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Help! I'm Going to Court!

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For what seemed like the 12th time today, my private line jangled me from deep concentration. Hey, give me a break - I have dyslexia (as anyone attending one of my seminars can attest). I've had two brain injuries (that I can remember, at least), and I'm not getting any younger. I need peace and quiet when I'm working, and 12 phone calls in a day isn't so bad - except that it's only 8:00 a.m. or a little after.

My first piece of advice to one caller would be of value only for future cases: Plan ahead. This means earlier than the day before you have to appear in court. Hey, even Jerry Spence couldn't pull that off successfully. I start planning on going to court from day one. You won't go to court in the majority of cases, but this way you'll always have a tight file and you'll be prepared for anything. When you do go to court or arbitration, here are a few strategies to consider.

Strategy 1: Know the case. You should be thoroughly familiar with your own records and those of others. Since you have probably been deposed earlier, you should re-read that transcript: you'd be surprised how often you'll answer questions differently when asked that question on two separate occasions. And, while slight variances of opinion are usually pretty benign, the opposing counsel will be quick to "whip out" the deposition transcript and point out the differing answers: "Which is the *truthful* answer, Doctor?" Such is the artifice of clever attorneys with nothing else terribly substantial on which to base their cases.

Strategy 2: Pretend you are the opposing medical/chiropractic expert. Look for all the weak spots in the case and how you would criticize the diagnosis or treatment rendered; how you would question, perhaps, the mechanism of trauma as a likely cause of the patient's alleged injuries; how prior injuries, complaints, treatment, or pre-existing conditions might factor in. And it is almost a guarantee that duration of care will be an issue if more than six weeks of treatment were provided to the patient, since every inveterate defense expert can be expected to subscribe to the notion that these injuries never last longer than six weeks.

If you are putting on the shoes of an auto crash reconstructionist, the strategic formula is really pretty straight forward:

1. Determine that the crash speed change was well below 5 mph, and;
2. Rely on the three or four crash studies in which the authors conjectured that 5 mph (delta V or velocity change) was the likely threshold for occupant injury.

We've already written the blueprint for defeating this argument. I suggest you read this paper carefully before your next deposition.¹

Next, put on the opposing counsel's hat. With these questions or criticisms in mind, what cross-exam questions would you devise for the treating doctor? For each one, develop the best answer well before setting foot in court. Pondering and wrestling with such questions for the first time on the witness stand is dicey at best. And by the way, the deposition usually serves as a pretty good blueprint for the opposing attorney's case. I often feel that I get more out of a deposition than the attorney deposing me. The questions the attorney asks here will probably be very similar to those asked at trial. The attorney's major areas of attack will be obvious to you. You will likewise be able to gauge what the attorney's strategy will be for using his own experts.

In a recent L.A. case, there were two crash injuries within a couple of months, and two insurance companies and two defense lawyers were involved. I was testifying for the plaintiff.

By the end of the deposition, in which I was serially deposed by both lawyers, it was clear to me that the first lawyer had hired an auto crash reconstructionist who was probably going to testify that the first crash velocity change was below 3 mph. It was also clear that he had nothing else to hang his hat on. That made it clear to me that one of our primary goals in my direct testimony in court would be to point to the myriad of difficulties in using auto crash reconstruction to obtain precise speed change calculations in low speed crashes; secondly, to explain how predicting injury from such data is nearly impossible. One cannot predict outcome from crash damage.

Knowing that strategy, I could predict the literature on which they would rely. (Another useful paper to look at is one in which I exposed much of the "smoke-and-mirrors" tactics of some auto crash

reconstructionists.²) So I came to court with literature that exposes the flaws and weaknesses of that literature.¹

It also occurred to me that each of these two attorneys were going to...attempt to limit their exposure by pointing their respective fingers at each other: "Our crash was less likely to cause injury than theirs."

Apportionment would naturally be an issue and I would have to be prepared to make a statement about that and provide a logical basis for my conclusions.

Strategy 3: Discuss the strengths and weaknesses of the case-as you see it-with the attorney calling you. And find out what the attorney sees as the case's strengths and weaknesses. Most importantly, find out the attorney's strategy and how he plans to use your testimony. This is a too-often-omitted step, I suppose because we're all just too busy. Strategically, it's roughly the equivalent of taking a calculus final while under the influence of mescaline.

Strategy 4: Choreograph your "dog and pony show." This is something that follows strategy **three**. Surprisingly, some attorneys will even forego this step, a faux pas roughly equivalent to running naked with scissors - also on mescaline. It's a sure-fire recipe for failure. The only time this degree of winging it works is in the movies. I did one of these (under protest) a few months back and it was a disaster. Making matters worse, the two attorneys reminded me of Eddie Haskell and Beaver Cleaver. I'm afraid "the Beav" character caved in at nearly every critical junction and I could say almost nothing I wanted to say.

