Third Edition

TESTIFYING IN COURT

Jack E. Horsley, JD
With John Carlova

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A guide for physicians

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Medical Economics Books
Oradell, New Jersey 07649

Library of Congress Cataloging-in-Publication Data

Horsley, Jack E., 1915–
Testifying in court; a guide for physicians/Jack E. Horsley, with John Carlova.—3rd ed.
p. cm.
Includes index.
1. Medical jurisprudence—United States. 2. Evidence, Expert—United States. I. Carlova, John. II. Title.
KF8964.Z9H65 1988
347.73'67—dc19
[347.30767]

Cover design by Douglas Steel

ISBN 0-87489-465-4

Medical Economics Company Inc.
Oradell, New Jersey 07649

Printed in the United States of America

FOREWORD

Sooner or later, most practicing physicians will testify in court. Basically, these appearances fall into three categories: (1) the "fact" witness, who's usually called to testify about the condition of a patient he's examined or treated; (2) the "opinion" or expert witness, who tries to help the judge and jury reach conclusions on medical issues; and, most important, (3) the doctor-defendant in a malpractice suit, whose career may depend on the effectiveness of his testimony.

Too often, however, doctors succumb to what I call "court fright." This is more virulent than "stage fright," and it strikes with surprising frequency. In 50 years as a trial lawyer, I've seen it undercut the effectiveness of witnesses who normally were persons with poise, intelligence, and strength of character.

Just one example: I represented the plaintiff in a medical malpractice case, during which a prominent surgeon was called by the defense as an expert witness. As he came through the courtroom doorway, he seemed a formidable fellow—tall and distinguished-looking, with an authoritative manner.

When he began that long walk to the witness stand, though, he looked as though he were approaching the electric chair. Almost literally, he went to pieces with "court fright." His knees seemed to buckle, and he glanced wildly about the courtroom, as though seeking escape. He was so flustered, he even tried to shake the hand of the court clerk, who was waiting to swear him in.

The watching jurors couldn't help but wonder, "Why is this witness so panicky and frightened?" He had one strike on him before he even took the stand.

On the stand, he alternated between fidgeting and slumping in the seat, with one hand restlessly wandering

over his face. At one point during his testimony, he grinned at someone in the spectators' section. Later, he scowled fiercely at me as I started my cross-examination. Two strikes on him.

There was no doubt that this doctor was an expert in his field. The trouble was that he devalued his own testimony by the way he presented it. He went on and on about his credentials until they became boring to the jurors. In answering my questions, he was hostile and evasive, which created the impression that he was hiding something.

Then he committed the cardinal sin of a witness—he lost his temper. He fumed and growled at me as he responded grudgingly to my questions.

Strike three. Despite his medical expertise, that doctor was a loser as a witness.

Compare his performance with that of a cardiologist who testified in another case I tried.

He approached the stand in a normal manner, glancing to neither right nor left, using the waiting court clerk as a focal point. On the stand, he sat upright, with his feet firmly on the floor, his hands resting in a comfortable position, his attention concentrated on the lawyer questioning him. He responded concisely, to the point, and with refreshing candor. If he didn't know an answer, he said so.

When he used medical terms, he sometimes explained them, but not to the extent of talking down to jurors. He addressed them as he would a patient—not as a lecturer, but as a teacher imparting his medical knowledge and giving advice and guidance.

Despite his low-key manner, he came through as a compassionate, caring person—realistic and objective in his views. In short, he was a good doctor who had brought his bedside manner with him to court; and it worked. He was a winner.

How can you be a winner on the witness stand? How can you overcome "court fright"? How should you prepare for an appearance on the stand? What fee should you charge—if any? How should you handle yourself on direct examination? What's the best way to deal with a tough cross-examiner? What are the booby traps you should avoid?

All those and many more questions are answered in this book.

By reputation, I have known the author, Jack E. Horsley, for many years. He's one of the best medical malpractice defense attorneys in the country. If anyone can prepare a doctor for the witness stand, Jack can. Read his book. It's a winner.

