Denver Law Review

Volume 31 | Issue 10 Article 2

January 1954

The Expert Witness

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THE EXPERT WITNESS*

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It is estimated that there are approximately one and one-half million auto accidents and two million industrial accidents annually in this country. These injuries afford ample opportunity not only for doctors but also for lawyers who are interested to engage in medical jurisprudence. For this reason, the subject "The Role of the Expert Witness in the Preparation and Trial of Tort Actions" is timely and is becoming increasingly important.

Courtesy in sending a subpoena to a doctor is an essential point in fostering pleasant relationships between doctors and lawyers. I do not have to tell you that most doctors are busy. They arrange their time in advance. For example, the doctor might have surgery scheduled as far as two or three weeks ahead. The layman has no idea what scheduling an operation entails. First, the operating room supervisor must be contacted for a specific day and time. If the doctor wants eight o'clock time, he may have to schedule an operation two or three weeks, or even longer, in advance. After he has scheduled operating time, an anesthetist must be found. When these details are arranged, the doctor must phone the hospital again and ask the admission clerk whether or not a bed can be obtained the day before the operation is scheduled. Imagine the disruption that occurs when a subpoena from an attorney arrives informing the doctor that he must appear in court at 9 or 10 o'clock on that particular day. The attorney did not ask the doctor whether or not he had any work scheduled on that day. My plea is for the lawyer to be courteous and telephone the doctor in advance, asking him whether or not he could arrange his time to appear in court at a specified time and day. Furthermore, ofttimes a subpoena reads that the doctor must appear in court at 10 o'clock on a certain day, when he may not be placed on the witness stand until 3:30 the same afternoon or perhaps even on the following morning. A courteous lawyer will avoid all such delays and unpleasantness for the doctor.

In the eyes of the law any medical practitioner may be considered to be an expert witness, although he may not necessarily be an expert or a specialist in his field. For practical purposes it behooves the lawyer to qualify his medical witness. I am reminded of a case in which I testified some years ago in district court. A general practitioner was testifying on a rare type of fracture. After the medical testimony was completed, we left the courtroom together and as we walked down the corridor, I queried "How many of those fractures have you seen?" He answered, "That's the only one I ever saw. I'm thankful they didn't ask me how many I have seen!"

Some lawyers are hesitant in questioning doctors about their

* Address given at a Symposium on the "Preparation and Trial of Tort Actions" held at the University of Colorado on Law Day, April 24, 1954.

qualifications. Time after time, I have heard the opposing lawyer say, "Doctor's qualifications accepted". The doctor was qualified by law but the jury was not made aware of his qualifications. The lawyer should impress the jury with these qualifications, particularly if the plaintiff's doctor is not as well versed in some branch of medicine as the doctor for the defendant.

The doctor's pre-medical education should be stated, since every layman has heard of some schools and not of others. Certain schools have been ingrained in the public mind and a little more respect might be engendered on the part of the jury. Ask the name of the medical school which the doctor attended. Today all medical schools are Class A. However, some schools carry higher prestige in the minds of laymen.

The type and place of the internship could be stressed. During World War II doctors were required to serve only a nine months internship. Prior to the war and again thereafter, a doctor was compelled to spend twelve months in order to fulfill an acceptable internship. If he took a residency, this fact should also be mentioned. A residency is considered to be advanced post-graduate training. The location of the residency, the type of work and duration may be factors which could influence a jury.

The American Board has become an important factor, and almost every specialist today is a diplomate. The American Board is an examining body that has been established to certify men who are qualified to practice as specialists. Each specialty in medicine has its own examining board. In order to become a diplomate of the American Board, one must first satisfy certain training requirements. For example, in orthopaedic surgery, one must serve, beyond the internship, three years devoted entirely to orthopaedic surgery. After the completion of this training, he must be in practice for five years and be ethically acceptable to his colleagues before he is eligible to take the Board examinations. If a doctor is a diplomate of the American Board of his specialty, it is important that the jury be apprised of it.

An attorney should try to utilize the doctor other than as an expert witness. If the attorney plans to take a deposition, for example, it is desirable for his doctor to be present and listen to the questions. Perhaps the doctor may suggest questions which the opposing doctor should be asked. This might be a very important factor. The difficulty is, that doctors are busy and most of them do not like to be bothered with this type of work. This is understandable because it is time consuming. However, if it can be arranged, this type of liaison can be extremely helpful to the lawyer.

