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Robert J. Turley
Turley, Tackett, Savage, & Moore

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Pretrial Interview With the Physician

By Robert J. Turley*

The testimony of a medical witness should be neither taken by deposition nor offered in court without having been first the subject of a pre-trial interview between the witness and the lawyer who presents it. Such an interview is best had in the doctor's office where all of his records are available. It should be a face to face confrontation between counsel and the physician and it should be of sufficient length to adequately serve its purpose. Neither attorney nor physician can be properly prepared for the trial of medical issues unless such a pre-trial interview has occurred.

The indispensable nature of the pre-trial interview cannot be fully appreciated without consideration of the problem of communication; and more particularly, the problem of communicating with a jury. It is upon the evidence that a jury decides contested issues of fact. This is elementary, of course, but we seldom pause to reflect that the decision must be based upon evidence somehow communicated to the jury's collective mind through their senses—and particularly their senses of hearing and sight. So we are all too seldom really conscious of the crucial problem of communication. This is true as to all evidence, but it is even more significant in the area of medical proof where the problem is complicated by the need to translate scientific and medical terms into language intelligible to a lay jury.

Furthermore, in the trial of a lawsuit the problem of communication becomes more acute when one reflects that the evidence is given by persons other than the lawyer himself. Even "expert" witnesses are more often expert in their particular fields

* LL.B., University of Kentucky (1949); Kentucky Association of Trial Attorneys, sustaining member, American Trial Lawyers Association; Former Chairman, Insurance, Compensation and Negligence Section, Kentucky State Bar Association; Member of the Firm, Turley, Tackett, Savage & Moore, Lexington, Kentucky.

of knowledge than expert in communicating their knowledge and opinions to others. A doctor's training and skill as a medical man in no way qualify him to be an effective, communicative witness.

One real obstacle to the effective presentation of medical evidence is the fact that most physicians and surgeons are apprehensive, if not actually fearful, when making an appearance in the trial of a lawsuit. This obstacle is not always recognized by lawyers who, like most others outside the medical profession, are inclined to consider doctors as some sort of supermen. If, however, the medical man's fear of the courtroom is known and understood, the pre-trial interview may be used to prepare him for an encounter with this alien environment.

Generally, the physician does not like or even comprehend the adversary system of jurisprudence. To the trial lawyer it is self-evident that this part of our Anglo-American common law heritage is the best system ever devised by man for the ascertainment of truth where evidence is conflicting. To those of the medical profession, on the other hand, whose training and experience grows out of the so-called "scientific approach" to the discovery of truth, our adversary system seems unfriendly and cross-examination unfair.

Secure in the role of physician or surgeon, admired by his nurses and treated as a demigod by his patients, the physician may well be quite insecure in any other role. In the courtroom he is as much out of his element as would be the attorney in an operating room. So it is to be expected that he would be wary and even defensive. This may explain why some doctors appear to maintain some sense of security by using words which no one else understands.

Any physician who has made an ill-prepared appearance as a medical witness is likely to be fearful of his next appearance; but even those who have never had such an experience have surely heard the folklore of scathing cross-examination and "booby-trap" questions from colleagues or seen television programs which misrepresent the courtroom.

Finally, like other witnesses, the physician may be subject to "stage-fright." Some have personalities subject to easy excitation and suffer from a genuine hysteria.

The pre-trial interview offers an opportunity to lessen the doctor's antipathy and to allay his fear of the courtroom, thus helping to bridge the gap between two professions. It may engender the confidence necessary to present persuasive and effective medical evidence.

The lawyer must be thoroughly prepared for the pre-trial interview. Lack of preparation on his part is a disservice to his client. It results in wasted time, a commodity which is precious to both parties involved in the conference. Failure to prepare also ensures that the purpose of the pre-trial interview will not be achieved.

Generally, the attorney's preparation is a continuous process of educating himself in the fields of anatomy, physiology, trauma, disease processes, etc., in the same manner as he continues his legal education throughout his practice. Specifically, his preparation is directed, of course, to the case at hand.

