

WORKING WITH THE HEALTH CARE PROVIDER

By

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Topic Outline (Spoken Presentation)

1. The Cynic's View - "There is no working with lawyers."
2. Ten (10) Key Points to Remember:
 - a. Reverse Roles: placing yourself in the hide of the other
 - b. Seven (7) Principles of Persuasion
 - c. Know your case
 - d. Learn the medicine
 - e. Show that you care
 - f. Pay bills promptly
 - g. Provide the HCP with complete and organized materials, in a notebook, and take it back when through
 - h. Treatment: reasonable and necessary, of course
 - i. Billing Amounts: I'd rather not comment
 - j. Backup Expert(s)
3. The Bottom Line: "You (attorney) need me more than I need you. Act accordingly and we'll get along fine."

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Introduction

There are methods, and skill-sets that, in my experience, have proven more, and less, effective in enlisting the cooperation of health care providers. If you are a PI lawyer then health care providers are a major, important element because they are the crucial fact and expert witnesses that the medical part of your case needs to succeed. They provide opinions, *to a reasonable degree of medical certainty*, about the nature and extent of your client's injuries; working diagnoses and prognoses; disability; and opinions on causation and apportionment. (See Attachment 1: Washington Pattern Jury Instructions - WPI 2.10 Expert Testimony; WPI 15.01 et seq, Proximate Cause.)

How you work with the HCP's will determine, to a large extent, how successful you will be at deposition, arbitration, mediation and trial in these cases.

If you are to become an expert in PI cases you must develop skills that help you enlist the support of your client's own HCP's, as well as skills that help you successfully challenge and overcome the often unfavorable opinions of 'defense' medical experts.

Most "treating" HCP's spend their time in the clinic or hospital, not in the courtroom. Many of them tend to feel uncomfortable with lawyers and the legal process. Tort reform battles, statewide and nationwide, are likely not helping bridge the gap between the medical and legal communities.

However, many defense medical experts make a very comfortable living performing defense medical exams (DME's), writing typically unfavorable (i.e. 'defense favorable') reports based on their typically brief physical examination of the client and a review of the available medical records, and testifying at deposition and trial. These are names (the 'usual suspects') that you will likely become more and more familiar with as they appear and reappear on cases with unpleasant regularity.

In this paper I'll offer my suggestions and approaches to dealing with each of these players in the drama that is your case. But remember, there are as many approaches to dealing

effectively with another human being as there are people in the world. What I say, and suggest in this paper, are tips, strategies, and behaviors that have worked (or not worked) for me. I believe each of us needs to develop a style and approach that is congruent, unique, and genuinely our own because, as the great Gerry Spence teaches, we can only be our own uniquely perfect selves.

The Treating HCP

The treating HCP's are your client's treating doctor(s), the general practitioner, orthopedist, neurologist, surgeon, anesthesiologist, radiologist, nurse, physical therapist, chiropractor, naturopath, acupuncturist, etc.

Each works within the established rules of the 'domain' of medicine, and his or her own sub-domain (or 'field') of particular expertise, and each tends to be genuinely committed to (if not occasionally disillusioned by) the well-being of his or her own patients.

As with any domain and field of expertise, there are established ways of doing things. For instance, all HCP's, to one extent or another, must maintain a medical file or chart of the

patient's medical care. Long before you actually speak with the HCP you should have his or her entire set of records and files of your client.

By law the HCP's must release this information if the written request is accompanied by a properly executed 'HIPAA' (Health Insurance Portability and Accountability Act) compliant release form. You can obtain the records by a direct request to the HCP or through a records retrieval service that specializes in this. (See Attachment 2: HIPAA Compliant Authorization to Disclose Health Information.)

Once you have obtained, organized and reviewed *all* of your client's relevant medical records, then you should have a fairly good idea where the strengths and weaknesses of your medical case rest, and what you may need, or need to do, to emphasize or overcome them, respectively.

