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III. ANTICIPATE IMPORTANT PRETRIAL ISSUES

A. Expertly Calculate the Amount of Compensatory Damages

Compensatory Damages are such as will compensate the injured party for the injury sustained, and nothing more. Blacks Law Dictionary.

1. Background

The rules for assessing and awarding economic damages are based on the universal principle of placing the injured victim in a position as nearly equivalent to where he or she would have been but for the tortious injury. Compensatory damages are the damages awarded as compensation, indemnity, or restitution. Damages for pecuniary loss include compensation for harm to earning capacity and the creation of past and future economic liabilities. Every tort victim is entitled to recover damages from the tortfeasor for all past, present, and prospective harm legally caused by the tort. The amount or degree of damage is measured by the total harm which has resulted or appears probable to result in the future. Depending on the character of loss, the value of economic damages may be calculated by reference to market, exchange or contract value, historic value of services or value peculiar to the victim's circumstance.

Each trial must have a recognizable and cognizant theme. Such a theme will depend upon the facts and circumstances of the liability and damages at issue. However, the underlying principle is that monetary damages are the only remedy that

will “make the client whole”. In this context, a jury must be guided in deliberation about the purpose of a significant monetary damage award, as follows:

a. To motivate the jury to award damages;

b. To fix a wrong that has been committed;

c. To help the injured party;

d. To make up for the loss;

e. To get revenge for a juror, family or friend that was wronged;

f. To express anger about the defendant’s conduct;

g. To make a social statement;

h. To make an example of the defendant, their industry or practice;

i. To make the defendant take responsibility;

k. To take care of a likeable party;

l. To reward and support a justified legal battle; and,

m. To stop wrongdoing.

2. Indiana Pattern Jury Instructions (IPJI)

The IPJI provide the basic elements of compensatory damages:

Nature and Extent of Injury - 11.20 - “The nature and extent of the injury and the effect of the injury on the plaintiff’s ability to function as a whole person.”

Permanent or Temporary - 11.21 - “Whether the injury is temporary or permanent.”

Pain and Suffering - 11.22 - “The physical pain and mental suffering experienced to the present and to be experienced in the future due to injury.”

Loss of Earnings - 11.23 - “The value of lost time, earnings, salaries and loss or impairment of earning capacity.”

Medical Expenses - 11.25 - “The reasonable expense of necessary medical care, treatment and services and the reasonable expense of future medical care, treatment and services.”

Pre Existing Condition - 11.26 - “The aggravation of a previous injury, disease or condition.”

Disfigurement/Deformity - 11.27 - “Disfigurement or deformity resulting from injury.”

Mental Anguish - 11.28 - “Fright, humiliation, or mental anguish experienced by plaintiff due to the “incident”.”

3. Compensatory Damage Foundation.

The requirements of proof on all economic damages are:

a. Proof of the fact of past loss;

b. Proof of the probability of future loss;

c. Proof of the causal linkage (e.g., proximate cause) between each category of past and future loss and the tortfeasor’s misconduct; and

d. Proof of the reasonable value of each existing or anticipated loss.

The evidentiary sources of this proof depends somewhat on the circumstances of the particular case, but invariably calls on a mix of lay and expert witnesses, documentary and other demonstrative evidence and illustrative exhibits which synthesize complex or cumbersome facts and, ideally, convey succinct memorable messages. Typically,

proof of economic damages incurred through the date of mediation or trial rely predominantly on lay evidence and simple mathematic computation. Proof of future economic damages, on the other hand, is largely expert dependant.

4. Issue of reasonable certainty and speculation.

A plaintiff is not required to prove compensatory losses with absolute certainty. There is inherent tension between the expectation damage principle, which affords recovery for future losses that are probable, and the uncertainty proviso, which instructs that damages are not recoverable beyond what the evidence shows with reasonable certainty. Courts are admonished to reject future loss awards that are based on speculation. Jurors are inclined to perceive most future loss calculations and prognostications as somewhat speculative. Defense counsel are conditioned to characterize every prospective damage as the product of guess work. Uncertain or speculative damage claims are precluded only where the fact of damage is uncertain, not where the amount is uncertain. Once the existence of a loss is established, it is sufficient if the evidence affords a reasonable basis for estimating the amount of loss by the trier of fact. Generally, any uncertainty in calculating the amount or extent of anticipated loss should be resolved against the defendant.

5. Major Elements of Economic Loss

There are three major components of economic damages: (a) income, benefits, and earning capacity; (b) medical, caregiver, and life care expenses; and (c) replacement services. Maximizing recoveries in each of these areas requires the consulting services and testimony of multiple “experts”

a. Calculating Future Losses

Calculating past financial losses is straightforward, and accomplished via tax returns, W2 and 1099 forms. If such forms are not available, an annual Social Security earning and wage statement may be sufficient to establish past earnings. Future losses, on the other hand, present the biggest challenge and the largest opportunity for recovery, both economic and noneconomic.

The categories of future damages which typically require actuarial calculation and expert assistance are lost earnings and employment benefits (particularly retirement and health insurance), medical and caregiver expenses and, broadly applied, replacement services.

A paradigm of future economic losses are set forth as follows:

1.Base amount of loss or expense

2.Frequency estimate

3.Time or duration

4.Comparative or mitigating influences

5.Rates of inflation or growth

6.Impairment of earning capacity

7.Lost benefits

8.Worklife and retirement expectancy

9.Gender and race bias

, 10. Average wage growth

b. Calculating Medical Expense

The evidentiary requirement for establishing past and future medical and related health care expenses are overlooked until an approaching deadline for expert

disclosure or a pretrial conference. Medical expenses (both past and future) should be considered an integral part of the entire case and typically the largest element of damages. Reasons for giving continuing attention to medical expenses

1.They are the category of recoverable damages provable with the highest degree of precision and most readily acceptable to the jury in formulating an award.

2.They provide the framework against which you can convincingly argue pain, suffering, and loss of enjoyment of life, and a yardstick against which judges, jurors, defense counsels, and adjusters frequently measure the magnitude of injury.

3.They are the key to identifying pivotal experts and support witnesses early in the case and developing succinct evidence with maximum persuasive potential.

4.They help identify collateral sources of payment and potential subrogation liens.

5.Inattention to detail on medical expenses risks disrupting the flow of the trial and invites challenges on foundational proof with potentially disastrous results.

It is essential to confirm that the injuries requiring medical treatment were proximately caused by the occurrence which is the subject of the action or claim. This is not just an issue of recovery on medical bills, but a necessary aspect of proof on the noneconomic losses related to injuries, as well. Although the causal linkage is often obvious and can be circumstantially inferred, there is no reason to risk the court or jurors missing the connection by omitting simple, straightforward proximate cause testimony. In the complex case, this will require expert testimony, particularly if preexisting conditions are an issue.

It is equally essential to show that the treatment was reasonably necessary and

appropriate to the plaintiff's condition or injury. In routine cases the connection may appear obvious, but to avoid problems all that is generally required is a simple set of questions to a competent witness, confirming that the treatment provided and the attendant expense were reasonably necessary in the witness's professional or otherwise informed judgment.