There can be no effective communication of the medical evidence unless the attorney understands the medical problem. His enlightenment begins with the doctor's report, which should include at least (1) history, (2) complaints, (3) clinical, X-ray and laboratory examinations, (4) diagnosis, (5) therapy, (6) prognosis, and (7) evaluation as to permanent residuals, if any, and their effect on the patient-client. The report should be carefully studied with a medical dictionary close at hand.

Attention should be directed toward gaining some appreciation of the normal anatomy and physiology of affected members, structures or organs, the nature of the particular injury or disease involved, methods and procedures utilized in treatment, results obtained, complications experienced and likely to be experienced in the future, and both temporary and permanent effects on the health and life of the patient-client. This calls for medical research in standard medical texts, and perhaps even an examination of relevant medical journal articles. Any attorney who expects to accept employment in personal injury cases should have a basic medical reference library; but one may also have access to the library of a nearby medical school, hospital, or doctor. Publications such as the *Attorney's Textbook of Medicine* and *Lawyers' Medical Cyclopedia* are helpful for orientation and for their bibliographies; but the medical profession is more likely to accept

as authoritative the texts and writings published by doctors for doctors. Therefore, one's research ultimately should be aimed toward standard authoritative medical textbooks.

Careful study of the doctor's report and some research concerning the medical problem should precede the pre-trial interview with the medical witness. Even if the medical problem is not fully understood—as is usually the case—the attorney is assured that he can communicate with the physician and, at the very least, ask intelligent questions.

Of course, no attorney can make firm and final plans for the presentation of medical evidence without consulting his medical witness. Nevertheless, he should realize that it is his duty to plan the presentation of evidence. This is not the doctor's responsibility. Techniques of surgery are within the medical man's province; but techniques of trial are in the lawyer's field. To leave the medical proof in the hands of a physician is unfair both to the physician and to the client.

If he has studied the medical report and done the elementary research referred to above, a capable trial attorney will surely have some idea of the methods by which he hopes to communicate the medical facts to the jury at the trial. Before the pre-trial interview, he should make preliminary plans concerning the order of proof, the matters to be of primary interest, and the ways by which he will try to make them known and understood in court. Even though his plans are but preliminary ones, they breed confidence in a doctor who recognizes that the attorney knows what he wants in the way of medical evidence to support his client's claim.

In making his preliminary plans for the presentation of medical evidence at the trial, one should plan the use of exhibits, such as reproductions of drawings from standard medical textbooks or anatomical models. For the purpose of the pre-trial interview, and even for use at the trial of cases which do not warrant the expenditure of funds necessary for the preparation of special exhibits, reproduction of drawings may be inexpensively done by xerox or similar equipment.

When counsel is thoroughly prepared for the pre-trial interview, an appointment should be made with the medical witness. At the time the appointment is made, the witness should under-

stand that he will be compensated for the time involved. Sufficient time should be set aside for the interview, so that all matters to be discussed may be fully covered in an unhurried manner.

The purpose of the pre-trial interview is not to "coach the witness," an unethical practice beneath the dignity of any competent trial lawyer, but rather to prepare the medical witness for entry into a foreign environment—the courtroom—so that his special knowledge and professional opinions may be effectively communicated to a group of laymen.

The interview should be opened and led by the lawyer, who knows its nature, its purpose, and its importance to his client's case. His first task is to explain these things to the doctor.

The attorney must not assume that the physician knows either the law applicable to the case at hand, the law of evidence, or proper trial techniques. He should not assume that the medical man is an experienced or articulate witness. Nor may he justifiably assume that the doctor knows how to best present the medical evidence. On the contrary, one should treat the doctor in the same manner as one would expect to be treated if called upon to assist in surgery. Doctors know no more about law than lawyers know about medicine. They may know even less.

The doctor should be treated with courtesy and respect, of course; but courtesy and respect do not require that an attorney abdicate his responsibility for his client's case or consider any witness better qualified than he to try his client's lawsuit.