Melvin M. Belli Sr.
San Francisco

PUBLISHER'S NOTES

Jack E. Horsley, J.D., is a specialist in medico-legal matters who has been practicing law for more than 40 years. He is a Fellow of the American College of Trial Lawyers, a former director of the Society of Trial Lawyers, and Past President of the Illinois Defense Counsel Association. He is a consultant and contributor to *Medical Economics* magazine, and has written extensively on legal subjects. His writings include a text, *Illinois Civil Practice & Procedure,* and numerous treatises and monographs published by the Illinois Continuing Legal Education Institute, Chicago; The Court Practice Institute of Chicago; and The Practicing Law Institute of New York. With John Carlova, he also wrote, *Your Family and the Law,* a book addressed specifically to physicians.

John Carlova, West Coast Editor of *Medical Economics* magazine, is the author or co-author of 12 books. His writings have appeared in *The Reader's Digest, Harper's Magazine, American Heritage, Cosmopolitan, The National Geographic,* and many other leading publications. He has also written for radio, television, and motion pictures.

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EXPLODING THE MYTHS

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Testifying = Terrifying.

Those two words are synonymous to many doctors who appear in court as witnesses. After a recent trial in the Midwest, for example, I spoke to an internist who had just testified. Although he'd appeared in quite a few previous cases as a medical witness, he showed signs of strain.

"I get nervous every time I testify," he told me. "I feel as though I'm all alone up there in that damned witness chair, facing a sea of hostile faces. It seems like everybody in the courtroom is against me."

That same day, I encountered a young surgeon who was making his first appearance in court as a medical witness, and he didn't like the idea one bit. "Now I know what a patient going into the operating room feels like," he said miserably.

There must be thousands of physicians who can identify with one or the other of those two doctors. Whether they're old-timers or newcomers in the witness chair, they have trouble in adjusting to what they feel is the alien, antagonistic atmosphere of the courtroom. The problem may be simple nervousness, or it may be apprehension—but almost always, I've found there's no good reason for it to exist. It's based mainly on myths.

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One purpose of this book is to explode those myths. We'll also cover such important items as how to prepare for a court appearance, how to give better depositions in less time, how to determine your witness fee, how to ward off stage fright on the witness stand, how to win over the judge and influence the jury, how to make the most of direct examination, how to use your records to the best advantage as a witness, how to star at presenting an exhibit or putting on a demonstration, how to dodge a cross-examination trap, how to be sure your testimony does not violate doctor-patient confidentiality, and how to handle the tough or tricky cross-examiner.

In short, the book will include all the big things and many of the little ones that cumulatively make for an effective performance on the witness stand.

Contact with the legal process, of course, has long been a fact of professional life for doctors. Back in the days of the Roman Empire, a physician named Antistius examined the bloody remains of Julius Caesar and later performed superbly on the witness stand. Of the 23 stab wounds inflicted, he testified, only one was mortal—the perforation of the thorax. Today the doctor on the stand is the most important of all expert witnesses. Between 60 and 80 per cent of all contested cases at the trial level require medical evidence.

Consequently, virtually every doctor will be called to testify at some time during his or her career. For orthopedists and many other M.D.s who treat or examine accident victims, a court appearance is a regular occurrence. And in a malpractice case, of course, a doctor's career may depend on the effectiveness of his testimony on the witness stand.

The specter of malpractice has haunted the medical profession much longer than some doctors might suppose. The code of Hammurabi in the early Mesopotamian civilization specified that "if a surgeon should treat

a gentleman with a bronze lancet and cause either death or loss of an eye, the surgeon's hand should be cut off, but if he causes the loss of a slave, he need only provide a new slave." While today's penalties for malpractice are somewhat less drastic, they're still worrisome for doctors who have to face them in court.

Actually, our system of trial by combat is unnerving to many who enter the legal arena, including lawyers themselves. Attorney Charles P. Curtis has defined the way we administer justice as "an adversary proceeding—which is to say we set the parties fighting." Rufus Choate, the great American lawyer who was a contemporary of Daniel Webster, freely admitted that he always felt wretched during a trial. He used to grumble that he'd invariably spend two sleepless nights, "One in preparing what I was to say in court, and one in lamenting what I had said."

