Marquette Law Review

Volume 12
Issue 2 *February 1928*

Article 2

Medical Testimony

Edward L. Miloslavich

MEDICAL TESTIMONY

By Edward L. Miloslavich, M.D.*

THE practical value of an individual is measured largely by the extent of his personally derived experience, which when accompanied and supported by a sound theoretical educational training, will lead inevitably to that result which he desires and endeavors to achieve.

Our success in daily life depends upon our instinctive, unconscious evaluation of every situation as it arises, reactions, which we can not acquire, latent and inborn feelings, which we can not account for, which, nevertheless, unquestionably and unfailingly manifest themselves at the opportune time.

The summation of these instinctive utterances, movements and actions constitutes the personality of an individual; it is something which we are unable to learn, something which we can not imitate and yet it is something for which we are not responsible.

The intrinsic impulses of a successful life defy a psychic analysis and the real, underlying reasons of a notable practical and scientific career still remain an unsolved mystery, despite the most careful and most minute scrutiny.

These introductory remarks should remind us that training, knowledge and experience harvest the most perfect fruits only, if planted on a natural, healthy and fertile soil.

At the beginning I wish to beg your indulgence, should I during my discussion, comment rather critically about the behavior of some of my colleagues and certain members of the legal profession. Lamentable occurrences in our courts, which sorry to say are familiar to all of us, are forcing me to expose these deplorable conditions and to censure in public and to brandmark the unscrupulous individuals who are responsible. Only a sound, openly spoken and publicly heard criticism will properly correct and gradually improve the evil.

Now, let us proceed with our topic.

The conditions, circumstances and reasons, which voluntarily or involuntarily lead a Doctor of Medicine in the court room are diverse. Be it as it may, one fact is certain, he almost invariably appears unprepared and both parties are effected by his presence in a different way:

---

* Professor of Pathology, Marquette University, Milwaukee, Wisconsin, formerly Associate Professor of Pathologic Anatomy, University of Vienna, Austria.

Paper read at the Annual Convention of the District Attorneys of the State of Wisconsin, in Green Bay, Wisconsin, on May 12, 1927.

the one suffers materially, the other welcomes him with open arms as being very serviceable; both sides, however, recognize him in his truly deplorable condition.

Medical Expert

Before I consider the physician as a medical witness and as a medical expert a few general remarks are necessary.

In the first place, I would like to clearly define the term "medical expert" in order to answer exactly the question "who can qualify as medical expert." The answer to this query is of the greatest importance for every court trial, particularly where a counsel briefly introduces a general practitioner as his expert and the opposing attorney unhesitatingly accepts him as such without further questioning.

A physician who limits his practice to surgery or internal medicine or to any other branch of practical medicine, whom we generally call a specialist for this or that practical branch, is not necessarily at the same time an expert in his field; to the contrary some are very narrowly bound by the limits of their special and general medical knowledge.

An able mastery of the diagnostic, surgical and therapeutical procedures and technique is not commonly met with among specialists. The greater majority lack the necessary theoretical knowledge of the most fundamental facts of their specialty and yet the apparent signs of their practical success seem to cover up their shortcomings. You may easily convince yourself in any court trial at any time regarding this fact: the scientific details of their subject about which they are testifying are more or less strange even to themselves. This is not surprising, for a specialist is only a practitioner dealing with a special branch of practical medicine.

The opinion of a practitioner in a scientific matter has the same value as that of a layman; since both know little or nothing about the subject. The former, perhaps, is a little more familiar with the technical expressions.

This self-evident deficiency of theoretical knowledge among physicians is the result of the one-sided development received in our medical schools where the greatest emphasis is placed upon the practical training, while the very important theoretical principles, which are really the reason for the success of a doctor, are sadly neglected and sorry to say, are not sufficiently recognized and esteemed by the medical profession.

But that specialist, who over a period of many years in a scientific way keeps abreast with and promotes his subject theoretically as well as practically and who in scientific circles is recognized and respected, possesses those qualifications which characterize an expert. You may instinctively and unconsciously note his presence in the court room.