The interview should be conducted in terms of the doctor's "patient" rather than in terms of counsel's "client," because it is in the treatment of his patient rather than the prosecution of a claim that the doctor is primarily interested. Yet the doctor should be persuaded that his testimony is necessary for the economic rehabilitation of his patient, just as his treatment was necessary for his patient's physical rehabilitaton.

Any witness—medical or lay—will do better if he knows in advance what to expect of the attorneys, the court, and the jury; and if he knows in advance what is expected of him. Therefore, the legal proceedings into which he is now thrust should be described to the doctor. The importance of this phase of the pre-trial interview should not be underestimated. As mentioned above,

this is the attorney's opportunity to lessen the doctor's antipathy and to allay his fear of the courtroom.

First, the lawyer should explain the nature of our adversary system in such terms that the physician will understand the respective roles to be played by judge, jury, counsel, and witnesses.

Secondly, the lawyer should explain the nature of "proof" and the problems attending the presentation of admissible evidence. The doctor must be made to comprehend the need for expert testimony as to medical facts—and the place in legal proceedings of professional "opinion" evidence. One vitally important matter to be explained is the significance of the word "probability" in the minds of the legal profession, and care should be taken to distinguish between "probability" as used in medicine and the same word as used in the context of a lawsuit. One might even suggest that the medical expert testify in terms of "more likely than not," rather than in terms of "reasonable medical certainty," "probability," "possibility," etc.

Thirdly, in the same manner as he would tell a lay witness, the attorney should tell the physician that the force of his testimony will depend in large measure upon the assurance and confidence with which it is given; and the use of expressions such as "I guess," "I think," and "I suppose" should be discouraged.

Fourthly, the use of leading questions and the use of hypothetical questions should be discussed. Testimony of a medical witness should be his testimony, of course, and not the testimony of either attorney in the case. He should be told, then, that upon direct examination the lawyer questioning him may not use questions which suggest the answers desired and that upon cross-examination he need not accept the suggestions implicit in counsel's leading questions. So also, he should be informed concerning hypothetical questions that the facts related are assumed to be true, whether they are within his personal knowledge or not.

Finally, and again as he would tell any lay witness, the lawyer should tell the doctor to listen carefully to every question, to request repetition or explanation of any question not fully understood, to answer truthfully and candidly, and to frankly confess

lack of knowledge or memory if asked questions to which he doesn't know or has forgotten the answers.

The doctor should be prepared for cross-examination. The expected ordeal of cross-examination will unnerve most witnesses, and the medical witness is no exception. Proper pre-trial preparation will not only give the witness some measure of confidence, but it will also save him embarrassment at the trial and protect counsel's case from the collapse it might otherwise experience.

Having been told about the adversary system, the physician will be prepared to hear that the cross-examination may strike at his testimony in any one of many ways. Quite as important as preparing the witness for a "rough" cross-examiner is preparing him for the polite and gentle cross-examiner who would lead him over a precipice by way of a primrose path.

Generally speaking, a medical witness is prepared for cross-examination in the same manner as is a lay witness; but, as will be seen, there are some special problems which are of significance in his case. The general problems will not be discussed here.

The doctor should be told emphatically that his cross-examiner will be well-prepared; and that he must be ready to answer general questions concerning anatomy, physiology, and the injury or disease process involved, as well as specific questions concerning his patient.

The use of medical textbooks and treatises in cross-examination should be explained to the doctor so that he can cope with that practice. If his opinion is not shared by all segments of the medical profession, he must be ready to explain why and to justify his opinion.

As previously related with respect to direct examination, the doctor must be assured that only his honest professional opinion as to relevant matters is sought and that he is not required in giving such an opinion to exclude every other reasonable hypothesis. This is extremely important; because, if he is not prepared in this respect, the witness may be easily flustered by a cross-examiner who is prepared to show that his opinion is not a matter of certainty. He should not be left to the tender mercies of a cross-examiner who will not hesitate to embarrass him in this manner. Properly prepared, he will feel confident in saying that the practice of medicine is grounded in opinion, that doctors

treat their patients every day as in their opinion the patients should be treated, and that their results are generally good even though—being human—they sometimes err. He should know that his opinion need not be capable of demonstration beyond any doubt, but need only be such as to satisfy his own conscience.

