Expert testimony in a personal injury case: What to expect

You have been treating a patient who was involved an accident. You may have wondered if this would result in litigation and your being asked to testify. Sure enough, you are asked (or subpoenaed) to testify in your patient's personal injury case. Some of you will have had experience testifying in the legal arena and will be comfortable with the process. For others, while you are confident of your skills as a medical practitioner, the prospect of being interrogated by lawyers in front of a judge and jury will drive you out of your comfort zone.

This article will try to take some of the mystique out of testifying by explaining: 1) what to anticipate from the attorneys, especially the "opposing" attorney; 2) how to prepare; and 3) why it is important to appear in person at trial.

In prior issues of this MEDICAL-LEGAL JOURNAL, medical testimony has been presented from various perspectives – the content of your testimony (Vol. 18, Spring 2001); testimony on specific matters such as causation and damages (Vol. 15, Spring 2000; Vol. 13, Summer-Fall 1999) and spinal injuries (Vol. 17, Winter 2000); whether to testify by deposition or at trial (Vol. 11, Winter 1998); and tips on testifying in court (Vol. 2, Fall 1996).

Usually you will be called to testify by your patient's attorney. The primary reason you have been called is to provide expert testimony on causation (did the injurious incident cause the injury(ies) you treated?) and damages (how the injury impaired your patient's lifestyle and ability to work; caused pain and suffering , etc.). These have been explored in detail in the articles referenced above.

WHAT QUESTIONS TO EXPECT

What should you expect when you are "cross-examined" by the "defense attorney" — the attorney representing either the person who caused the accident or an insurance company opposing your patient's claim?

You are not likely to be grilled on the medicine. Cross-examination is not a medical school-type oral exam. This is especially true if you practice "traditional" medicine, with well-established methods of treatment which have been generally accepted in the medical community and literature. In this case, the defense attorney is unlikely to "argue the medicine" with you.

If your practice includes "less traditional" medicine (i.e. treatment methods that may be experimental or less accepted in the medical community and literature), the defense attorney may ask you to explain the treatment, the literature on testing and support for such treatment, and whether others in the medical community practice in a similar manner. Simply be prepared to answer these questions as best you can. Your job is not to convince the opposing attorney, but to convince the jury that your treatment is effective. If your treatment helped your patient, the jury will probably not care if it was non-traditional.

In all cases, expect the defense attorney to challenge you based on what he or she thinks you do not know, such as the details of your patient's medical history. The attorney may assume that your opinion on causation is based solely on what your patient told you, and that you do not have all your patient's pre-accident medical history documents, records from other medical providers pertaining to this accident, police/incident reports, etc. The attorney will not expect you to have thoroughly researched this other material.

For example, your chart notes may indicate that your patient reported having no neck pain before being rear-ended by a car going 45 mph. Then the neck symptoms began, ultimately requiring medical treatment leading to the discovery of a herniated cervical disc.

The defense attorney will probably begin by asking you if an accurate and complete medical history is important to your making an accurate diagnosis. (This is vital to evaluating what attorneys call "causation.") Most doctors will respond affirmatively. The attorney will then ask, AIf your patient has not given you a complete and accurate medical history, then you may not have the basis for giving an accurate opinion on causation?" Most doctors will again answer in the affirmative.

Next, the attorney will rely on documents of your patient's medical history of which the attorney expects that you were not aware. For example, your patient may have injured or received treatment prior to (perhaps many years before) the accident in question for the same body part that you have been treating. Or he/she may have been involved in another accident subsequent to the one in question, resulting in similar injuries.

Assuming the attorney has this evidence, you will probably be asked about it and whether the patient told you about it at the time of treatment. Assuming you were not aware of it, you will be asked whether this new information changes your opinion. If this additional information does not change your opinion, fine. The attorney will probably not challenge your opinion or "argue the medicine." He/she will, however, have placed that information into evidence with the hope that the jury will find that your opinion was based on incomplete information.

