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HEADLINE: **Trial Advocacy, Direct Examination Of A Medical Expert**

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BODY:

The direct examination of your medical expert sets the framework for the entire medical case. An artful examination focuses the jury's attention on the real issues in the trial: the nature and extent of the injuries, your client's pain and suffering, causation, permanency and the plaintiff's prognosis and requirement for future medical care.

A well-documented medical case can also lay the foundation for a thoughtful cross-examination of your opponent's medical experts. As with all other aspects of trial practice, careful preparation is essential.

Qualifications of Expert

The jury must have a full and complete understanding of the professional background of the testifying doctor. His education, training and experience along with his ability to articulate his qualifications go a long way to enhancing his credibility. If the fundamental background information is brought forth on direct, the jury will accept the witness as an expert in his field. Conversely, the failure to take the time to bring out his qualifications and background will serve to weaken his overall credibility.

For these reasons, counsel should never accept an offer by an adversary to concede the expert qualifications of the physician. Your goal is not merely to permit the witness to offer expert opinions, but instead to persuade the jury that these opinions are beyond reproach. Simply put, although you may know your expert is qualified, accepting a concession of his expertise will leave the jury in the dark as to that reality. Additionally, accepting such a concession on direct does not preclude an attack of the expert's qualifications during cross examination. Your adversary is still free to attack the expert's background and experience and to pit your expert's lack of qualifications against those of his own expert.

The following questions are designed to bring out the expert's qualifications. Time spent with the expert in preparing him to answer these questions in a clear and articulate manner is crucial. Typical direct examination questions for eliciting the background of a medical expert include the following:

Q: Are you a physician duly licensed to practice medicine in the State of New York?

Q: When were you so licensed?

Q: Describe your educational background?

Q: What medical school did you attend?

Q: When did you graduate?

Q: Following graduation from medical school, did you begin a post-graduate course of study? (What used to be referred to as an internship and residency is now commonly referred to as a postgraduate year (PGY) of study PGY1, PGY2 etc).

Q: Was that postgraduate course of study focused or limited to one particular area?

(Assume the expert witness is an orthopedist)

Q: What is orthopedics?

Q: For how long did your residency in orthopedics last?

Q: Tell us about your fellowship?

Q: Are you Board certified? Please tell us what that is?

Q: What additional certifications do you have?

Q: What if any teaching positions do you have?

Q: What articles have you published?

Q: What specific experiences do you have in dealing with and treating injuries such as those involved in this case?

When addressing your expert's qualifications make sure you diffuse the potential collateral attack on his compensation in connection with your retention of him as well as his testimony in prior court cases. Do not let your adversary look like a hero in bringing out this information first. If you do it tastefully, not only will the jury appreciate your candor, but they may deduce that the amount of prior court experience is a testament to his expertise:

Q: Doctor, we have met on two previous occasions to discuss the care and treatment of my client, Jenny Jones?

Q: Are you being compensated for those meetings and for your time in court today?

Q: How much are you being compensated?

Q: Prior to today doctor, have you been qualified as an expert in the courts of the State of New York?

Q: Approximately how many times?

Q: Your honor, I offer Dr. Smith as an expert in the field of orthopedics.

Actually offering the witness as an expert is an interesting tactic. As a result of such an offer, the court will accept the appropriately credentialed physician as an expert and the court's ruling on the expert's qualifications will serve to put the imprimatur of the court on your expert.

Examination and Treatment

Now that the witness has been qualified to give expert testimony, have him go through his physical examinations, findings, diagnosis and course of treatment. If there is a long course of treatment, have the witness testify as to his significant findings over a course of time. Make sure he testifies as to all positive findings such as muscle spasm, atrophy, weakness, reflex changes, diminished sensation, motor deficits, electrodiagnostic tests, X-rays and other imaging studies. These findings should be incorporated into your cross of the opposing medical experts.

To get the most mileage from the expert medical witness, he must be understood. Just as you must avoid legalese when talking to the jury, the medical witness must not talk down to the jury nor should he hide behind complicated medical terms. It is your job to constantly be on the lookout to reduce complex terms to plain language, and to avoid confusion and boredom of the jurors. There is nothing wrong with interrupting the witness when necessary for a simple translation of complicated medical terms, studies and procedures.

To assist the expert in explaining medical terms and procedures, you should always seek to use illustrative aids.

Diagrams, charts, photos and anatomic exhibits will assist in this regard. Through such aids the trial attorney can allow the expert to take over and lecture on key areas by pointing out with illustration exactly what he is saying. For example, suppose a plaintiff suffered a disc injury. By using a model of the lumbar spine, the terms vertebral body, intervertebral disc and nerve roots take on immediate meaning.

The illustrative aid serves a twofold purpose. It gives the jury an opportunity to observe firsthand what these terms mean, and it allows the expert to bolster his credibility by showcasing his knowledge in the field.

Just as with a lay witness, we suggest it is better to work with prepared exhibits than to have the expert draw directly on a blackboard or posterboard. This avoids the pitfall of having to deal with an inaccurately drawn diagram that can open up a fertile area of attack on cross. Take the time to search for helpful exhibits and diagrams prior to trial. The Atlas of Human Anatomy by Netter [FN1] is a good starting point. If that text is not helpful, consider hiring a medical illustrator to prepare a custom drawing to help your expert in dealing with complicated medical issues. Be sure to have the expert review the drawings with the illustrator prior to trial. The expert's input into the creation of the diagram should be included in your examination when laying a foundation for the admission of the exhibit. This will allow you to point out that, not only is the rendering an anatomically correct diagram, but that extra care was taken to correct any inaccuracies.