Practice Tip Some lawyers disagree, however I find it is immensely helpful to hire someone who is properly trained and experienced, to conduct an in-depth review and examination of the medical records. Such persons are highly skilled at organizing the records in an easily accessible fashion, and preparing a detailed, written time chronology and treatment

summary. This costs a bit more, unless this function is capably performed by someone in your own office, but saves me precious time to work on other aspects of my case, and the written chronologies and summaries can provide a reliable 'snapshot' of the medical history that can be helpful to *both* the HCP and me in focusing in on the most important issues unique to the case.

HCP's and Written Reports

There may come a time when it is to your advantage to obtain a written report (as simple as a letter, or as formal as a declaration) about some or all of the medical aspects of your case. Typically this will be done to improve a case's value or chances of settling, and the written report or declaration will be provided to the insurance adjuster or to opposing counsel. Occasionally, it may be used as part of a summary judgment motion, or motion in limine, to establish causation, or to establish, in advance of trial, the reasonableness and necessity of the medical care and bills.

Practice Tip I can't emphasize enough the importance of improving the medical record in this manner. However, one needs to be careful in one's approach because, once stated,

especially in writing, an HCP's opinion rarely changes, and is probably suspect indeed, if it does, at least without very good reason.

Identify the questions you need the HCP to answer for clarification. As I stated earlier, these will typically center on the following ten (10) areas:

- nature and extent of the injuries;
- likely cause of the injuries;
- apportionment, if there are more than one possible causes of injury;
- prognosis for recovery;
- need for further treatment, and of what kind;
- need for further treatment, and by whom;
- disability (whole or partial; permanent or temporary);
- work restrictions;
- reasonableness and necessity of treatment and care;
- anticipated costs of future care.

(See Attachment 3: Letter to HCP requesting written opinion re: health care.)

Practice Tip

Believe it or not, HCP's are human too. I'll never forget my very real surprise the first time a doctor called

me up at the office, late one evening, to discuss a case I had timidly called him about. Before then I'd never known that physicians would call and discuss a patient's care or an attorney's needs. In this case, the physician was returning my call, and he could not have been more helpful or gracious.

Most HCP's are willing to schedule a time for a telephone conference that is convenient to them. However, be prepared, and be agreeable to pay for their time. Typically the HCP will charge in 15 minute increments, but each varies. Talk to the HCP's assistant first. Get his or her fee schedule, arrange for the conference in advance, and prepay. Above all, always always be courteous and appreciative of the HCP's time and expertise. A written 'thank you' in following up is also a good idea.

Practice Tip Ask the physician or HCP to call and discuss his or her opinions *before* he or she commits to them in writing. Remember, everything that goes into the HCP's file is discoverable.

Practice Tip I owe this suggestion to my colleague (and *Eagle*) Joe Cunnane. Joe has had success meeting in person with the HCP, and getting the HCP's permission to audio record the meeting, especially the 'Q & A' portion. Joe then has the

audio transcript typed up, shapes his own working draft of the narrative for the HCP's review, changes (if any) and signature. The advantages to this method are at least two: 1) the attorney has some control over the output (the contents of the narrative); and 2) the HCP's patient file is not compromised with an unfavorable narrative that might be subject to discovery.

Costs and Fees

Be prepared for sticker shock when dealing with the HCP. These are professionals with businesses to run, payrolls and overhead. They value their time. Some will have a fee schedule that seems outrageous. Some will seem fair. Just remember, *you need them more than they need you*. Accept it. Deal with it as a fact of your professional life, and a cost of doing business, then smile in 'thanks' when handing over the check. They are, after all, an essential part of your winning team.

If you cannot or are not willing to 'pay the freight' then consider associating with more experienced, and better-funded co-counsel. But above all, remember, medical cases are an 'expert driven' game. Just like poker: you've got to pay to play.

Practice Tip

Instead of a telephone call, you can also schedule a meeting with the physician. There is no substitute for personal contact, face-to-face and eye-to-eye communication, to establish rapport with another. This is especially helpful when preparing your client's HCP for deposition.

Finally, if there is a strong likelihood that the case will be going to trial, you will need the testimony of your client's HCP(s). It can be prohibitively expensive to arrange for physicians and others to take time and prepare for, travel to and attend court proceedings, especially when the trial date is subject to continuance or postponement by the court.