Indiana requires proof that the cause and necessity of a client's medical treatment in terms of a "reasonable degree of medical certainty" or applying other variations on that same theme of probability. These standards of proof may be only significant to lawyers and judges, but fulfilling the requisites with precision is critical. It is important to review the foundational standard with your experts—particularly treating physicians—and script out the key questions and answers in advance of deposition and trial testimony.

The foundational requirements for introducing evidence of future medical expenses is the same as each of the elements for past expenses, with a few vitally important extra considerations. The most significant difference is in the area of medical necessity; namely, whether further treatment and care is probable and whether the character of treatment and care anticipated is appropriate and reasonable. The fundamental elements may be the same as with past expenses, but the quality and quantity of proof is very different.

1.Expert proof

With rare exception, unless the connections are matters of common knowledge, expect testimony will be required to prove causation, probable necessity, and reasonableness on future medical and caregiver expenses.

2.Probability

Proof of a probable future expense only requires that it is “more likely than not” to occur; stated differently, that there is greater than a “50-50 chance.”

3.Speculation

As with other aspects of economic damages (see supra, at pp. 2-4), the rule that prohibits recovery for speculative losses should be properly appreciated. The character of future loss, with an associated treatment need and expense, must only be shown with reasonable certainty, e.g., it is probable the loss will occur. Any proof that affords a reasonable basis for determining the amount is sufficient.

4.Statistical proof

With certain maladies and medical conditions (lung cancer, for example), statistical proof may be available to help an expert prognosticate the likely course of changes in the plaintiff’s health, treatment needs, and expense.

As each aspect of past and future medical and caregiver expense is measured against each of the above elements of evidentiary foundation, the level of competence required of the foundational witness—whether as lay, expert or special witness—becomes apparent. On issues of causation, necessity and probability testimony from a cooperative treating physician is probably best. On the reasonableness of medical expenses, however, a properly credentialed nurse or rehabilitation specialist may work better and will avoid cluttering the important messages of the treating physician’s testimony with minutia. For authentication of medical bills and other specials, the plaintiff or a family member is usually a competent witness. Surprisingly, physicians and other providers may not be able to authenticate

their own bills. So, consider calling a custodian of medical and accounting records for the health care provider.

In wrongful death cases, most jurisdictions allow recovery for loss of household services. In seeking this recovery, it is a common practice to itemize services like household repairs, cooking, washing, managing finances, and so on, previously performed by the decedent, estimating the frequency of their occurrence, and valuing the cost of replacement utilizing wage rates for comparable services in a labor market. This same conceptual approach of placing a precise economic value on a seemingly intangible loss has potential application in other dimensions of the damage case, as well; even in personal injury actions.

B. Should You Use a Trial Consultant or Mock Trial

1. Jury Consultant

A jury or trial consultant is an individual with expertise in trial presentation, preparation, themes and jury selection. While there is no recognized training for trial consultants, frequent occupations include, psychologists, neuro linguistic programmers, or counselors. Expense varies between trial consultants, primarily based on experience, services provided and nature and extent of involvement. A trial consultant can be invaluable in a large damage case, such that the expense of the same is justified by the potential verdict range.

In a large damage case, a trial consultant should be involved early in the litigation process. It is important to begin theme development during the discovery process so that the theme may be intertwined throughout case development. Such a consultant may assist in theme development, as well as work with key witnesses

(including the plaintiff) who may not otherwise be familiar with the litigation process.

A jury consultant may also assist in the creation of demonstrative aids, jury questionnaires, exhibits and the like. During voir dire, a jury consultant may be helpful in attempting to de-select potentially biased jurors or those individuals with preconceived negative beliefs. Finally, a jury consultant may assist in conducting focus groups or mock trials.

2. Focus Group

A focus group is a representative gathering of potential jurors. The participants can be strangers, friends, or participants from previous focus groups. A focus group provides you an opportunity to obtain feedback by having a number of people sit through a shortened version of a trial, portions of a trial, or testimony of a particular witness. Focus groups are sometimes called mock trials and can easily be customized for whatever needs you may have.

One of the most important uses of focus groups is to help develop effective themes for cases. Every case needs a theme. There can be many themes under the same set of facts, but there is usually one that best fits the case. Focus groups can help us figure out which theme will be the most effective. When laypeople sit around and discuss a case, it is amazing how their characterization of a case can be right on the money and provide a theme for the case that the lawyers would never think of.

Focus groups allow lawyers to assess how potential jurors will receive their clients and witnesses. Focus groups also give the clients a chance to get some excellent feedback on how well they perform, how persuasive they are as witnesses, and what they can do to make their testimony more effective. Clients can testify live or

be presented by video. The advantage of having clients testify live is that it makes the testimony more realistic and gives the clients a chance to practice their testimony in a setting that closely resembles a trial. When presenting a client's live testimony to a focus group, we normally use two attorneys-one does a direct examination of the client and the other conducts the cross-examination. Hard questions should be asked on cross-examination. The cross-examination of the plaintiffs should be better than it will be at trial. Every weakness of the testimony should be raised on cross-examination. We then usually open the witness up to the focus group members for any questions that they have concerning the testimony.

If the focus group is being conducted in a setting that allows visual monitoring from a different room, the clients will be able to watch and listen to the focus group discuss their testimony. The clients will be able to see and hear what people think about them as witnesses and they can gain insight into how they can be better witnesses. It is also helpful to video the clients when they are giving live testimony so that they can later go back and watch themselves testify. By listening to the comments of a focus group and seeing themselves on video, clients will have a better appreciation of their strengths and weaknesses than they would by just listening to their lawyers critique them.

A successful focus group should include an unbiased, yet shortened presentation, covering both sides of the dispute. After the presentation, the mock jurors are asked a series of carefully crafted questions, to determine issues that are important, are not important and questions that the jury would like answered, but were not otherwise covered. Having formed an emotional bond with a case, it is easy to

either lose sight of the big picture or fail to realize the importance of secondary aspects of the case. A fresh outlook obtained through a focus group that has not been associated with the case has often opened our eyes and allowed us to see more clearly the strengths and weaknesses of the case before trial. A properly conducted focus group, or better yet, a series of properly conducted focus groups, can be a tremendous help in determining a realistic verdict range. Focus groups can highlight elements of damages that are most important and which elements of damage to downplay or even abandon. Loss of consortium is an issue that often presents a dilemma in certain cases. Do you present the issue to the jury or not? Does a claim for loss of consortium make your clients appear greedy and actually reduce the verdict for the spouse who has the actual injury? Is a scar bad enough to ask a jury to compensate the plaintiff for it, or is the plaintiff better off not asking for money for a scar, or asking for a small amount for the scar and focusing instead on other more significant damages? Focus groups can help answer these and similar questions.