The attitude of the lawyer in cross-examining a physician is important. An attorney with great trial experience once said, "In cross-examination, do not examine crossly." That is a good rule to follow. I know one gentleman, who, when he cross-examines, bellows so loud that one can hear him far away. This conduct is

unnecessary, and in the end, defeats its purpose. The asking of intelligent questions in a normal tone of voice rather than the shouting of less pertinent questions will accomplish much more.

The average lawyer should not attempt to cross-examine an expert medical witness unless he has some knowledge of the field. A lawyer cannot pit his knowledge of medicine against the doctor, because the expert witness can trip the lawyer very easily. The lawyer can only hope to discredit the expert witness if he is prone to exaggerate testimony. For example, if the expert witness expresses an opinion which reveals that he did not adequately examine the patient or if he tends to digress into a field where he is not familiar either by training or by experience, the alert lawyer should immediately reveal such digressions.

One of the most important factors for the lawyer who is preparing a tort action for trial is to review the medical facts of the case with the doctor. The lawyer should either go to the doctor's office or perhaps to the doctor's home, as I have often had attorneys do. The case should be thoroughly reviewed so that the attorney understands the medical problems involved and learns something about medical terminology as it relates to the particular problem. The lawyer will then better understand how to cross-examine the opposing doctor. If the lawyer fails to discuss the problem with the doctor prior to the trial, he makes a serious mistake. The attorney can study the subject himself, and some attorneys are extremely clever in digesting medical terminology and problems. I recollect a case before the State Compensation Insurance Fund a few years ago, where I sat in amazement as I listened to a young attorney cross-examine on a very difficult medical subject.

The attitude of the doctor on the witness stand is important. The doctor should tell the truth, the whole truth and nothing but the truth. He should do his utmost to be impartial and fair-minded. He should be natural. He should not talk down to the jury, or to the lawyer, since this is unbecoming conduct. The doctor should be modest and not exaggerate his qualifications, capacity or experience. He should not make a speech, nor volunteer information. He should listen to each question and be sure he understands it before he answers. If he does not understand the question, he should not hesitate to ask the lawyer to repeat it, because his answer might be extremely important in the decision that will be given by the jury. Above all, he should not attempt to be an advocate. He should only be a medical expert. He should not lose his temper. Moreover, if the lawyer loses his temper and the doctor does likewise, the case will most certainly be lost.

The medical facts should be presented to the jury in such simple terminology that each and every member can understand the problem in question. The ability to convey medical thoughts in simple words should be cultivated by everyone interested in medical jurisprudence. Instead of using polysyllabic or Latin words, the expert medical witness should express himself in simple words that the jury can understand. It is similar to teaching.

If one understands a subject, he can teach it. If he does not, he has great difficulty in conveying ideas to the student. So it is with addressing a jury. If the doctor really understands the problem, he can inform the jury in simple terms so that the jury can understand them. I would like to quote from an article about a trial in which a physician had testified to the results of a blow to the plaintiff's abdomen. The judge interpreted the remarks as follows. "Gentlemen of the jury, the doctor means to say that the plaintiff was hit in the stomach." Everybody knows where the belly or the stomach is, but perhaps everybody doesn't know where the abdomen is located. The use of anatomical charts, if permissible, may be helpful in conveying ideas to the jury. It is ofttimes more impressive to an individual to see the location of a region on an anatomical chart rather than try to paint a word picture.

Impartiality on the part of the attorney merits some consideration. It is understandable that there are instances when it is difficult to be impartial, but one must continually ask himself the question "Am I doing the right thing?" Lawyers must remember that they are officers of the court, and they should not resort to tactics of the prize ring or a wrestling match, expecting the judge to serve only as a referee. The lawyer's duty is to see that justice is done and present the facts of the case.

I would like to ask lawyers to be more tolerant of doctors in reference to rating a disability. The lawyer must realize that we have no exact mathematical rules. Many factors are involved and the human element is not the least important. A doctor's experience, his impression of the patient, his interpretation of the data revealed by physical examination, and the thoroughness of the physical examination, all play a role in the final conclusion. Interpretations can and do differ. The important point is that the doctor's opinion should be truthful and impartial. The problem of rating back cases, for example, has cast a shadow or doubt against the medical profession in the minds of many lawyers. However, if one stops to consider the myriad points involved in reaching a conclusion, one can perhaps better understand discrepancies in estimating disability.

The medical reports to lawyers should be detailed but not padded. By necessity they have to be couched in scientific terminology which, when required, can be interpreted verbally in simpler words to the lawyer. If the doctor includes any personal remarks in his letter, such as the following which I encountered: "we hope that our report will enable her to recover for her disability", the lawyer should request the doctor to delete such statements.