You can short circuit this strategy by taking a thorough and accurate medical history. Of course, when you first see the patient, he/she may not be in a position to provide a complete, detailed history. At some point, it will be important for you to obtain all relevant past and subsequent medical records and to review them before giving your testimony. Your patient's attorney should be relied upon to obtain these records.

The defense attorney will probably have a medical witness to present an opinion opposing yours. This doctor will, of course, have reviewed your chart notes and all other medical records, including those you may not have been aware of. Even if this doctor's testimony is no more persuasive than yours, the defense attorney will want to convince the jury that this doctor's opinion is more reliable since it was based on more complete information.

You can expect to be questioned concerning your credentials, to the extent not covered by your patient's attorney. This is to raise doubts about your expertise by pointing out areas that are NOT your specialty. If you are a family doctor, the attorney will ascertain that you are ***not*** a neurologist; if you are a neurologist, that you are ***not*** a radiologist or a physiologist. The attorney is showing that your specific medical practice may be insufficient to address some or all of the medical issues. You will be asked about memberships in professional organizations, hospital privileges, board certifications and states in which you are or have been licensed to practice. Having your curriculum vitae on hand may cut short some of this questioning.

You may be asked about your experience giving testimony, whether you have worked with your patient's attorney in the past, and how much you are charging for your trial testimony. You may also be asked whether you ever perform "independent medical exams" (IME's) and, if so, what percentage of the people you see are for IME's as opposed to patients you are treating.

The attorney will also want to know when you first saw this patient relative to the injuries allegedly suffered in the incident. If you did not see the patient until long after the incident, the attorney will want the jury to think that your treatment was too remote in time to give you a good basis to explain that the incident caused the patient's injuries.

BE PREPARED

Whether you are testifying for a deposition or at trial, the importance of being prepared cannot be overstated. For the sake of being an effective witness, as well as for the sake of your patient, please prepare before you testify. This can be as simple as reviewing your treatment records and any other related records the night before your testimony.

Quite often, you will be asked to discuss treatment that occurred years ago. No one expects you to recall such distant treatment off the top of your head. You will need to rely on your notes. Having your paperwork organized in such a manner that you can quickly find such information will show the jury you are prepared and will avoid the potential for unnecessary lengthy pauses in your testimony. In the eyes of a jury, there's a world of difference between the doctor who speaks with confident familiarity with his/her patient's case and the doctor who has to fumble through records at trial.

Being prepared and knowledgeable at depositions is equally important. Effective deposition testimony may help preclude the need for trial.

THE IMPORTANCE OF APPEARING IN PERSON AT TRIAL

Some doctors prefer to give their testimony in a perpetuation deposition in advance of trial, **instead of** appearing in court. This may be because of very busy patient schedules. However, **for the sake of your patient, it is important that you do everything possible to make yourself available to appear in person at the trial**. While the transcript or video of your deposition will be part of the evidence for the jury to review, live testimony is much more effective. Jurors tend to relate better to "live" witnesses. They are also less likely to be distracted and more attentive if you are there in person, than if they watch you on a television screen or hear someone else read the transcript of your testimony.

Another obvious reason to appear in person is that you will be able to respond to additional questions that arise during trial. This is especially important in Jackson County, Oregon, where jurors are now able to submit written questions for doctors serving as expert witnesses. Obviously, a live witness can answer the jury's questions immediately. If your testimony is submitted by deposition, it is highly unlikely that the

jury will be able to ask its questions. This can be the difference in whether your patient prevails in his/her case.

We hope that knowing what to expect will take some of the anxiety out of testifying on behalf of your injured patient. We recognize that attending depositions and appearing in court are not always pleasant experiences. However, please remember: **you are the expert**. Since you are a professional, the jury will be highly interested in what you have to say and in learning about medicine from you. To obtain and keep their attention, you must be prepared and be willing to appear in person in court. This will go a long way in providing the best service and complete medical care for your patient.