Focus groups can let you know if your clients are perceived as legitimately hurt or are whiners. Determining how potential jurors perceive your clients is probably the single most important aspect of evaluating the plaintiff's damages. If your clients are viewed as malingerers or are not liked by the focus group, then their case is obviously worth less unless your clients can change how they are perceived. A focus group can help identify the reasons the plaintiff is viewed unfavorably. You and your clients can then work on these issues to see if they can change the way that they are perceived.

Subsequent focus groups can then let you and your clients know if they are capable of changing their presentation to make them more likable. What you learn will

provide valuable guidance in determining the value of the case and whether your clients should settle or go to trial. In addition, a focus group results may demonstrate to a difficult client, serious issues of liability or damages.

C. Effectively Prepare Key Witnesses to Testify for Deposition and Trial

1. Preparation of the Lay Witness

As set forth above, a trial or jury consultant may be useful in preparing a client or key witnesses for deposition and/or trial testimony. Most lay witnesses are foreign to the litigation process, and certainly testifying before a judge and a jury at trial. It is worth the time, effort and expense to invest in a witness preparation video. Such a video will establish basic ground rules and client expectations at such proceedings, in addition to answering basic questions about the legal process. If the case is proceeding to trial, schedule a time to meet the client at the courtroom. Have the client sit at counsel table; sit in the witness box; and, sit in the jury box. This experience will assist the client to be more comfortable and relaxed for their "day in court".

The basics of witness preparation are fundamental and important. There is no substitute to interacting with the client or witness before their testimony. Keep in mind that if you do not like your client, the odds are likely that the defense lawyer, adjuster, judge and jury will not like your client either. As a result, follow these steps in witness preparation:

1.Each witness should be prepared by the lawyer who will be leading his or her testimony at trial, individually.

2.Review with the witness all previous testimony, examinations for discovery, answers to interrogatories, written and oral statements, and any other material which

could be used for possible impeachment. Explain to the witness how the impeachment process may be used by the opposing lawyer with respect to prior inconsistent statements. If necessary, read the information to the client or witness. Do not presume that the witness can read, and if so, that the witness actually understands what is written or its potential impact.

3.Review with the witness all exhibits he or she will identify or authenticate, explaining the foundation requirements for each exhibit and how they are intended to be used in court.

4.Review this witness's testimony in the context of the probable testimony of other witnesses to see if there are any inconsistencies. If there are, look for explanations for the inconsistencies that can be used by the witness to explain to the court the reason for the inconsistencies.

5.Prepare the direct examination of the witness and review it with the witness repeatedly. Make sure the witness can actually testify to what you anticipate he or she can, and make sure that the foundation is established for all necessary exhibits. Once the general outline has been set forth, go over the actual questions in light of evidentiary requirements. Explain why you cannot use leading questions, and continue your preparation until the witness is thoroughly familiar with the questions and can answer them in the clearest, most accurate way. Preparation should never continue to the point where the testimony sounds memorized or rehearsed.

6.After the direct examination has been prepared, review with the witness the areas that cross-examination will cover, explaining the rules of cross-examination and the purposes. Have an associate do a sample cross-examination of the witness.

Counsel the witness to keep his or her answers brief and direct, and to only answer the question asked.

7.Explain to the witness the demeanor that he or she should employ in the courtroom, and that he or she should dress neatly and conservatively appropriate to his or her background. Explain how he or she should stand, the administration of the oath, and to address his or her answers to the judge or the jury as the case may be.

8.Prepare the witness for his or her courtroom testimony, explaining that these rules will affect the way the court and jury will evaluate the witness and his or her testimony:

a. Listen carefully to every question and answer only that question, without volunteering extraneous information.

b. If you do not understand a question, say so, and counsel will rephrase it, and don’t be afraid to acknowledge that you can’t remember an answer if you genuinely have a memory lapse. Use approximations for dates, times, and distances, and try to give positive, clear, and direct answers to every question. Avoid the use of the vernacular, or the use of technical language typically unfamiliar to the witness.

c. Be serious and polite at all times, without exaggeration or understatement. Cute or clever answers are forbidden, and the witness should never argue with counsel or the judge. Resist the temptation to lose your temper with questions that are potentially uncomfortable.

d. Testimony is typically restricted to what the witness personally saw, heard, and did. The witness can generally not testify to what others know, or to conclusions, opinions, and speculations.

e. If an objection is made by either side to any question or answer, stop and wait for the judge to rule. If the judge overrules the objection answer the question, and if the judge sustains the objection, never try to squeeze an answer in when an objection has been made.

f. Explain the purposes of direct, cross, re-direct, and re-cross and the forms of questions employed in each type of examination.

g. Explain trick questions that the other side may ask, such as “have you talked to anyone about this case.” Explain how such questions can be accurately and fairly answered.

h. Above all, remain courteous and always tell the complete truth according to your best recollection of the facts and events involved.

Many attorneys prepare a complete question and answer outline for use at trial. Under this method every question you intend to ask and the witness’s anticipated answer is written out. If you use this method, do not show the actual written questions and answers to the witness as opposing counsel may ask the writer if he or she prepared or saw any outlines of his or her examination. The disadvantage is that unless you are a skilled actor, your questions will sound as if they are being read from a script. However, such a technique is impressive on cross examination of a hostile witness. Prepare the questions and answers in advance, with citations to impeachment material at your fingertips. Not only will the jury be impressed with concise examination, but empowered with readily available impeachment material.

Many attorneys employ a narrative manner for purposes of direct examination on friendly witnesses. Under this method you write out in outline form what the witness

will say and do on direct. You then simply follow the narrative, posing questions that will elicit the desired answers. This will have the advantage of fresh-sounding and spontaneous answers and allow you to retain flexibility during the direct examination.

2. Preparation of the Expert Witness

Once you have passed pretrial motions attacking your expert, you will have the opportunity to present the expert's testimony to the jury. Before the expert has the opportunity to give and discuss his or her opinion, a proper foundation must be laid. First, the expert must be introduced to the jury and qualified. This introductory phase of the testimony presents an excellent opportunity to personalize the expert. Working with an expert before trial can help to develop a rapport between yourself and the expert. If there is a connection between you and the expert witness, the jury is more likely to pick up on it and develop a more favorable opinion of the expert. The reverse is also true.

In qualifying the expert, there is a risk of losing the jury's attention and interest. Long and tedious accounts of educational background and practical experience can lure a jury into boredom and indifference. When a witness is first called, the jurors are highly interested in why the witness is before them and what they have to say. Taking more time than necessary to qualify the witness runs the risk of losing the jury's focus. The expert's credentials should be covered enough to qualify him or her to testify and to sufficiently impress the jury with credentials and credibility. You must keep this in mind while preparing for the direct examination of an expert witness. The introductory phase sets the stage for subsequent testimony. In order to maximize expert testimony, the stage must be set in the beginning by effectively qualifying and personalizing.