The civil rules (CR 30 and CR 32) provide that a party may 'perpetuate' the testimony of a witness by deposition at an earlier, more convenient time. The deposition can also be videotaped for replay at trial. However, be prepared for the court to order selected editing of the videotape on the defense's motion. It is unpleasant, scurrying to have a videotape edited on extremely short notice. This problem is not encountered with written deposition transcripts that can easily be edited by lining out the court ordered edits.

Generally, plaintiff HCP's prefer to avoid having to arrange or rearrange their schedules to accommodate someone's trial. Therefore, you may want to consider perpetuating his or her testimony. This is generally less expensive, and has the benefit of letting you know what the testimony of your witness will be. The downside is the potentially lessened persuasive impact of a deposition that is only read or shown to the jury, as opposed to the inherent dynamic of the witness testifying live, in the witness chair, making eye contact and connections with the jurors.

Practice Tip There are different schools of thought, however I believe that videotaped depositions of HCP's are *less* effective than verbatim reading of deposition transcripts. Having seen enough of these videotaped depositions, I see the jurors tuning out rather quickly. Remember, there is typically only one camera angle in a perpetuated video deposition. Most jurors are used to the faster-paced styles and editing of modern television programs these days. A lengthy videotaped deposition (anything more than twenty minutes) can seem like an eternity to them.

Instead, I will typically ask a colleague to read (and play) the part of the HCP, and work with my colleague to learn and develop ways of maximizing rapport with the jury while doing so.

In my experience, this 'warm body' approach has been surprisingly effective, and after trial, debriefing the jury, they tell me, for the most part, they neither noticed nor cared that the deposition was read by someone other than the HCP.

The Defense Medical Examiner (aka 'the Enemy' and Other Four Letter Words)

Nothing gets a plaintiff attorney's blood boiling quite so much as the written report of the Defense Medical Examiner (DME). These so-called 'objective' medical exams often seem to be anything but 'objective' and you will wonder in frustration, as you read his or her report in shock and awe, just what planet does this 'expert' come from?

Civil Rule 35 (Physical and Mental Examination of Persons) allows for the defense to require the plaintiff to be 'examined' by a competent medical expert. Typically the defense will retain an examiner from one of the 'panel' services that exist for this very purpose. Medical Consultants Network (MCN), and Central Seattle Panel of Consultants (CSPC) are just two of several that are routinely used by defense firms and the insurance companies that hire them.

This is big business, and increasingly, physician incomes are shrinking due to restrictions on billing practices and health insurance company belt-tightening. At the same time, the costs of running a medical practice are growing. As a result, many doctors and other HCP's are making themselves available to this kind of work. Some do so exclusively, others as adjunct to an active practice. Still others are retired from active practice and are finding that DME work is a lucrative way to supplement their incomes. I do not begrudge any of these people. In my opinion they have every right to earn a living.

In any event, as with any profession, there are some with more, or less integrity, than others.

Practice Tip Do not be so quick to dismiss, out of hand, an unfavorable DME report. In my experience, some of these experts may simply have a more conservative mindset, and are expressing what they truly believe, based on their own experience, first-hand observation and interaction with the client, the actual examination, and their review of the client's relevant medical history. Read carefully what the examiner is saying. If the examiner's conclusions seem patently absurd or biased, then be glad, and begin planning ways to expose the

incompetence or bias. Typically your opportunity for this will be at the deposition of the DME and/or during your cross-examination of the DME at trial.

Also, the DME may not have been provided with all of the relevant case information. There is nothing to stop you from educating the DME, either as to relevant facts or as to the current state of the medicine.

Neutralizing the DME's Opinions

Typically, a DME's adverse opinions are countered by: a) the more favorable opinions of your client's own HCP's; b) a showing of incompetence or a lack of understanding of 1. facts and issues or 2. of the medicine, in the particular case; and c) a showing of bias. The deposition of the DME is the place to explore these issues. However, before you take the deposition of the DME, you will find it helpful to learn as much about the case facts, the current state of the medicine as it applies to your client's injuries, the peer-reviewed literature, the background and demonstrated expertise of the DME, the prior testimony of the DME (if any), and the compensation the DME receives.