Over the years I've heard a couple of criticisms of choreographing testimony from lawyers:

1. It looks "put-on" and disingenuous; the jury will pick up on that and find the testimony artificial and not believable;
2. It doesn't make sense to choreograph because these cases are so variable, you can never predict where things will go and you wouldn't be able to follow the plan anyway.

Both of these are, in my experience, ridiculous and far from the truth. Just because you have a well-thought-out plan of how you will give your opinions at trial, and what those opinions will be, it shouldn't in any way imply that you are acting or fibbing. Naturally, it shouldn't look rehearsed, but rather, *prepared*. And I would also disagree that you can't follow a plan. During direct examination,

notwithstanding some sustained objections for opposing counsel, you can nicely follow your plan. In the biggest trial in which I ever participated, I actually had a script with the attorney's questions and my answers written down verbatim. Naturally, these were the answers I had worked out at previous meetings with the attorney. Football games are even more unpredictable than trials, yet they have plans too.

Strategy 5: This one also follows from strategy **four**. Think about what illustrative evidence you will use to effectively communicate your opinions to the jury: charts, posters, diagrams, plastic models, radiographs on view boxes, videotapes, LCD projectors connected to laptops, etc. Don't forget that juries are likely to find your "talking head" type testimony (i.e., you speaking to them from the witness booth) about as exciting as watching seawater evaporate. This is made worse when they don't even really understand the subject matter. What layperson knows what fascia is? Most can't even locate their anatomical hips or shoulders, so get them involved and interested by using props to make your points.

The courts generally allow you to make use of illustrative evidence to facilitate understanding, by the lay jury, of potentially complex and technical issues. That type does not have to be entered into evidence, but may have to pass muster on the basis of the Frye ruling (*Frye v. United States*, 293 F. Suppl. 1013 (D.C. 1923) or, in many states, the Daubert ruling (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). These are essentially legal tests for scientific testimony. In Daubert, the U.S. Supreme Court essentially dismissed Frye, promulgating fresh standards of scientific critique. Judges, who were stressed by the Court as *gatekeepers*, are now encouraged to consider evidence more independently, using relevance to the facts at hand and reliability as their guide. Four elements to consider are as follows:

1. Has the scientific theory or technique been tested?
2. Has the opinion been published or reviewed by peers?
3. What is the known or potential rate of error?
4. Has it been generally accepted in the relevant scientific community?

Sometimes five factors are described, with the fifth being *the existence and maintenance of standards controlling the technique's operation*. Note that factor **four** is the vestige of the Frye ruling, so, while Frye is no longer the standard, it remains one of the tests of such evidence.

This probably sounds more imposing than it is. For example, in a case in which I testified last week, I used an LCD projector connected to my computer and showed "QuickTime" movies. I also used my poster system. But then, I still use "Silly Putty" to demonstrate the viscoelastic response of soft tissue in many cases, and this illustrates one of the more important points I can make here: Try everything within reason; you never know what will be allowed. Even when the opposing attorney successfully objects to your using it, you still are likely to get some credit from the jury for trying. Strategically, I think it hurts the opposing counsel more than it helps to keep that demonstration from the eyes of the jury because the jury is likely to feel that, as the triers of fact, it should be up to them to see all the evidence. They will often view that attorney as manipulative and unfair, rather than as the champion of justice.

Literature is another thing entirely. Generally, you won't be able to walk into court with a stack of papers that opposing counsel has not previously been privy to. However, if you mentioned this literature in some document or proceeding during the discovery phase of the case (e.g., in the narrative report or during the deposition), you will be able to use it in court most of the time. The important caveat here is to know that literature well. And, to a lesser degree, know the other literature written by those authors. Otherwise, it could be embarrassing if you cite an author as authoritative and it is later shown that he also disagrees with your other fundamental opinions.

Strategy 6: *Relax* when you go to court. It is always amusing to remind myself that I'm the only person in this case who really has nothing major at stake. I'm being paid for my time regardless of the outcome. (Not that I haven't wished, in a couple of memorable cases, that experts could get a contingency too.)

Many doctors feel like "fish out of water" when they step into a courtroom. They don't know the rules and feel their "soft underbellies" are vulnerable to any attack. I felt the same way for a long time myself. Suddenly I had an epiphany: These lawyers know much less than I do about my area of expertise. When they cross-examine me they are in "way over their heads." Lawyers know only too well how potentially dangerous and difficult it can be to manage a good expert witness, and must exercise extreme caution. But it seems at some point they always become reckless, and that's when it really becomes great sport.

In summary, planning ahead is the key to success. There is no great mystery in taking a case to court, nor does it need to be a major life stressor. Juries, like everybody else, like to be entertained, and illustrative material will always help you in getting your point across. Remember to look for the weak spots - every case has them. They might not invalidate your patient's claim for reimbursement or recovery, but they will provide a handhold for the opposition, fair or otherwise. So, plan how you will bring the evidence before the jury in an understandable way and how you will counter the likely cross-examination. Meet with the attorney calling you as an expert or treating doctor and discuss the plan of action. And relax, it's all just part of doing business.

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