After introducing and qualifying the expert, the purpose of the expert's testimony must be addressed. In response to direct questioning, the expert will explain the issue he or she will testify about and the related scientific or technical principles. It is important that the expert take this opportunity to engage the jury and teach the underlying technical or scientific principles that form the basis of his or her opinion. You should work with the expert before trial to develop a classroom type testimony that captures the interest of the jury. The expert must use easy to understand language, examples, and analogies. We have found that the jury follows the "are you familiar with a certain medical term" and "will you please explain to us what that means" to be an effective way of teaching the jury the basic background necessary to appreciate and accept the opinions which will follow.

Expert witnesses should summarize and explain to the jury complex scientific concepts, such as complex injuries and treatment. Testimony can describe concepts in general terms and address specifics by use of demonstrative evidence. For example, testimony of general descriptions of injuries can recount daily activities of an injured patient along with the type of daily treatment received. Life care planners and caregivers are best able to explain what the life of the victim has become in terms the jury can understand. We recommend letting the client maximize the optimistic goals as much as possible.

After the witness is qualified and the technical and scientific foundation has been laid for the opinion, use of demonstrative evidence can be valuable in persuading the jury. The use of demonstrative evidence at trial has two goals. Not only will it increase the likelihood of a favorable verdict for one's client, but it can also make

damage awards higher by better educating the jury of the damages your client has suffered. At trial, the effective use of demonstrative evidence will pique the interest of the jurors and assist the jury in understanding your case. Studies have shown that the ability to comprehend information is vastly enhanced by coupling verbal with visual communication. By allowing jurors to visually grasp points, e.g., using charts, graphs, and models, in addition to hearing testimony, an attorney dramatically increases the likelihood that the jury will remember the data when it comes time to deliberate. However, the attorney must remember that while a trial is, in part, a show or performance, if the use of demonstrative evidence is overdone, it may detract from, rather than enhance the case.

D. How to Prepare a Damages Case Through Medical Testimony

A. The Ground Rules. The Indiana Rules of Evidence.

The United States Supreme Court issued its ruling in Daubert v. Merrell Dow Pharmaceuticals, Inc.,[1] that was intended to "liberal[ize]" federal evidence practices and abolish the requirement that expert opinion must represent consensus views.[2] It was anticipated that Daubert would reduce the frequency and intensity of judicial scrutiny of expert opinions. In reality, it has had the opposite effect in Federal Court.

Trial lawyers throughout Indiana have carefully watched how the Indiana Supreme Court would respond to Daubert. Thankfully, for both the plaintiff and defense bar the Indiana Supreme Court has taken a common sense approach to the

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[1]509 U.S. 579 (1993).

[2]509 U.S. 579, 588.

admissibility of expert testimony, and has recognized that Daubert was intended to liberalize the rules concerning the admissibility of expert testimony.

The Indiana Supreme Court has held that it is not bound to follow the Daubert approach, and recognized that Daubert was intended to liberalize the rules concerning the admissibility of expert testimony. Further, unlike the approach that is often utilized in the federal courts, the Indiana Supreme Court has made it clear that it does not want Indiana trial judges to over-analyze every aspect of an expert's testimony in making the initial admissibility determination. The Court has recognized that it is the function of the jury in our system of justice that is empowered to determine the weight to be given to the testimony of all witnesses, including expert witnesses.

The nature and extent of the evidence that must be submitted to and Indiana trial court to satisfy the reliability analysis of Rule 702 depends on the nature of the testimony in question. Thus, the Indiana Supreme Court in McGrew v. State, 682 N.E.2d 1289 (Ind. 1997), decided that the complexity of the scientific principles underlying the subject matter of the expert testimony would determine the complexity of the foundation necessary to support the admissibility of the testimony. The Court held that:

> Inherent in any reliability analysis is the understanding that, as the scientific principles become more advanced and complex, the foundation required to establish reliability will necessarily become more advanced and complex as well. The converse is just as applicable, as demonstrated by the trial court's conclusion that "what we're talking about

is not the traditional scientific evaluation. We are talking about simply a person's observations under a microscope."

In its' decision in Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453 (Ind. 2000), the Indiana Supreme Court made it clear that it was not going to require the trial court to conduct "mini-trials" in making the reliability analysis under Rule 702. Further, the Court emphasized that the general principles and general methodologies underlying the expert's testimony where to be examined, as opposed to an examination of every aspect of the expert's testimony. Specifically, the Court cautioned trial courts in Indiana to not attempt to micro-manage the admissibility of expert testimony so as to eliminate the vital role assigned to the jury to ultimately determine the weight that any testimony will be accorded.

In Sears, the testimony of two physicians was challenged at trial as unreliable and therefore inadmissable. The physicians expressed the opinion that the plaintiff suffered from symptoms of post-concussion syndrome which adversely affected his ability to return to his former employment. The defendant challenged this testimony on various grounds, including the allegation that the testimony was not scientifically reliable. The trial court overruled the defendant's objections and the testimony was admitted at trial.

On appeal, the Indiana Court of Appeals examined in great detail the testimony of each of the physician experts, and ruled that the testimony was not reliable under 702(b) and thus should not have been admitted into evidence by the trial court. Sears Roebuck & Co. v. Manuilov, 715 N.E.2d 968 (Ind. Ct. App. 1999). Further, the Indiana

Court of Appeals encouraged trial courts to hold separate pre-trial Daubert hearings whenever a 702(b) challenge was made to expert testimony. Id. at 993, n.20. The scope of such a hearing would have required the party offering the expert testimony to bring his expert to the hearing and engage in a mini-trial in virtually every case.

The Indiana Supreme Court reversed the Court of Appeals decision in Sears and at the outset of its discussion concerning the admissibility of expert testimony implicitly rejected the suggestion by the Court of Appeals that trial courts should routinely conduct separate Daubert hearings before trial. "In adopting evidence rule 702, this court did not intend to interpose an unnecessarily burdensome procedure or methodology for trial courts." Sears Roebuck & Co. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001).

The Supreme Court next observed that the adoption of Rule 702 "reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence." Id. Further, the court reemphasized its earlier decisions that although potentially helpful, Federal Court opinions interpreting Daubert are not binding on Indiana Courts in deciding evidentiary issues. Id. at n.5

In the most critical passage in the opinion, the Indiana Supreme Court instructed trial courts to consider the general principles and general methodology underlying the reliability of an expert's testimony, leaving the accuracy, consistency, and credibility of the testimony to be determined by the trier of fact after testimony has been subjected to the adversarial process at trial. If applied to separately evaluate every subsidiary point made during the testimony of a qualified expert regarding matters based on reliable science, Rule 702(b) can become excessively burdensome to the fair and efficient

administration of justice. It directs the trial court to consider the underlying reliability of the general principles involved in the subject matter of the testimony, but does not require the trial court to reevaluate and micro manage each subsidiary element of an expert's testimony within the subject. Once the trial court is satisfied that the expert's testimony will assist the trier of fact and that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact. Id. at 461.

