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## **Using Medical Literature To Prove Damages**

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With rare exception, the extent of provable damages in a personal injury action about the existence, nature, cause and effect of an injury allegedly suffered by the plaintiff is determined by testimony of medical experts. No lawyer can effectively represent an injured person without presenting reliable medical testimony and impeaching an opponent's medical evidence.

The trial lawyer's quest to present and counter medical testimony demands the lawyer familiarize himself with not only the facts found in the medical records and known to the witnesses but to also learn the science relevant to the opinions offered by the medical experts. Learning the medical science in large measure means learning the medical literature.

Throughout the modern era, medical science has relied upon written publication to disseminate new theories and findings, to discuss its controversies and to educate its practitioners and students. This literature comes in many formats. Case reports discuss the medical treatment and course of a single patient or group of patients. Articles describe in detail the clinical research conducted and the conclusions of the researchers. Review articles give the reader a survey of the state of knowledge on a particular disease or therapy. Textbooks also serve to summarize the state of knowledge and state conclusions and opinions of their authors.

The weight attached by the medical profession to various items of literature varies greatly. The highest esteem is accorded to that literature which has subjected to rigorous peer review and approval prior to publication. Examples of highly respected peer reviewed journals would be the New England Journal of Medicine and the Journal of the American Medical Association (JAMA). Each specialty has its own journals enjoying the respect of its members. Further down the food chain are journals with minimal or no peer review. Today, we also have freewheeling discussions found in Internet forums which, while provocative, would be accorded little weight because of the absence of meaningful peer review.

The following comments will review how this body of literature can be used by the trial lawyer both in the courtroom and as a means to prepare to be an effective advocate in proving medical damages.

### **I. Legal Principles Governing Use of Medical Literature.**

**A. Virginia.** Va. Code § 8.01-401.1 provides in relevant part:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced through an expert witness upon direct examination, copies of the statements shall be provided to opposing parties thirty days prior to trial unless otherwise ordered by the court.

The above provision was derived from Federal Rule of Evidence 803(18). The Supreme Court of Virginia has held that, in order to lay a proper foundation, the witness must testify that the publication itself is a reliable authority and not simply that the author of the publication is an authority. *Griffett v. Ryan*, 247 Va. 465, 473, 443 S.E.2d 149, 154 (1994).

**B. Federal Rule.** Federal Rule of Evidence 803(18) exempts from exclusion as hearsay reliable authorities:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

**C. Effect of 803(18) and its Virginia Counterpart.** Admissibility of medical literature is facilitated by the above quoted provisions. A foundation for admission of a publication can be laid not only through obtaining a concession of the authoritative nature of the work from an expert on cross examination. Now, the statements can be admitted on direct examination. Furthermore, if an expert called by a party on direct examination testifies the publication is a reliable authority, an expert called by an opposing party can be cross examined on statements in the publication notwithstanding the cross examined expert's refusal to concede the publication is a reliable authority. *Dawsey v. Olin Corp.*, 782 F.2d 1254 (5<sup>th</sup> Cir. 1986). Once admitted, the

statements are received not merely for impeachment purposes but are substantive evidence.

**II. Locating the Medical Literature.** The key to modern medical research is Medline. Medline is a compendium of all journal articles published since 1966. Access to Medline at no charge is available through a number of Internet sites. Medline provides the bibliographic citation and the abstract of the articles. In a few instances, the full text of the article is available online. Vendors can be contacted via the Internet and fax who will retrieve articles and deliver copies for a fee. Bibliographic citation to medical textbooks are also accessible via the Internet. Many university libraries permit Internet access to the catalogues of their collections. Internet booksellers such as Amazon.com permit searching of titles and their convenient purchase on line. See the Appendix for a bibliography of a trial lawyer's basic medical library and websites useful in locating medical literature.

**III. Initial Use of the Literature.** Shortly after reviewing the medical records of the client, counsel should obtain and familiarize himself with the germane medical literature. This should precede any conference with the treating physicians. The following sequential literature study method is recommended:

- A.** Prepare a glossary of the key medical terms.
- B.** Review the anatomy and physiology.
- C.** Study the nature of the injury or condition and its possible complications including possible causes, how diagnosis is made, treatment modalities and prognosis.
- D.** In instances where there is permanent disability, research how the disability is assessed and rated.