In conclusion, wide overlap of the functions of the doctor and lawyer is noted in the field of medical jurisprudence. I would like to make a plea for more cooperation between the two professions for the ultimate good and welfare of the patient-client towards the goal that justice may be done.

FORMS COMMITTEE PRESENTS CHECK LIST FOR FORECLOSURE PROCEEDINGS INVOLVING LOANS INSURED OR GUARANTEED BY THE FEDERAL HOUSING ADMINISTRATION OR THE VETERANS ADMINISTRATION*

Some loans have been insured or guaranteed by both FHA (for conciseness Federal Housing Administration will be abbreviated to FHA, and Veterans Administration to VA), and VA. Sometimes you will foreclose the FHA first loan and sometimes the VA is the first loan. All references to the other department will not apply unless otherwise indicated in an appropriate footnote. The addresses for foreclosure purposes are:

(FHA) State Director
Federal Housing Administration
555 New Customhouse
Denver, Colorado

(VA) Loan Guaranty Division
Veterans Administration
Denver Federal Center
Denver 12, Colorado

Proceedings to foreclose should be taken in the following order:

1. As a preliminary to foreclosure, the mortgagee or its servicing agent has already notified FHA by filing in duplicate form 2068.[1] Then at the time the foreclosure is actually filed another form 2068, in duplicate, should be sent. No comparable procedure is necessary on a VA foreclosure.

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* By Sub-Committee on District Court Forms, Royal C. Rubright, Chairman. The parent committee is the Forms Standardization Committee of the Colorado Bar Association, Donald M. Lesher, General Chairman.

For standard pleading samples to be used in foreclosure by the Public Trustee, see 28 DICTA 461-473 and 29 DICTA 1-6; see also the excellent article by Percy S. Morris, *Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado*, 28 DICTA 437-459.

This present article is believed necessary because, in addition to the normal procedures of foreclosure, there are certain technical requirements prescribed by the Federal Housing Administration and the Veterans Administration governing foreclosure. The forms and procedures are contained in manuals and regulations not readily available to the average practicing lawyer. The Forms Committee hopes that the check list will guide readers through the complications so that a title will finally be accepted by the FHA and the VA. The article does not attempt to repeat any of the statutory steps outlined in the former DICTA articles, but it will give some practical hints and set forth an orderly method of procedure.

The problems have been discussed with the FHA and VA and it is believed that the steps outlined comply with their regualtions.

[1] Mortgagee's handbook published by the Federal Housing Administration in Washington, D. C. issued July 1952, Sec. 1103, provides the first notice is to be filed 60 days after default occurs which is 30 days after date the delinquent payment is due. Each 60 days thereafter the mortgagee shall file another form 2068.

2. Obtain Note and Trust Deed and abstract and make a photostatic copy of

(a) The Note
(b) The Trust Deed
(c) Assignment of Rents, if any
(d) Assignment of the Trust Deed, if any.
(e) Statement of account showing the delinquency, the date of delinquency, the monthly payments, the interest, the amount in the tax reserve, and the insurance reserve.

3. Prepare and file with the Public Trustee:

(a) Notice of Election and Demand (Two signed copies for the Public Trustee, one for your file and one for the lender). VA loan—one copy for VA. (VA copies are necessary if you foreclose a VA first or if there is a VA second trust deed).
(b) Copies of Notice of Public Trustee's Sale. Two copies for Public Trustee, one to mail to each person having recorded interest in title, one for your file, one for lender (and one for VA—see 3(a).
(c) $50.00 deposit check (current Denver amount).
(d) Original Note.
(e) Recorded original Trust Deed.
(f) Recorded Assignment of Trust Deed, if one exists.

4. After Notice of Election and Demand has been recorded, send abstract to be brought to date to include the recorded Election and Demand.[2]

(a) Send Form 2068 to FHA (make four copies; one for your file, one for the lender and two for the FHA).
(b) Send VA a copy of (1) Election and Demand, (2) Notice of Public Trustee's Sale.[3]

5. Before delivering abstract, or stub-abstract to the Public Trustee, compile list [4] of names and addresses of the original mortgagor, subsequent lienors and grantees,[5] and furnish the list to the Public Trustee (three copies; two to Public Trustee, one for your file).