Applying these principles to the physician's testimony at trial, the Court held that the trial court did not abuse its discretion in admitting the testimony. Likewise, the Court rejected the argument that the doctor's testimony about the affects of post-concussion syndrome on plaintiff's ability to return to work as a high-wire circus performer was unreliable. Emphasizing the lack of complexity in the doctor's testimony in this regard, the Court stated as follows:

> The doctor's testimony that the severe blow to the head from the plaintiff's fall resulting in continuing dizziness and headaches and preventing him from returning to his career as high-wire performer is not a matter necessarily restricted to the province of a vocational expert knowledgeable about the requirements of circus high-wire artistry. That dizziness would substantially affect the plaintiff's capacity to perform on the high-wire is a matter of common sense, and does not require vocational expertise.

Id. at 461.

Following Sears, the Appellate Court in Pinkins v. State, 799 N.E.2d 1079, 1087 (Ind. Ct. App. 2003), summarized Sears into a two part test holding that:

> Specifically, we note that for a witness to be qualified as an expert, two requirements must be met. First, the subject matter must be distinctly related to some scientific field, business or profession beyond the knowledge of the average person. Second, the witness must have sufficient skill, knowledge, or experience in that area so that th opinion will aid the trier of fact.

In Indiana, there are various combinations of characteristics of knowledge, skill, experience, training or education that an expert witness may possess that will be deemed sufficient to allow his testimony to be admissible. An example of this can be found in Vaughn v. Daniels Company (West Virginia) Inc.,777 N.E.2d 1110, 1122 (Ind. Ct. App. 2002). The Appellate Court in Vaughn held that:

> Knowledge may be acquired through hands-on experience, formal education, specialized training, study of textbooks, performing experiments, and observation. Id. (citing 13 W. MILLER, INDIANA PRACTICE § 702.103 at 35-37 (1984)). Contrary to Daniel's contentions, it was not necessary for MacCollum to have seen the sump in person for him to render an expert opinion in this case. Also, any question as to his experience with coal plants would go to the weight and credibility of his opinions, not their admissibility.

Id. at p. 1121. (Emphasis Added). The holding in Vaughn has been followed in Messer

v. Cerestar USA, Inc., 803 N.E.2d 1240, 1248 (Ind. Ct. App. 2004). The Court held that:

> Evidence Rule 702 does not require that an individual have received formal education in a certain field before that person may be considered an expert, and we will not read such requirement into the rule. Instead, Evidence Rule 702 acknowledges that one may acquire the requisite knowledge through means other than formal education. From the information available to this court, we see that Puchalski has spent fourteen years as a construction safety supervisor for the Illinois Toll Authority, worked four years as a consulting safety engineer, owned his own construction safety consulting business, and investigated jobsite accidents. This information is sufficient to permit the reasonable conclusion that Puchalski is an expert in worksite safety issues and accident investigation.

The Indiana Supreme Court allowed a nurse to testify that an Alzheimer's patient was incompetent in Creasy v. Rusk, 730 N.E.2d 659, 669 (Ind. 2000). The Court held in that case that:

> Ayers's affidavit states that she is a licensed practical nurse, which presumes that she received the medical training necessary to obtain that license. The affidavit also verifies that Ayres had worked for the nursing home for nine years at the time Creasy was injured – the entire time Rusk had lived there. Ayers's certification, associated training, practical experience gained through working for the nursing home for nine years,

> and three years of working with Rusk qualified her as an expert for purposes of assessing Rusk's mental state and rendering an opinion.

When does expert testimony become "scientific"?

Indiana Evidence Rule 702(b) requires the court to ensure that the principles upon which the expert bases his opinion is reliable if the testimony is "scientific". Unfortunately, the rule does not address when the testimony is "scientific" and when it is merely technical or some other form of specialized knowledge. Justice Breyer in Kumho recognized this difficulty in differentiating between scientific testimony and other forms of expert testimony. He wrote in Kumho that:

> It would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machines. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.

Kumho, 119 S.Ct. at 1174.

A Court of Appeals decision, Lytle v. Ford Motor Company, 814 N.E.2d 301, 309 (Ind. Ct. App. 2004), illustrates the difficulty in determining what is "scientific" for purposes of Rule 702(b) and what is not. The Lytle case involved a catastrophic injury caused when the plaintiff was thrown from a 1987 Ford Ranger pick-up truck. The

evidence assumed by the trial court was that the plaintiff was wearing her seat belt prior to the collision. After the collision, the plaintiff was found outside the pick-up truck. The plaintiff presented two experts with extensive backgrounds in automotive engineering.

Lytle's first expert, Thomas Horton, had several years of experience, in industry, designing and testing seat belts systems. Horton's opinions were based upon "(1) his examination of the vehicle and seatbelt assemblies, including the placement and photograph of two people in an exemplar vehicle in 2003, and (2) his uninstrumented hand manipulations of two exemplar assemblies, unattached to any vehicle, and without passenger load or any web tension whatsoever." Id at 313. The court noted that Horton could not replicate the forces that were involved in the roll over and that he "had performed no testing to support his theory that a longer center buckle stalk was a safer alternative design, and he had not done any testing and had no support for his opinion that the other buckle was a safer alternative design." Id. As such, the court held that:

> In light of such a significant analytical gap between Horton's data and his conclusions, his testimony was unreliable as a matter of law, and we must conclude that the trial court properly excluded his testimony.

Id.

Lytle's other expert, Dr. Khadilkar, was a Ph.D. in automotive engineering who performed testing for the National Highway Traffic Safety Administration (NHTSA). Dr. Khadilkar's "testimony regarding inadvertent unlatch was based primarily on

observation and analysis of the geometry of the restraint system and its alternatives." Id. The court held that:

> Dr. Khadilkar never documented the amount of depression that was necessary to release the seatbelt buckle in the accident. . . . [He] did not perform any research, and did not identify any literature in support of his theory. . . . Dr. Khadilkar engaged in less than ten minutes of "testing" to reach his opinion: he placed a buckle against a table in his office and "eyeballed" the depression necessary to release the latchplate. . . . [He] made [no] effort to measure the force, web tension, direction or rotation that would occur in this type of accident. . . . [He failed to show] that the seatbelt assemblies moved toward one another, moved with any particular force or load, twisted into position, or that any other object contacted the passenger's button at all. . . [nor showed the] sufficient force, direction, duration, rotation, and load conditions to release the buckle. As with Horton's testimony, we are compelled to conclude that the trial court properly excluded Dr. Khadilkar's testimony.
>
> Id. at 314.

The plaintiff in Lytle argued that her experts' opinion that the seat belt was defective was based upon her experts' skilled observations, common sense, knowledge and experience and did not require a determination of reliability because the testimony was not "scientific". Lytle relied on Malinski v. State, 794 N.E.2d 1071, 1084 (Ind. 2003), and PSI Energy, Inc. v. Home Insur. Co., 801 N.E.2d 705, 740-41 (Ind. Ct. App.

2004), for the assertion that plaintiff's experts were not giving "scientific" testimony.