The conception of the term expert is not identical with that of a specialist. One must, therefore, clearly distinguish between a specialist in surgery, a specialist in gynecology, in pathology, etc., and an expert in pathology, in gynecology, in surgery, etc. In other words, one can be, for example, a successful specialist in practical surgery but not necessarily an expert in surgery, one may be a good operator, but a poor surgeon. Should an internist or surgeon be questioned about the fundamental facts of his specialty, he will promptly excuse himself with the reply that he is not a pathologist. He, moreover, emphasizes the fact that he does not feel himself in any way qualified in the field of pathology, but forgets at the same time that without knowledge of the indispensable scientific principles included in pathology he cannot be a good general practitioner, much less a specialist.

I have called your attention to this fine distinction and have given it special emphasis, because I have found that most members of the legal profession are unfamiliar with this subtle but very important difference. While this differentiation is rather difficult to introduce in the court room, nevertheless, it is of practical importance that you keep this distinction impressed in your mind, as it may prove to be of the most vital significance while you are selecting a physician to serve as a real expert. I need not emphasize this fact at greater length, since, I believe, that you have been frequently confronted with the situation.

Medical Practitioner as Witness

Now, let us call a practitioner to the witness stand. Occasionally he will gladly and proudly admit his qualifications as an expert without deliberation, usually to his detriment. Generally he appears in court unprepared, either firmly trusting that he will live through the situation on the strength of the indaquate knowledge he has gained through practical experience or not having the slightest conception of the matter in question. Even during direct examination one can observe immediately that he is vacillating in hesitancy and it will not take an able, discerning attorney a long time to recognize promptly this sign of weakness and to utilize it successfully to his own advantage.

The tendency of many doctors, even those who are apparently experienced, is to converse with the attorney regarding medical and scientific questions, while on the witness stand, in simple every day language and in a rather shallow manner. In this way the doctor may be easily inveigled in a network of contradictions and may be hopelessly cornered, and must finally admit and confirm all those convictions which he held and declared to be absolutely absurd, before he entered the court room, being placed under the dominating influence of the

attorney who skillfully used him for his purpose, deftly turning the discussion to the possibilities and probabilities in the case.

Should the physician come unprepared for his case, should his knowledge have a shallow foundation, he will be forced to surrender completely to a clever, hard pressing attorney. A well prepared lawyer will dominate the situation from the very outset; during the course of the trial he will prove himself more thoroughly informed than the physician and will finally expose him without regard or mercy forcing him to admit and confess his ignorance. One has the unrefutable conviction that the attorney as a layman is by far better versed along the medical lines of the case, that he has a more complete grasp of the medical phases than the physician who testifies as an expert. Occurrences of this kind are by no means the exception; many a physician has made a very pitiful appearance and has left a sad impression in the courtroom.

Inefficient Medical Witness

The second essential fact which may unfavorably influence the medical testimony during the trial is the intentional or occasionally unintentional partiality of the physician, a court experience which is not uncommon.

A person has the general impression that the physician, who is engaged to testify, is far more interested in the case on trial than the parties involved. One can judge the extent of his interest from every spoken word, which is uttered in the most pedagogical manner—ex cathedra as it were, allowing no exceptions. During a favorable course of his examination, for example, one can immediately and readily read the degree of his uncontrollable enthusiasm and satisfaction; when the case is unexpectedly and unfavorably altered, however, his wrathful embarrassment is outwardly expressed in every word and action.

The same type of physician closely attaches himself to the lawyer during the entire trial, tried to instruct and direct him in every detail and assumes the air of blustering importance. He becomes particularly excited when another physician differs or disagrees with him on the witness stand. But as soon as he is called to testify he is either an enthusiastic defender or a bitter prosecutor in the case on trial.

Gentlemen, these are characteristics, which absolutely typify a poor medical witness; he is a detriment to himself and your cause.

A further observation which is of equal importance to physicians as well as lawyers, is the following:

Many doctors, while on the witness stand, have the bad habit to argue at great length with the attorney about medical problems, much to the amusement of the court and jury. This behavior, furthermore, indicates that the lawyer is his equal in scientific questions. Would that

such a physician would keep in mind that a true expert never quarrels with a layman about the minute and complicated details of a scientific subject. Should he be forced to do this, however, he must know how to silence the layman in a short time with timely, well placed and significant answers. The less a physician is equipped with knowledge, the more will he be inclined to force his contentions in a quarrelsome, disagreeable manner. While he is in this frame of mind he invariably loses all conception of scientific accuracy and a well trained attorney will use the advantage of this situation for the profit of his client. The shrewd lawyer knows how to provoke an irritable witness and how to ridicule him before the court and jury. Self-control is the only efficient but difficultly applied remedy for this class of medical witness.