Another significant matter for discussion in this respect is the matter of "subjective complaints" or symptoms. In some cases there are no "objective findings" or signs, and the physician's opinion is based solely on his patient's symptoms. In others, the symptoms are quite as much the basis for his diagnosis as are the signs. The cross-examiner will surely attempt to denigrate the doctor's testimony by relating it to the patient's credibility. If the witness is a treating physician who has not simply examined the patient for purposes of evaluation, he may counter such cross-examination with an explanation that his whole course of treatment was based upon his belief that the patient honestly and candidly related the symptoms.

The problem of communication has been mentioned in relation to the importance of the pre-trial interview. This problem should be discussed with the doctor, and it should be emphasized that his testimony is taken for the sole purpose of communicating to the jury his knowledge of the medical aspects of the case.

The physician is accustomed to thinking in scientific terms which enable him to express himself exactly, accurately, and without misunderstanding to his colleagues of the medical profession. He must be given to understand, however, that when he testifies he must either eliminate the scientific jargon from his vocabulary or carefully explain each scientific term as he uses it. As a result of ingrained verbal habits, the doctor may find it difficult to overcome the "tyranny" of words to which he is accustomed. Therefore, the lawyer must stress the use of plain language, graphic and descriptive, which will simply present and logically express the medical witness' ideas.

Furthermore, the doctor must be tactfully told that his demeanor is of no less importance than his language. He is not called to impress the jury with his erudition or to entertain them. He, like a lay witness, should be modest and unassuming. If he assumes an air of smugness or superiority he will surely antagonize the jury and thereby reduce his effectiveness as a witness.

Visual aids have long been used in medical education, so it is likely that the medical witness will be preconditioned to the use of demonstrative evidence in the communication of medical facts and opinions.

Presumably by now the lawyer has oriented himself generally as to the medical problems at hand, and he has oriented the physician as to the legal implications of his patient's problems. The interview should now turn to its classic phase—that of having the doctor acquaint counsel thoroughly with the particular medical problems involved, so that he will be well prepared to ask intelligent and penetrating questions on deposition or at the trial and to capably cross-examine any medical witnesses offered by his opponent.

This part of the interview may be commenced with a review of the doctor's report, the attorney interrogating as to any matters in question and the physician explaining the situation reflected by his report. Attention may be directed to the doctor's office notes, and he should be asked to go over the hospital charts and records with counsel. Any questions raised in the lawyer's mind by this material should be the subject of inquiry, and any inconsistencies in the various records should be thoroughly explained.

From this discussion the attorney should emerge with a clear understanding of (1) the anatomy and physiology involved, (2) the nature of his client's injuries, (3) the effect of the injuries, both on the immediate area involved and on other parts of the body, (4) various methods of treatment, both accepted and contraindicated, (5) the reasons for choice of particular methods used, (6) the results obtained, (7) complications, if any, and the reasons therefor, (8) temporary residual effects of the injuries, and (9) permanent residual effects, if any, of the injuries.

Having already discussed with the witness the problems encountered in presenting medical evidence by deposition or in the courtroom, counsel should now explain the methods by which he has planned to offer the proof in the case at hand. In doing so he should solicit comments from the doctor who, of course, may be very helpful in suggesting ways of communicating particular matters to the jury.

Since hospital charts, medical records, and other exhibits of

various kinds are likely to be used with the physician's oral testimony, their pertinence and use at the trial should be the subject of discussion. The efficacy of the written word as persuasive evidence should be explained to the doctor, and he should be told that even uncomplicated X-ray films are often an excellent means of interesting the jury in the case as well as demonstrating facts which are otherwise quite difficult for laymen to comprehend.