In Malinski v. State, 794 N.E.2d 1071, 1085-86 (Ind. 2003), the court held that:

> The evidence before us does not appear to be a matter of "scientific principles" governed by Evidence Rule 702(b). Rather, it is more a "matter of the observations of persons with specialized knowledge" than "a matter of 'scientific principles' governed by Indiana Evidence Rule 702(b)," . . . As a four-year veteran forensic pathologist, Dr Prahlow was qualified to make such observations. Doctors often testify about the injuries depicted in photographs even though they were not present when the pictures were taken and did not personally examine the injuries depicted. . . . Dr. Prahlow's testimony regarding Lori's state falls into the area of specialized knowledge of anatomy and physiology. Such area of specialized knowledge was within the scope of expertise and beyond the knowledge generally held by lay observers. Prahlow's expertise in examining and evaluating wound, such as those depicted in the photos, was undoubtedly an aid to the jury.

In PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705, 741 (Ind. Ct. App. 2004), the court found that:

> It is clear from the record before us that Helfrich has extensive experience in investigation and remediation of MGP subsurface structures and contamination. While Helfrich did apply scientific principles in forming his theory, the concepts he relied upon, such as vibrations from a passing

train, are relatively simple and within the knowledge of a common layperson. Consequently, we agree with PSI that Helfrich's theory is reliably based on his observations and application of his specialized knowledge to those observations. Moreover, it is important to note that Helfrich's theory will be subject to cross-examination at trial. . . . Under these circumstances, the trial court did not abuse its discretion when it denied the Insures' motion to strike the testimony of Thomas Helfrich.

The court in Lytle, however, distinguished the Malinski and PSI cases. The court found that the experts' opinions in both Malinski and PSI "were rooted in observations of physical evidence such as a shoe print, bondage photographs, a cell under a microscope, a bullet wound, or a crack in concrete." 814 N.E.2d at 313. In the Lytle case, the court held that Lytle's experts had a hypothesis of "how some extremely complex physical event might have occurred," which Malinski and PSI did not have. Id. at 310. The court also held that this case was more like the Messer v. Cerestar USA, Inc., 803 N.E.2d 1240, 1244-45 (Ind. Ct. App. 2004), case.

In Messer, an expert's testimony concerning the failure of a safety gate under Rule 702(b)was barred. The gate was designed to be removed by lifting it upward and out of a U-shaped bracket. Messer leaned over the gate and the gate gave way with him. Messer's expert concluded that the gate failed "because it was unable to withstand two-hundred pounds of pressure and remain fixed in place." Id. at 1248. The court held that the expert did not take "any measurements, perform any analysis, or even view the gate and accident scene" and that he "did not reveal what scientific

method or principles were used to arrive at the conclusion that the gate was defective" as required by Rule 702(b). Id. at 1247-48. As a result, his "opinion is unsupported speculation or subjective belief. . . and the affidavit should not have been admitted." Id. at 1248. The court did not discuss what made the expert's testimony "scientific". Id. The defendant in the case did allege that the plaintiff's expert based his opinion on "physics, mechanics, and/or ergonomics of how the force of [Greg]'s body affected Cerestar's gate." Id.

Applying Messer, the Lytle court found that Lytle's experts were giving "scientific" testimony and that the testimony did not meet the reliability test in Rule 702(b).

B. Preliminary Questions.

Before an expert is selected, the following analysis should be conducted:

1. What information must be communicated to the jury that is not within their common knowledge or understanding?

2. What is the most efficient and understandable way to demonstrate knowledge to the jury?

3. What foundation must be laid for admissibility of the opinion?

4. Has the expert conducted a differential diagnosis? In turn, can the witness rule out other causes; symptoms; or, complaints for the alleged condition.

5. Is the opinion based on the expert's knowledge, skill, experience and training?

6. Is the opinion reliable, verifiable or subject to scientific proof?

7. Has the expert witness testified previously? If so, collect all depositions and

reports. Review the depositions and reports and speak with the attorney(s) that previously retained the expert.

8. Has the witness ever been disqualified?

9. What type of practice does the expert have? i.e. Academic, Clinic, Research, Professional Witness.

10. Does the expert consult or testify for Plaintiff and Defendant?

11. Has the expert been involved in past litigation, either as a Plaintiff or a Defendant?

12. Do you like the witness? i.e. Communication, appearance, cordiality, defensive, posture, etc.

C. Jurisdictional Knowledge.

1. Know the law of your jurisdiction. Does the jurisdiction follow the federal standard or does it have its own standard?

2. Select your forum carefully. Remember that the trial judge has a lot of discretion and typically his decision on the admissibility of an expert's opinion will only be reversed for an abuse of discretion.

D. Selection of the Expert.

1. Does the expert have the appropriate qualifications?

2. Has the expert's opinion been previously stricken by a trial court? This question will typically be asked by defense counsel and if the answer is "yes", beware! Consider Schepise v. Saturn Corp., 1997 WL 897676 at 16 (D.N.J. 1997), wherein the district court held that it "need go no further than [the case of] Rutigliano were the same experts' opinions regarding

formaldehyde sensitization caused by carbonless copy paper were challenged and subsequently barred by Judge Liflend."

3. Will the expert work with you in learning the facts of your case so that he can develop the necessary factual foundation for admissible expert opinion?

4. What methods and principles will the expert use, and why should they be accepted as reliable by the trial court? If the expert you are considering to hire cannot answer this question, you need to start looking for another expert.

5. Will the expert prepare a detailed report of his opinions after enough information has been gathered to do so, and, will the report set out the methods and principles used and indicate why they are reliable? The expert's report must comply with FRE 26 in federal court. Further, a report that provides a factual basis for the opinion, and sets out the reliability of the methods and/or principles utilized to reach the opinion, may preclude a challenge to its admissibility. The Daubert challenge of an expert can turn into a mini-trial and cost thousands of dollars in case preparation expenses.

6. Will the expert use the same methods/principles in this case that they would use in a non-litigation setting? This is one test that Kumho suggests should always be considered by the trial judge in federal court.

E. After the Expert is Retained.

1. Provide the expert with the facts of the case. When you send the expert

depositions, accident reports, photographs, and other data, document in an attachment to the cover letter what you have sent. Update this list of data each time you send something new to the expert. Then when your expert is asked at his/her deposition the materials that were reviewed in order to reach an opinion, the expert will have a ready list which should facilitate establishing the required factual basis for the opinion.

2. Prepare the expert carefully for his deposition. In particular, make sure that the expert can give an intelligent answer to this question: "Would you explain the methods and/or principles you utilized in reaching your opinion(s) in this case?"

3. Be ready to do your own research to find peer-review articles, national standards, and other information necessary to establish the reliability of the methods and principles used by your expert. At times, experts do not meet the expectations you have of them when you hire them, and have to be assisted. In addition, the more you know about the methods and principles utilized by your expert, the better judge you will become in evaluating the reliability of your expert's opinion.

4. Determine if your opponent can help establish the reliability of your expert's opinion. Find out in discovery if the defense expert utilizes the same principles and methods relied upon by your expert. If there is an in-house expert, determine if the defendant corporation uses the same methods and principles as your expert.