In light of all this, it's not surprising that some doctor-witnesses get nervous before and after taking the stand. The problem isn't the nervousness; it's the inability to control it. The fact is that, if you can control it, nervousness as a witness is good for you. Listen to what Frederic T. Howard, an eminent attorney, has to say on the subject of jitters in court:

"When one rises to cross-examine or make a plea, he will be nervous indeed—that is, if he's any good. His knees will weaken, and his perspiration will flow copiously, but this very fear or stage fright gives presence and magnetism to the sufferer. If he controls it, this repressed emotion is transmitted to his hearers like the effect of a galvanic battery. It gives the idea of great reserved power."

Although those remarks were addressed to young lawyers, they apply equally well to the medical witness. Nervousness stimulates you, keys you up, makes you sharp and alert. Fine. But how do you control it? The first step

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is to throw out of your mind the most common myth about testifying—that the doctor on the witness stand is all alone and highly vulnerable.

The truth is, the medical witness is in a particularly strong position. First of all, he can expect help from the attorney for his side, who'll be ready to object if the opposing lawyer tries any unfair tactics. The judge will be watching, too—and courts are much more interested in protecting the rights of the witness than you may think. Then there's the jury, those 12 good men (and/or women) and true. They tend to identify more with the witness than with the cross-examiner—*unless* the witness gives them reason to do otherwise.

In sum, everybody is with the witness except the opposing lawyer—and he's not always the formidable fellow he might seem to be. Even if he's studied the medical aspects of the case, he's still a tyro in *your* element. You have the advantage of knowing far more than he does about medicine. Very literally, you're the doctor.

Another myth that creates tension for the medical witness is that doctors and lawyers are natural enemies, like cats and dogs. The physician who goes to court with that attitude is likely to be suspicious, skeptical, or outright belligerent. He's inclined to agree with Dickens's Mr. Bumble, who denounced the law as "a ass—a idiot!" Alas, he may even agree with the British peer who defined a lawyer as "a legal chap who rescues your estate from your enemies and keeps it for himself."

Now, I'm not going to pretend that all lawyers are perfect little gentlemen; we all know better than that. I just want to point out two things: (1) The suspicious, skeptical, or belligerent medical witness usually hurts himself and his side because his testimony tends to be sardonic or truculent—two attributes that juries find distasteful. (2) Most cross-examiners regard the competent medical witness with respect and some trepidation. A

veteran attorney, Irving Goldstein, once put it this way:

"The more experience one has in the cross-examination of the medical witness, and particularly the expert medical witness, the more one must come to the conclusion that the cross-examination of a truthful, honest, efficient, and capable expert medical witness who isn't given to exaggeration is not only dangerous but usually harmful to the trial lawyer. When this type of medical witness is encountered, it's no wonder that the most experienced and most successful trial lawyers in personal injury cases frequently feel that the best cross-examination is no cross-examination."

In brief, it's the inept, unprepared, unprepossessing, or unthinking medical witness that the cross-examiner is likely to go for. An insecure doctor on the stand, for example, may try to make himself look good and feel better by puffing up his qualifications. I remember one case in which the medical witness, a G.P., testified that he had surgical privileges at three hospitals. On cross-examination, he was asked whether he actually did any surgery at those hospitals. The answer was "No." Then he was asked if he ever did surgery at all, except for minor office procedures. Again the answer was "No." That doctor's testimony was largely discredited because the jury's attitude was, "This fellow isn't exactly a liar, but he sure doesn't tell the whole truth and nothing but the truth."

This doesn't mean that a G.P., or any other M.D., can't qualify as an expert medical witness. The courts have consistently held that anyone with an M.D. degree may be considered a medical expert, even though he might not be a specialist in the particular ailment that is the subject of the inquiry.

Obviously there is a danger here—the possibility that a doctor may overestimate himself as an expert—and it's one into which more than a few physicians have blun-

I dered. Early in a fracture case a few years ago, an elderly G.P.'s expertise was put to a test on the witness stand. He was handed a bone by the cross-examiner and asked to identify the part of the body it came from. After studying the bone, the doctor said it came from a woman's leg. The cross-examiner then revealed that the bone the G.P. was holding had come from a dog. That doctor might just as well have gone home right then and there, for all the influence the rest of his testimony had.