The foundation questions are straightforward. After marking the exhibit for identification ask the following:

Q: Is this (drawing) anatomically correct?

Q: Will it aid us in understanding (or you in explaining) the relevant anatomy and injuries in the case?

Plaintiff as Exhibit

One of the most difficult problems confronting the trial lawyer is how to best show the plaintiff's injury to the jury. For example, if the plaintiff has suffered a devastating injury such as the loss of a leg, a severe burn or other deformity, the jury may not feel the full impact of the disability if the injury is merely explained or discussed during the plaintiff's testimony. We suggest the better approach is to have the medical expert use the plaintiff (in effect) as an exhibit to explain the nature and extent of the injury to the jury. Just as with a portable demonstrative aid such as a diagram, the expert can graphically describe the injury by pointing it out on the plaintiff and showing the effect it has had and will have on the plaintiff's life.

Hypothetical Questions

Aside from establishing the defendant's negligence, it is basic tort law in New York that the plaintiff is required to prove that his injuries and their sequelae were proximately caused by the subject accident. You must ensure that the medical proof illustrates a direct connection between each injury and the defendant's negligence. An important part of the medical expert's testimony is the introduction of his opinion on the issue of proximate cause. Generally, the expert will not have personal knowledge of all the relevant factors that must be taken into account to arrive at a well-founded opinion on causation. By using the hypothetical question, you can restate the relevant facts on which you are relying and have the expert state his opinions with regard to the facts as you have set them out.

The development of the hypothetical question is crucial. You must offer the expert a general narrative that takes into consideration the most important aspects of the evidence adduced at the trial. If used properly, the hypothetical question can give the trial attorney an opportunity to forcefully present proof supporting his position. It can also have the effect of allowing counsel to deliver what amounts to a brief summation during direct examination.

You must make sure your hypothetical question is appropriate. Only facts in evidence may be included in the question. However, the trial attorney should be calculating in his delivery of the question making sure to emphasize key points through tone and speed of delivery.

The following is an example of a hypothetical question in an automobile accident case.

Q: Doctor, I am going to ask you to assume the following facts as true. Prior to June 2, 1998 Jenny Jones never suffered an injury to her back. On June 2, 1998, Jenny Jones was a passenger in an automobile stopped in traffic. At that time, although she was wearing a seatbelt, her vehicle was struck from behind by a tractor trailer. Her body was thrown backward and forward as her vehicle was pushed into the automobile stopped in front of her. She was taken by ambulance to the emergency room where she complained of severe low back pain radiating into her right leg. She was X-rayed, the findings being negative for fracture, and released. Two weeks later she came under your care where she remains to the present time. After two months you suspected a disc herniation based upon her symptoms and your physical findings. Thereafter, you referred her for an MRI. That MRI revealed a herniated disc at L4-L5 impinging on the thecal sac.

...
Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether the motor vehicle accident was a substantial factor in bringing about her injuries including the herniated disc?

The same type of hypothetical question should be used to prove pain and suffering as well as the permanent nature of the injuries. For example, add the following to your hypothetical question:

Q: I also want you to assume that Jenny has constant pain in her low back. That she has difficulty sitting for any extended period of time. That she can stand for no more than a few minutes at a time. That she has pain that starts in her back and radiates or travels down her right leg into her big toe.

Do you have an opinion doctor, to a reasonable degree of medical certainty, as to whether or not the accident I described earlier is the competent producing cause of pain in her back and leg from the day of the accident to the present time?

Do you have an opinion as to whether or not these injuries will cause pain in the future?

How long into her future?

Future Expenses

If future medical expenses are anticipated, now is the time to address them. Ask for the doctor's opinion as to the need for future medical treatment, whether it involves rehabilitation, surgery or medical consultations. Then ask for his opinion on the reasonable amount that the plaintiff will be forced to expend for future medical care and treatment.

In the typical automobile case where the no-fault law is in issue, track the language of the insurance law. For example:

Q: Do you have an opinion to a reasonable degree of medical certainty as to whether, as a result of the accident, Ms. Jones has permanently lost the use of a body organ, member, function or system?

Q: Do you have an opinion to a reasonable degree of medical certainty as to whether, as a result of the accident, Ms. Jones sustained a significant limitation of use of a body function or system?

Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether, as a result of the accident, Ms. Jones has sustained a permanent consequential limitation of a body organ or member?

Although these questions technically ask for the expert's opinion as to an ultimate issue in the case, the courts have allowed this testimony. [FN2]

Conclusion

The direct examination of your expert serves as the foundation for delivering medical proof. Before sitting down

with your expert, learn the applicable medicine. Have a thorough understanding of the medical issues, your client's injuries and the doctor's chart before stepping foot in the courtroom. Make sure that the physician is well prepared for all areas of cross-examination as well as for any potential negatives (such as prior or subsequent injuries and conditions, and collateral attack). Bring out the physician's credentials so that the court and jury will admire his expertise and have no doubt as to the veracity of his opinion. Liberally utilize hypothetical questions to summarize the evidence and form the basis for the doctor's opinion as to causation, pain, permanency and need for future treatment. An artful direct examination of your medical expert will go a long way in assuring victory.

FN(1) Atlas of Human Anatomy, Frank H. Netter, M.D., 1989 Edition.

FN(2) [DUFEL V. GREEN, 84 N.Y.2D 795; 622 N.Y.S.2D 900 \(1995\); MORENO V. CHEMTOB, 271 A.D.2D 585, 706 N.Y.S.2D 150 \(2D DEPT. 2000\).](#)