**IV. Preparing your expert.** When you confer with your expert, take copies of significant literature with you. Many physicians will already be familiar with the literature you have been reading. The physician will usually respect the lawyer who has done her homework and is well versed on the medical issues. A treating physician who is not disposed to aid a plaintiff is less likely to offer unfavorable opinions of dubious merit if the physician knows the lawyer is well versed on the medicine of the case. You also need to review the literature with your expert if you desire your expert to lay the foundation for admission into evidence as a reliable authority.

**V. Use of literature to cross examine defense expert.** Using medical literature to weaken or negate the opinions of an opposing expert requires careful

planning. The well traveled expert is prepared to deny any publication is authoritative thus thwarting efforts to lay the foundation for impeachment. Especially in cases of soft tissue and orthopedic injury, experts will want to simply rely upon their wealth of personal clinical experience (which is almost impossible to scrutinize for accuracy) and dismiss literature as simply something written by someone who has a lot of time on his hands. When the case turns upon the pharmacology of drugs or the nature of new treatment or diagnostic tools, the expert's sole reliance on his own experience becomes less effective in steering away from the literature. Your goal should be to drive the expert towards the literature and to turn a stubborn refusal to acknowledge the data found in the literature into a reason to doubt the credibility of the expert.

**A. Depose the opposing expert.** In the courtroom, it is often hard to parry with an opposing expert for any length of time about the literature if the expert refuses to concede the literature is authoritative. In a deposition, the discussion with the expert is more freewheeling and the rules of evidence are somewhat in a state of suspension. So what if the expert doesn't acknowledge a treatise is authoritative. Use it as your source for questions. Hold the treatise in front of you, and reading from the text, convert a statement into a leading question. Oftentimes, an expert will grudgingly admit your question (drawn directly from the text) is true. Always obtain those publications of the opposing expert which are germane to your case. These not only can be used for cross examination, but also to have the opposing expert to concede the publication is a reliable authority.

**B. Drive the expert to the literature.** Physicians' training makes extensive use of the literature and efforts to keep current involve ongoing review of journals and other literature. New drugs coming on line mean review of the accompanying data about the medication. Most conscientious doctors maintain some sort of medical library and will use Medline from time to time (if not directly through the hospital librarian). Challenge the physician expert. Do you keep up? You normally do Medline search when you encounter the unusual, why did you not do one in this legal review? In sum, push the expert to tell you about the literature and his reliance upon it in his practice and how knowledge gleaned from the literature comprises to some extent a basis for his opinions.

**C. Use Fed. R. Ev. 705 and its State Analogue Va. Code Ann. § 801-401.1.** In both federal and state practice, an expert must disclose the underlying facts or data undergirding his opinions on cross-examination. Always thoroughly explore the basis of the expert's opinion to determine whether any publication was taken into account in forming the opinion. If so, the expert can be cross examined on the publication. If not, the expert may be

subject to attack for not having an adequate basis for his opinion due to a failure to consider the literature.

**D. The Definition of “Reliable Authority”.** Experts seeking to evade being confronted with data found in respected literature often use the artifice of fashioning a definition of “reliable authority” or “authoritative” which no writing by a mortal could meet. Other than the Ten Commandments delivered by God to Moses, no writing would meet this definition. The following observations will hopefully assist you in countering this tactic:

**1. Define Authority for the expert.** Don’t accept the extreme definition of authority used by the expert. Explain to the expert that you simply mean a publication generally respected by physicians. Authority simply means the source from which a citation is drawn. *Webster’s Ninth New Collegiate Dictionary*. The emphasis for determining what is a “reliable authority” should therefore be shifted to what is reliable. If a text is used routinely to train medical students and by physicians in the course of treating patients, who can seriously contend it is not reliable? The questions to the expert should establish use of the text in the medical environment for teaching and treating.

**2. Don’t accept the “I don’t agree with everything in the book” response.** The expert will often attempt to deflect the interrogator who asks if a publication is a reliable authority by stating “ I am familiar with the book but don’t necessarily agree with everything in it”. Tell the expert that wasn’t your question and you will later give him an opportunity to state his disagreement with the contents of the text. Press forward and establish its reliability with the questions outlined above. Then ask the expert if he agrees with a passage read to him. Remember laying a foundation of reliable authority is simply a prelude to inquiring as to whether the expert agrees with the passage. A purpose of introducing the statement from the authority is simply to inform the trier of fact that respected experts authoring the reliable authority are not in accord with the testifying expert’s opinions thus enabling the trier of fact to assign the proper weight to be given to the opinion.