Incidents such as that have built up another courtroom myth: Most cross-examiners are slyly murderous. That one goes back to the days when many trial lawyers were indeed cunning, ruthless, and relentless. During one trial, a witness became so irate when the cross-examiner kept wagging a finger under his nose that he bit the finger. At another trial, a country doctor spit tobacco juice into the eye of a cross-examiner who was badgering him by shaking a book in his face. The lawyer then literally threw the book at the doctor—appropriately, it was Gray's Anatomy. Another attorney of that colorful era once ended a powerful argument with a tear-choked version of "Home, Sweet Home" because his client, a mother of eight, was confined to a hospital.

No trial lawyer today could get away with that. The lugubrious lawyer, like the bullying barrister, is largely a thing of the past. Judges are too intent on maintaining decorum in court, and juries are too sophisticated to be taken in by a corny act. Trial lawyers themselves tend to be low-key. Many even remain seated at the counsel table during cross-examination, rather than closing in on the witness to wag a finger or shake a book.

One note of caution: No matter how subdued a lawyer may seem, if the medical witness gives him an opening, that lawyer is almost sure to reach out and figuratively knock the doctor's block off. During a trial in a rural, southern Illinois town, for example, a rather pompous

orthopedist was committing one of the cardinal sins of testifying. He kept spouting scientific terms that mean little or nothing to the layman. The jury of farmers and small-business men looked baffled and annoyed. Finally, the cross-examiner, who'd been lounging at the counsel table, drawled: "Just a moment, Doctor. You keep talking about this here tibia. What is that—a country in Africa?"

"Why, no," the orthopedist replied. "It's the shin bone."

"Ah! *That* I understand. I'd certainly appreciate it, Doctor—and I'm sure the jury would appreciate it, too—if you'd translate all them fancy terms for us country-folk." And the lawyer rolled his eyes at the jury, as much as to say, "See how I got this dude to speak plain English?" He clearly had the jury on his side.

Another sure way for the medical witness to make a fool of himself is to memorize his testimony as though it were a speech. Cross-examiners love to spot this type of witness—and he's not difficult to spot. The parrot-like intonation and the stiff, artificial structure of his sentences give him away. He's not difficult to demolish, either. The skillful cross-examiner simply diverts the witness from his memorized lines by asking unrelated questions. The witness loses his place, so to speak, and begins to flop and flounder, sometimes blanking out completely on the points he's trying to get across. The jury is led to the conclusion that the witness is either weak-minded or a liar.

When I'm preparing a medical witness for a trial, I especially warn him against memorizing any part of his testimony. I advise him to assemble his ideas, not his words, in effective order. The words, I've learned, take care of themselves.

Another bit of advice I pass on to the medical witness is related to still another myth—that the expert in a court case is expected to know it all. The doctor who

I takes the stand with this impression is asking for trouble. Cross-examiners have a good ear for the overemphatic statement that marks the medical witness who cherishes his authority. Quite often he can be led into deep waters—medical matters that he has no reason to keep fresh in his mind—and left there to thrash about.

In one case I recall, the doctor compounded his error by angrily sputtering at the cross-examiner: "Are you questioning my competence, sir? Are you suggesting I'm a liar?" He himself planted the seed of discredit in the minds of the jurors, and there was no doubt that it had taken root.

In contrast, consider the behavior of a psychiatrist who was testifying in a California case. When the cross-examiner attempted to question him on a detail of anatomy, the psychiatrist frankly admitted he didn't consider himself an expert in that area.

"But, Doctor," the lawyer protested, "you studied anatomy in medical school, didn't you?"

"Yes."

"Then you must be thoroughly familiar with it."

"I *was*."

"Why do you speak in the past tense?"

"Because there are just two types of people who know all about anatomy. One is the professor in medical school, and the other is the student who's just graduated from the course. I am neither."

The jury respected that man for his candor. No matter how expert a doctor may be in his particular field, he's still a human being subject to limitations of knowledge. When he admits he doesn't know it all, he reveals himself as a human being—and so makes the jury feel closer to him. The moral for the medical witness: If you don't know the answer to a question, or even if you're doubtful about the answer, say so. Indulging in guesswork is one sure road to disaster.