There is much you can, and should learn before taking the deposition of the DME. Since DME's are 'expert' and not 'fact' witnesses, there are different approaches for neutralizing their testimony and opinions. This is a proper subject for a CLE of its very own.

Still, a good starting point is, where else, the Internet. Another good resource is the Health Sciences Library at the University of Washington Medical Center. (See Attachment 4: a list of useful medical reference resources.)

Practice Tip When noting the deposition of the DME, be sure to include a Subpoena Duces Tecum setting forth in detail the items, materials, and documents you wish the DME to bring to the deposition. (See Attachment 5: Subpoena Duces Tecum of Defense Medical Examiner.) More than one DME has refused to testify, and been subsequently disqualified, when ordered by the court to provide relevant financial information (e.g. IRS Form 1099's) that goes to bias.

Paying the DME - Why Should / Have To?

Finally, it hardly seems fair, but the civil rules provide that the DME may be compensated for his or her time preparing for,

traveling to, and attending the deposition. You are likely to find the DME's charges to be excessive. There are ways to deal with this situation. The first is to apply to the court and seek a determination that the DME's fees are unreasonably excessive.

Practice Tip *Eagle* members of WSTLA can access sample motions, declarations and orders seeking a determination of unreasonableness of the DME's fees on the *Eagle* portion of the WSTLA website. There are hundreds of sample forms and documents available that make *Eagle* membership worthwhile.

The second is to ask the question whether or not it is even necessary to take the deposition of the DME. There are probably as many schools of thought on this as there are attorneys in practice. Some attorneys believe that taking the deposition of the DME simply alerts, educates and prepares the defense and the DME to the issues that will be raised on cross-examination at trial. Others believe that it is better to conduct a thorough deposition in advance of trial, highlighting and pinpointing the weaknesses of the defense case and the DME's opinions. Certainly, if the deposition is done well, this can be very helpful in settlement discussions or in mediation at a later date.

Finally, in some cases, in MAR (mandatory arbitration) for example, taking the DME's deposition in advance may simply not be cost-effective. You will need to carefully weigh all these competing factors and determine the best strategy as is appropriate for the unique aspects of the case. However, careful considerations to strategy in a given case should never be trumped by one's own financial resources or lack thereof. Again, this is where an experienced and better-funded co-counsel can make a real difference. Remember, you can't win a war without committing resources. Thankfully we don't give our lives, but we must be prepared to give our time, efforts, thoughts, creativity, commitment, and funds to our cases.

Practice Tip What typically drives settlement negotiations is 'fear'. If the defense sees you are doing the work, and digging deep into your own pocket to fund the development of the case, then they will more likely believe that you believe in your case, and that you are genuinely committed to take the case all the way to trial, if necessary. Do not underestimate the power and influence this commitment and belief in your case has on your opposing counsel and the adjuster he or she answers to. Commitment and caring are contagious. And if the defense gets

bitten by the bug of *your* devotion to client and case, then they are more likely to operate, react and negotiate out of fear, and that is exactly where you want them to be.

But the reverse is also true. If the defense senses your own real commitment to the client, the work, or to spending the monies necessary to win are lacking, then they will recognize *your* fear, and that will almost certainly have an unfavorable impact on their evaluation of the case, and you will be at a certain disadvantage come settlement time.

Index of Attachments

Attachment 1: Washington Pattern Jury Instructions – WPI 2.10
Expert Testimony; WPI 15.01 et seq, Proximate Cause

Attachment 2: HIPAA Compliant Authorization to Disclose Health
Information; United States Department of Health & Human
Services HIPAA Fact Sheet

Attachment 3: Sample Letter to HCP Requesting Written Opinion
re: Health Care (with 'Thanks' to *Eagle* Member John Budlong,
whose form I borrowed from liberally several years ago).

Attachment 4: List of Medical Resources

Attachment 5: Subpoena Duces Tecum of Defense Medical
Examiner