**3. Courts do not permit the expert to hide behind a tortured definition of “reliable authority”.** Simply because the expert refuses to expressly concede a text is a “reliable authority” does not thwart laying a foundation on cross examination. A publication is deemed to be a reliable authority if it is simply established that professionals in the field regard the text as trustworthy or is of a type reasonably relied upon by experts in the field. *Jacober v. St. Peter’s Medical Center*, 608 A. 2d 304, 313, 315 (N.J. 1992). Similarly, testimony of an expert that he used the periodical in which

the articles at issue were published to keep up to date, that the articles were “somewhat authoritative” and the author directed a university department of good reputation was sufficient to admit the articles. *Allen v. Safeco Ins. Co. of America*, 782 F.2d 1517, 1519 (11<sup>th</sup> Cir. 1986).

**VI. Rebutting Failure to Accept Treatment.** When defense counsel contends the plaintiff failed to mitigate her damages by refusal of recommended treatment, the medical literature should be reviewed to ascertain all of the risks and possible complications associated with the treatment. Almost every medication and invasive procedure has a host of adverse events and reactions associated with them. A search of the literature will reveal these possible complications as well as arming you with data on the statistical odds that the proposed treatment will be successful. A physician advocating the treatment must either concede he is unaware of the data revealed by a literature search or that he is familiar with the risk of harm.

**VII. Trial preparation.** Make a decision well in advance of trial as to how you will lay the foundation for admitting published statements into evidence. Waiting until cross examination has the virtue of surprise. On the other hand, it is often difficult to predict if you will succeed in obtaining the necessary concessions from the cross examined expert to admit the statements into evidence. If you determine it is best to lay a foundation for admission through an expert on direct examination called during your case in chief, you must provide copies of the statements to opposing parties thirty days prior to trial unless otherwise ordered by the court. Va. Code § 8.01-401.1. It may also be prudent to reveal in your pretrial expert designation that your expert will be relying upon the publication as a basis for her opinion.

## **MEDICAL REFERENCES**

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Editor

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**Williams Obstetrics**, 20<sup>th</sup> Edition, F. Gary Cunningham, et al, Appleton-Century-Crofts, 1997

## **Internet Resources:**

**Biosciences Index**, ([mcb.harvard.edu/BioLinks.html](http://mcb.harvard.edu/BioLinks.html)) part of the WWW Virtual Library, a catalog using Library of Congress classification.

**BioSites**, ([www.library.ucsf.edu/biosites](http://www.library.ucsf.edu/biosites)) listings with excellent annotations, from a collaboration of medical school libraries in the Pacific Southwest Region of the National Network of Libraries of Medicine.

**Carolina Library Services**, ([www.intrex.net/carolib/order.html](http://www.intrex.net/carolib/order.html)), retrieves copies of articles and other documents for mailing or faxing to requestor.

**Health & Medicine**, ([www.healthandmedicine.com](http://www.healthandmedicine.com)) part of the Argus Clearinghouse, guides to popular sites around the world.

**healthfinder**, ([www.healthfinder.com](http://www.healthfinder.com)) U.S. government's links to dependable consumer health information.

**Healthgate**, ([www.healthgate.com](http://www.healthgate.com)) good source for current wellness and biomedical information; provides access to several medical databases.

**HealthWeb**, ([www.healthweb.net](http://www.healthweb.net)) easy-to-use health specialty categories, maintained by medical school libraries in the Greater Midwest Region of the National Network of Libraries of Medicine.

**Internet Grateful Med**, ([igm.nlm.nih.gov](http://igm.nlm.nih.gov)) gives free access to a variety of databases maintained by the National Library of Medicine, such as MEDLINE, AIDSLINE, HEALTHSTAR.

**Medical Matrix**, a physician peer-reviewed list. Good links to MEDLINE, CME, online publications. Useful topical and specialty categorizations. Registration is required.

**Medscape**, ([www.medscape.com](http://www.medscape.com)) practice oriented content; organized by medical specialty, each with its own custom website. Can order on line full text copies of articles.

**MedWeb**, ([www.medweb.com](http://www.medweb.com)) well-chosen and thorough Internet selections in biomedicine, maintained by Emory University. Extensive links to health professional organizations.

**PubMed**, ([www.ncbi.nlm.nih.gov/PubMed](http://www.ncbi.nlm.nih.gov/PubMed)) the National Library of Medicine's free search service to access 9 million citations in MEDLINE, with links to participating on-line journals.

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