can often effectively argue that the materials are a substantive part of the case and are, therefore, both relevant and material. In any case, remember that charts, diagrams, posters, etc., do not generally have to pass a general acceptance test. The "test" they must pass is that they assist the expert substantially in conveying complex ideas or details to a lay jury; ideas or details which would otherwise be very difficult to convey with words alone. And, of course, the materials should be anatomically or scientifically accurate and correct.

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