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[2] Many of the newer properties do not have abstracts and the lender has a Mortgagee's Title Policy. In this case, order a stub-abstract beginning with the date of recording of the deed of trust you are foreclosing. It should include all entries subsequent, to and including the Notice of Election and Demand. Where abstract companies can furnish photographic entries, request them to save yourself time in listing the addresses shown in the recorded documents, and to avoid errors.

[3] These are required by Section 36:4319 of the VA regulations.

[4] 28 DICTA p. 467. In this article reference will be made to the former DICTA articles, rather than the statutes because the valuable explanatory statements and suggestions in the articles help one to comply with the statutes.

[5] Attorneys often add their names to the list. The receipt of the Notice of Sale reminds them to verify the fact that the mailing was made within 10 days after first publication as required by COLO. STAT. ANN., c. 40, § 64 (1935); see 28 DICTA 448.

6. File motion in District Court for an order for Public Trustee's Sale.[6] Pay the docket fee. This is the proceeding under Rule 120:

(a) Prepare Order for Hearing [7] (three copies—original to file, one for VA, one for your file).

(b) Take along:

(1) Notices of Hearing Date,[8] (original to file, one for the Clerk to post in his office, one for VA, one for your file, and one for mailing to each person having recorded interest in property). (The list will be the same as in number 5 above).

(2) Stamped envelopes addressed to each person to whom the notice is to be mailed by the Clerk of the Court.

(3) Certificate of Mailing and Posting,[9] to be signed by the Clerk of the Court (four copies, two for Clerk, one for your file, one for VA).

(c) Mail VA:

(1) Motion for Order
(2) Order for Hearing
(3) Notice of Hearing Date
(4) Certificate of the Clerk of District Court showmailing and posting.[10]

7. Check the newspaper to see that the Notice of Public Trustee's publication is in the paper and that it is properly printed and published for proper time.[11]

8. Check with Public Trustee to be sure that Notices were mailed by the Public Trustee within 10 days from the first publication.[12]

9. Prepare and have entered by the District Court the Order authorizing Public Trustee's Sale.[13] (Four copies, original to file, one for the Public Trustee, one for VA and one for your file).

10. Attend Public Trustee's sale on date set. Check with Public Trustee a day or two before to determine the Public Trustee's costs and to inform the Public Trustee of any taxes paid, court costs under the Rule 120 proceedings, water bill or other items paid pursuant to the provisions of the Trust Deed. You will thus establish the proper amount of your bid. It need not be paid in cash since you are bidding as holder of note. If the costs incurred by Public Trustee exceed your cash deposit you must pay that amount in cash at the sale. The Public Trustee normally pre-

[6] 28 DICTA 461.
[7] 28 DICTA 464.
[8] 28 DICTA 464.
[9] 28 DICTA 465.
[10] 28 DICTA 447.
[11] 28 DICTA 447.
[12] 28 DICTA 448.
[13] 28 DICTA 469.

pares the Certificate of Purchase, and gives you the original after the sale. The Public Trustee records the duplicate within ten days after the sale.[14] Send form 2068 in duplicate to FHA (one copy for your file); send detailed statement of bid to VA (one copy for your file, one to lender).

11. Prepare a Return of Sale and file with District Court.[15] (three copies; file original, one for VA and one for your file).

12. Prepare and have entered by District Court the Order Approving Sale.[16] (Four copies; file original, one for Public Trustee, one for VA and one for your file).

13. When redemption period expires [17] the Public Trustee will ordinarily prepare the Public Trustee's Deed. It is to be hoped that VA will redeem if you have foreclosed the FHA first Trust Deed. In this event your worries are over. If redemption is not made by VA, the Public Trustee's deed will issue to your client.

The procedure for collecting on the insurance or guaranty when (a) only a FHA loan is foreclosed or (b) where only a GI loan is foreclosed, is an administrative problem which your client will normally handle without aid from you and the problems are beyond the scope of this article. We therefore leave you proudly and firmly grasping your perfect and indefeasible Public Trustee's Deed as you walk into your client's office to collect your fee. As you are now keenly aware—having followed all of the above steps —you earned it! We only hope we have made the path a little easier.

[14] 28 DICTA 454.
[15] 28 DICTA 472.
[16] 28 DICTA 472.
[17] 28 DICTA 457.

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As announced in the July issue, the 30 year subject-author index to DICTA is ready for your use. The students and attorneys who have compiled the information feel that this publication will be an valuable aid in your library. This 85 page booklet, at a printing cost to us of $2.00, is being made available to you as a service of DICTA with no attempt to profit therefrom.

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V. G. Seavy, Jr., Managing Editor.

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Name Address

Please make check payable to the University of Denver