One point should never be forgotten by physicians appearing in court, that their speech, their expressions and their discussions should always convey an impression of scientific accuracy. Of course, when necessary, he must immediately interpret the scientific terms, the technical matters in more simple language, so that the judge and jury can more completely understand the full significance of his testimony and can more easily follow his trend of thought without provocation. The expression "without provocation" I wish to emphasize most particularly, because a keen-minded lawyer is apt to interrupt the medical expert in the height of his vitality important testimony with a witty, well directed remark, referring to his intricate vocabulary, thereby indirectly ridiculing him. As a consequence, the psychological effect of the expert testimony may suffer or may even be lost entirely.

It might be well to add that jurors being rational like to reason and therefore listen very attentively to the discussions and answers of the expert. The danger lies in the ever present possibility that he is not understood, that he failed to convince them, usually, because he has gone wide of his mark through too many and too complicated words instead of using too few and too simple terms. A flood of words never impresses but repulses.

The Real Medical Expert

All the failings and weaknesses which we have hitherto considered and which we reluctantly behold and severely condemn in a poor medical witness, are not discernible in an able, experienced medical expert. The significant difference between the two lies in the fact that in a real expert one naturally presumes to find a thorough preparation in every respect, a preparation for every emergency. This, however, requires two essential prerequisites, namely, inexhaustible theoretical knowledge of his specialty and a long practical training and experience in court procedure.

One unconsciously observes, notes and is impressed by the very approach of the expert to the witness stand, his behavior while taking the oath, his manner while occupying the chair, all ordinary irrelevant actions. But the first impression of the expert has been made on the court.

While testifying the expert should be guided by the following practical advice. In the first place, he must constantly remember that his conduct, his actions, in fact every facial expression is observed, and I may say, carefully studied by all those present in the court room, but particularly by the jurors. He must, therefore, cautiously control his behavior. This is especially necessary, when he is grilled by the attorney during the cross examination or when the lawyer unexpectedly surprises him with an apparently embarrassing question. Any restlessness which may be shown while on the witness stand, will be readily observed, immediately noted and invariably interpreted as uneasiness or embarrassment. Even the most perfect answer loses its desired effect if accompanied by evidences of discomfort. On the other hand, the expert should not let the court feel his superiority and success, nor should he smilingly enjoy his own answers, when they amuse the jury at the expense of the examining attorney. His earnestness and competency make him the master of the situation.

In the second place, his discussions and answers must be short and to the point, particularly during cross examination and if possible, so framed and qualified that further questioning or arguments will not be forthcoming. Should he possess this ability he will bring the cross examination to a speedy and successful conclusion.

Technique of Medical Evidence

In respect to the expert testimony itself, referring to the technique of the presentation of the medical and scientific evidence, the following procedure may be followed, which, of course, presumes a serious, detailed preparation and a mutual understanding between the expert and the counsel.

On direct examination the medical evidence is presented in vividly portrayed language, employing only positive, undeniable facts in such a way as to captivate the attention of the court and jury. The salient points which form the important parts of the medical testimony must then be inculcated on the minds of the jury through well directed questions of the counsel to the expert. All uncertain, equivocal or doubtful matters should not be mentioned at this time, but should be left to the initiative of the opposing attorney, who may or may not have the ability to utilize the questionable issues during his turn in the cross examination.

The cross examination is the most important phase of the expert's

testimony. Therein is reflected, as our court experience teaches, the mental alertness, the skillful repartee, the inborn talent, in fact the success of the expert. The ordeal of cross examination must be endured in a calm and serious manner. During this period one must attempt to reaffirm in appropriate, well aimed statements one's own true and unbiased point of view, endeavoring to present it still more convincingly.

The inevitable success of every cross examination depends upon a conscientious and minute preparation of all the possible, conceivable, anticipated objections which eventually may be proposed. The expert must dominate the situation and must not let the trend of the medical discussion slip from his control. During the cross examination he must lead the lawyer and always let him feel his scientific superiority. In a critical moment the answer must skillfully distract the questioning attorney. Should the zealous counsel seize the opportunity, which may really happen, he will be cleverly deprived, if even momentarily, of the force of his apparently important but embarrassing argument. The many detailed aspects, which may arise in such unforeseen occasions during a cross examination, are difficult to discuss, because they depend largely upon the individual natures of the parties involved.