F. What is Discoverable and Who Pays? The Indiana Rules of Trial Procedure.

1. Scope of Discovery - In General.

The Indiana Rules of Trial Procedure provide the scope of discovery as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (IRTP, 26(B)(1)).

2. Testifying Expert Witness.

There are certain provisions of the Indiana Rules of Trial procedure concerning discovery of expert witnesses and their opinions. The distinction is made between expert witnesses that are retained in anticipation of litigation or trial.

The Rules provide that the identity of such expert witnesses and their opinions are discoverable as follows:

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (B)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(a) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and

a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (B)(4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

3. Consulting Expert Witness.

An expert witness that has not been formally retained in anticipation of trial is known as a consulting witness. Such a consulting witness, and the witness opinions, are generally not discoverable. The Indiana Rules of Trial Procedure provide as follows:

(b) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The identity and opinions of a consulting non-medical expert witness are discoverable only upon the following showing:

a. The showing of exceptional circumstances;

b. Under which it is impracticable for the party seeking discovery; and,

c. To obtain facts or opinions on the same subject by other means.

However, the identity of a consulting medical expert is discoverable pursuant to Trial Rule 35(B) as a Report of a Licensed or Certified Examiner (commonly known as an Independent or Defense Medical Examination:

> (B) Report of licensed or certified examiner.
>
> (1) If requested by the party against whom an order is made under Rule 35(A) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examiner setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude his testimony if offered at the trial.
>
> (2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.
>
> (3) This subdivision applies to examinations made by agreement of the parties,

unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

4. Who Pays the Expert's Bill?

General guidance in the payment of fees and expenses with respect to the disclosure of an expert witness opinions is provided in the Indiana Rules of Trial Procedure. Absent a showing of manifest injustice, the party seeking discovery shall pay the reasonable fee for time spent in responding to discovery. The Rule provides as follows:

> (c) Unless manifest injustice would result,
>
> (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (B)(4)(a)(ii) and (B)(4)(b) of this rule; and
>
> (ii) with respect to discovery obtained under subdivision (B)(4)(a)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (B)(4)(b) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

G. What Materials should you Provide to the Expert Witness?

As set forth above, any information provided to an expert witness is discoverable. Such information may include notes generated from telephone calls or file reviews; e-mail; case summary; depositions; articles; and, attorney retention letters. An expert should be provided all materials necessary to lay a proper foundation for the

expert opinion in a form that is admissible. Information that should not be provided to an expert witness includes confidential attorney client materials; attorney opinions as to the strength and weaknesses of the case; or, any information suggesting that the expert has an interest in the outcome of the case.

At the outset of retention of an expert witness, an engagement letter should be provided. The engagement letter should be used whenever an expert is retained. Typically, the expert will provide a contract or engagement letter of their own as well as a fee schedule. Such engagement letter specifies the experts role; billing schedule; and, other issues that are necessary for a compatible and productive relationship. Such topics to be included in an expert engagement letter are set forth below:

Dear Expert:

This letter will confirm that our office has retained you as a consulting expert only on the above captioned case. Enclosed with this letter is the retainer for your services and the following materials related to this case:

{herein insert detailed list of what is being sent: document, number of pages, dates, etc.}

In order to make sure that there is no misunderstanding of what our office expects from you by way of your professional services I would request that you comply with the following directives in your work on this case:

A. Preserve all written or computer generated material that you compile in your work on this case;

B. Keep all information in your file and all information that you obtain from

my office or from any other source confidential as such information is to be used solely for the benefit of my client.

C. You agree to not consult with anyone who has any interest adverse to my client in this case

D. You agree to keep the fact of this consultation confidential

E. You agree not to prepare any reports or drafts of reports without first obtaining approval from myself or another attorney from my office.

F. You agree to return all materials of whatever nature that you compile in this consultation to my office at the end of this engagement.

G. You agree to utilize the methodologies and procedures considered to be reliable in your field of expertise in your work on this case.

H. How Will Experts Report Their Findings?

After an expert has reviewed the case, collected all information and formed an admissible opinion, the same will be shared with counsel in the following forms:

A. Telephone conversation.

B. Written report.

C. Discovery responses.

D. Deposition.

Such disclosure may also include anatomical models, graphs, medical summary, medical illustration or other demonstrative aids.

Before any written report is issued, the following checklist may be used to lay a proper foundation for admissibility of the same:

1. First report should state: "Preliminary, based on incomplete

information and subject to change."

2. Should cover as many Daubert keys as possible: general acceptance of methods and procedures used; is result testable?; error concept applicable to opinions; based on peer review articles if applicable and ATTACH ALL SUCH ARTICLES RELIED UPON BY THE EXPERT.

3. Report should cover all opinions

4. Expert understands his/her right and duty to supplement the report when opinions in the report change

5. Attached all applicable learned treatises to the final report that expert considers authoritative re the opinions expressed in the report; these can be read to the jury on direct and the opposing expert can be cross-examined about these sources.

I. Preparing the Expert Witness.

1. Depositions.

An expert, like any other witness, must be thoroughly prepared prior to deposition. Such preparation includes such obvious requirements as being familiar with the medical records; medical literature; testing (procedures and results); diagnostic studies (procedure, technology, interpretation); relevant treating physician or patient testimony; prior medical records or issues; differential diagnosis; and, the skill, expertise, qualifications and training that allows an expert to provide an opinion on an ultimate fact at issue.

Most physicians are not professional testifiers, meaning that their income is limited only to testifying in cases involving litigation. As a result, the basic deposition

ground rules are necessary: only answer what has been asked; answer what is understood; do not argue; provide an answer that a layperson could understand; do not conjecture or speculate; give up points where necessary that do not affect ultimate opinion; do not disparage another practitioner or their treatment; give the benefit of the doubt (where necessary); the role of medicine is to help people get better, and, at times is an inexact science.

2. Cross and Direct Examination Techniques.

Numerous studies have demonstrated that juries learn by way of audio, visual and tactile clues. In today's electronic environment, most individuals have a computer, a mobile phone and cable television. As a result, the attention span of an average juror may be limited. i.e. The "Clicker Generation". Thus, it is important to make any direct or cross examination, interesting, brief, easily understood and to the point. Counsel should avoid complex narrative description. Rather, if the issue involves a test measuring the range of motion of a patients spine, a demonstration or model may be used to satisfy the audio and visual tactile clues. If the issue is the movement of a brain within a skull causing a traumatic brain injury, pass a model of the skull to the jury so that they satisfy their visual and tactile cues by touching the rough spikes on the inside of the skull that caused injury.

A useful line of questioning on re-direct examination may include the following:

Q. Doctor, having heard the questions asked by Attorney Jones, have your opinions changed in any manner.

Q. Is it still your opinion, based upon your skill, education, experience and training, as well as seeing thousands of patients, that Mr. Smith suffered a traumatic brain injury

as a result of the May 15, 2005 car crash.

Q Is it your opinion, based upon a reasonable degree of medical certainty, that Mr. Smith's brain injury is permanent.

Q. Is it your opinion, based upon a reasonable degree of medical certainty, that Mr. Smith's confusion, dizziness and mood swings are permanent symptoms of his brain injury.