Suggested exhibits should be shown to the doctor; and he should be asked which, if any, of them, would be helpful in explaining the nature and effect of his patient's injuries. Furthermore, he should be asked for suggestions concerning other exhibits or devices which might be used to help the jury understand the medical evidence.

Counsel might well defer to the physician's judgment as to the use of certain exhibits and as to whether he can more effectively communicate with or without such aids.

Although implicit in the foregoing discussion, it should be clearly stated that the lawyer's attitude at this point of the interview may be expresed as, "Now, doctor, tell me what we can do in this case to effectively communicate the medical facts and your opinion to the jury in such a way that they will fully comprehend these matters." Needless to say, the physician can give one wise counsel in this regard. In all likelihood he has explained these and similar matters to many patients in the past, and from his experience in doing so may be drawn methods and illustrations which would never occur to the lawyer. The doctor may be asked for suggestions as to cross-examination of adverse medical witnesses; and, to this end, any reports of the other physicians should be at hand so that the witness may see and comment on them. The doctor may also be questioned concerning the names of relevant medical textbooks which can be consulted and used in further preparation for trial or in cross-examination of other medical witnesses.

If the witness is a general practitioner, tactful inquiry should be made as to whether his patient should be referred to a specialist, while explaining that the other side may well present the testimony of such an expert and that the witness may be saved embarrassment by having support for his opinion from a specialist.

Inasmuch as his patient's special damages may be in issue and a fair subject for cross-examination, the doctor's charges for treatment should be discussed. The doctor should be prepared to testify as to both the need for his professional services and the reasonableness of his charges. Furthermore, his compensation as an expert witness should also be the subject of discussion at the pre-trial interview. He is entitled to be paid for his time in giving a deposition or appearing at the trial. This should be made clear, and he should be impressed with the facts that (1) his compensation is not contingent upon the outcome of the case, and (2) his compensation is to be paid by his patient rather than by the attorney. If these sensitive matters are candidly discussed, neither doctor nor lawyer need fear embarrassment by frank testimony on both direct and cross-examination.

Although the foregoing discussion assumes that the physician's testimony will be presented in person at the trial, the attorney may well discover at the pre-trial interview that the doctor will not make a good impression at the trial so that his testimony should be offered by deposition. Indeed, the lawyer should recognize that a mediocre doctor who is a convincing witness will often better serve his patient in this respect than will an outstanding doctor who is a poor witness. Furthermore, it may be found that due to circumstances beyond control, the physician cannot attend the trial and his evidence must necessarily be proffered by deposition.

Therefore, after the pre-trial interview counsel must decide whether to take the doctor's deposition or schedule his personal appearance at the trial.

Even though the cost of presenting the doctor's testimony in person is usually somewhat greater than that of presenting the same testimony by deposition the use of deposition procedure is in many cases false economy. The expertwitness fee will probably be greater for a personal appearence, but the cost of the deposition itself, including the reporter's appearance fee and charges for the transcript and copy, should be borne in mind when making the decision. Generally, the medical evidence should be presented in person because its force and effect is obviously much greater than when offered by the reading of a deposition.

Following the pre-trial interview and if his testimony is to

be offered at the trial, the doctor's appearance at the trial should be scheduled and a firm commitment obtained as to his availability on that date. He should be told of the necessity of obtaining an order of personal attendance in order to protect the rights of his patient in case of his unforeseen unavailability. Otherwise he may be offended when served with the order, thinking that the attorney is not willing to "take his word" that he will be present. Then a list should be made of the records, documents, and exhibits which the doctor should have on hand at the trial in order that a subpoena duces tecum might be issued and served along with the order of personal attendance.

After a comprehensive pre-trial medical conference, one may expect not only to have prepared himself for the production of his medical evidence, but also to have on call an understanding medical witness whose fears of the courtroom are allayed and who will cooperate in its presentation. The persuasive effect of medical testimony at the trial is in direct proportion to the manner in which counsel conducts his pre-trial interview with his medical witness.