All contingencies which may occur during the course of the cross examination must previously have been premeditated exhaustively with the counsel so that both, the attorney and the expert, can introduce and efficiently develop their case, in harmonious co-operation and mutual understanding.

One more point I desire to stress most especially. The cross examination offers a more advantageous opportunity to the expert than the direct examination for the emphatic reiteration of previously presented facts which can furthermore be developed with greater ease, with greater power and a still greater degree of conviction. The psychological effect of a successful cross examination is inestimable since the jury can be thereby most conclusively impressed with the erroneous and misinterpreted conceptions of the opposing attorney.

The foregoing considerations form a general outline of so-called court-room tactics, which should be seriously considered by medical witnesses, for thereupon depends their success.

Expert's Court Manner

It is an indispensable necessity that the medical witness be present during the entire course of the trial in the court room and that he follow up with interest and attention the development of the case. This is advantageous for two reasons; first, he becomes thoroughly acquainted with all the peculiarities of the case and secondly, he familiar-

izes himself with the methods of questioning employed by the opposing attorney.

The medical witness should never fail to address the jury directly and persuasively during the presentation of all the significant phases of the scientific evidence avoiding any sensational expressions or witty remarks. His behavior on the witness stand should never reveal a fighting spirit, on the contrary he should quietly answer the apparently excited lawyer with calmness and composure. To do the opposite of that which your opponent expects you to do is a valuable, practical axiom.

In intricate medical cases it is always expedient to explain the medical facts to the jury by displaying actual anatomical specimens or medical pictures in order to stimulate their interest. The expert can appear most impressively if he is able to accompany his scientific discussion with a few well planned sketches on an ordinary black-board during his testimony. But even this requires a preliminary preparation in order that uncertainty and incorrectness will not bring about the opposite effect.

Unscrupulous Lawyers and Doctors

It is a common practice with the average lawyer to discuss the case with a medical witness at the very last minute, irregardless of its importance. Very frequently he is approached at the very door of the court house or is even called directly from his office to the witness stand. I advise every physician to refuse cases of this kind without hesitancy; anyway a conscientious doctor would never undertake such a proposition for he would immediately prove his shallowness and carelessness.

I censure most emphatically the practice of such lawyers because they openly betray their unscrupulousness and their irresponsibility toward their clients. They attempt to persuade an unprepared and carefree physician to save their case, and a cleverly adjusted hypothetical question is used to cover up his disadvantageous difficulties.

At this time I do not care to analyze the medical merit of a hypothetical question, which is often abused, however, I would like to point out the fact, that in the majority of the cases, a question of this kind can be answered in various ways, even in diametrically opposed directions, because it is often speculative in content and consequently unscientific. Its value, however, is unquestionable if based upon sufficient scientific facts. The hypothetical question represents that form of medical testimony which is often misused.

Certain lawyers try to tempt a physician to appear in the court room by presenting the case to him erroneously, purposely omitting the critical points. Should the doctor accept the lawyer's invitation, in good faith but without further deliberation, he may expect to be surprised suddenly and disagreeably while on the witness stand, the lawyer en-

tirely disregarding his predicament. The avariciousness and mercenary conduct of the attorney and the careless, covetous disposition of the physician are the principal reasons for these occurrences.

From a criminal standpoint the following aspects may be of interest. An unscrupulous attorney will carefully and cautiously build up an important court case out of an otherwise harmless incident, in order to gain additional pecuniary profits at the expense of his confiding client. Not to fail in his plans, he secures the assistance of several doctors, whose greediness is well known to him. Harboring criminal tendencies and intentions they approach the court under the guise of justice, taking the judge and jury by surprise. The defendant is therefore forced to introduce an opposing group of physicians to adjust the balance of power and to prevent their success. A real comedy, unbeknown to the jurors, but a glaring example of criminal co-operation between a lawyer and physician.

That class of medical witnesses, who intentionally interpret the facts incorrectly, who twist and turn the scientific evidence in order to meet their case, I will not consider at this time. These and analogous instances of criminal tendencies and activities of practicing physicians I am reserving for another occasion dealing with the title "The Physician as a Criminal."

Gentlemen, while I believe that I have not presented the subject as fully and as exhaustively as its importance deserves and that the contents and tenor of my discussion would have been more appropriate for a medical audience, nevertheless, I fell certain that you have formulated some helpful conclusions from my brief discussion. I thank you.