3. How to Use a Videotaped Deposition During Trial.

An attorney must make a decision whether to call the expert witness live at trial. Such a decision may include the weighing of factors including the costs associated; the attitude of the witness being forced to testify live as opposed to voluntarily appearance; the uncertainty of when the witness will be called; the necessity of the jury to visually see the witness testify in response to questions; whether any issues occurred at trial which were not covered in the video deposition; and, the witnesses schedule and or patient load. After weighing such issues, a video deposition may be the best alternative to live testimony.

If a video deposition for use at trial is the best alternative, the attorney taking the deposition must be as prepared for the deposition as the attorney would be at trial. Typically, a discovery deposition is taken before the video or trial testimony. Before either deposition is taken, it is imperative that the attorney taking the deposition meet with the doctor prior to the deposition to solidify the physicians opinions. At the meeting, it is important to have all questions prepared and exhibits (as well as demonstrative evidence) ready for admission.

Prior to the video testimony, it is suggested that the parties attempt to stipulate to

the admission of certain exhibits; medical records; medical bills; diagnostic studies; and, medical illustrations. During the trial deposition, have the expert demonstrate, by way of anatomical models, surgical hardware, diagnostic studies, the injuries, surgery, etc. Such stipulations may be informal; reduced to writing; or, obtained by way of request for admissions. Such agreements will reduce or eliminate objections or other testimony that may require the videotape to be redacted prior to showing to the jury.

At trial, the video deposition is played as if the witness is present in the courtroom. An attorney may announce that the next witness is “Dr. Jones, who will testify on behalf of the Plaintiff in lieu of the witnesses live testimony.” If any exhibits are introduced at the video deposition, it is necessary to move the same into admission in live court. Be certain to prepare an exhibit binder or have copies available to publish the same to the jury. Also, publish a copy (or the original) of the deposition. Be certain that the tape (or other media) does not have a defect which would prevent its dissemination to the jury.

A sample testimony outline, for purpose of video testimony is provided below:

DOCTOR VIDEO DEPOSITION QUESTIONS

I. Name

Medical Doctor

Location of Practice

- Office

- Where on staff

Education

- Experience, education, training and qualifications to provide medical

servcies to patients.

- College (Major)
- Medical School
  - Specialty
- Internship
- Residency
- Other training

License

- State Issued
  - How long
- Other states
- Maintained licensing

Area of Practice

- Specialty
- Standards
- # Patients treated in career
- Due to busy patient load, unable to testify live at trial.
- Examinations

Certifications

Professional Associations

II. Patient

- How many occasions did you see the patient?
  - Referred by

- What specialty is
        - Why was the patient referred?
        - Complaints

First office Visit

- Date
- Obtain History
    - Age
    - Complaints
    - What other information
- Conduct Physical Exam
    - What tests
        - How work Results conclusion
        - Results
        - Conclusion
- Based on history and exam, what inquiries did at that time.

What is

- Injury

Exhibit 1 - Medical Records

- Obtained from your office
- Please identify
- What are they

- Patient
- Whose handwriting
- Personal knowledge of facts contained herein
- Documents generated and kept in normal, ordinary course of business

- Go through records,
  - What procedure; how Performed; expected result
  - Where was procedure performed
    - Example 2 - Hospital
    - Example 3 - Registration
    - On Staff where
    - How long
  - Why performed; how long is procedure
  - Familiar with record keeping
  - Handwriting
  - Normal custom to make notes during procedure
  - Are these your notes

E. A Roadmap for Proving Non-Economic Damages

1. Lay Witness

Lay witness testimony is truly an art. The importance of lay witness testimony in proving damages is recognized by trial lawyers, but is a subject that has not been adequately developed in many cases. Often lawyers or their staff meet with the lay witness briefly, or talk with the lay witness over the phone, asking them about before and after observations and changes in the plaintiff.

The effectiveness of the lay witnesses' testimony will largely depend on how effective (not the same as articulate) the lay witness is in conveying what can often be boring facts (e.g., "Before the collision, Shirley used to garden four hours a day all summer; since the accident, she only gardens maybe once a week.").

Effective lay witness testimony should be moving, and tell you something about the person which is interesting and compelling. Simple anecdotes are best for this purpose.

The most compelling lay witnesses are typically those individuals with significant pre and post contact with the client. This may include:

Teacher/Coach/Professor

Colleague/Boss

Longtime Friend

Social/Vocational/Service Club Members

Spiritual Adviser

Neighbor

Hairdresser

Financial Planner

2. Physiatrist and/or Consulting Physician

In a catastrophic injury case, there may be dozens of physicians that treated the client. It would be impractical, expensive and boring to produce all such witnesses at trial. Typically, catastrophically injured clients will be treated or followed by a physical medicine physician. These medical professionals review the entire medical records to ascertain the clients' injuries, treatments, prognosis and potential for rehabilitation. If a

physical medicine doctor is not participating in the client care, an "independent physician" may be retained to follow the client's progress and perform the same file review. Either way, a physical medicine or consulting physician may be an economical, expedient and interesting witness to discuss the client's injuries, treatment and progress at trial.

3. Vocational Rehabilitation Expert

Traditionally, a vocational expert will testify as to the type of impairments that a client may have, restricting the type of employment (or lack of employability) in a particular case. At trial, a vocational expert will be able to demonstrate the types of tests performed; skills required (past and potential employment); and the limitations possessed by the client. If possible, the vocational expert may be able to assist the client in retraining and steering the client to possible employment. Again, this information will demonstrate the type of character possessed by the client, in trying to return to the workforce, but in a lower paying or diminished capacity.

4. Request for Admissions

The Indiana Rules of Trial Procedure, Rule 36, provide that a party may serve a written request for the admission of the truth of any matter, including the genuineness of documents. If answered affirmatively (or denied within thirty days) the subject request is conclusively admitted for all purposes at trial. Trial Rule 36 is an invaluable means to narrow issues, reduces evidentiary hurdles and expedites the presentation of evidence at trial. Request for admissions may be used for such issues as:

Medical Records

Medical Bills

Photographs

Reports

Exhibits

Medical Illustrations

If a party denies the subject request, and the same is proved at trial, the party that proved the same may be entitled to reasonable attorney fees and expenses.

5. Demonstrative Aids

Each demonstrative used, whether by you or by your expert, should move your case along, and reinforce your case theme and the underlying theories of liability. It is undisputed that jurors learn better and retain more information when it is communicated verbally and visually. Such demonstrative aids should be professionally prepared with the assistance of a jury or trial consultant, expert and / or witness tendering the same. Each demonstrative aid should be appealing to the eye, interesting and communicate a fundamental fact or issue.

Frequently used demonstrative aids include:

Treatment timeline

Medical Illustrations

Anatomical Models

Scale Accident Scene

Photographs (crash, family, treatment)

Surgical Tools/Plates/Screws/Fixator

Videotape (treatment, family, day in the life [narration]).

Computer Generated Animation

Diagnostic Studies