CHAIR'S COLUMN

By: Elliott C. Winograd
Mineola, New York

It has been a pleasure to serve as Chair of this Committee. Our Committee offers a special and unique opportunity for all lawyers to enhance the quality of the legal profession and improve our self-image, as well as learn and benefit from one another. This newsletter and other American Bar Association publications provide a forum to enable practitioners from across the country to share their thoughts on successful trial techniques as well as air their views on matters which relate to our particular interests and concerns. I encourage your submission of articles for upcoming editions of our newsletters.

If you have utilized a creative approach to an old and recurring problem or written a memorandum involving a difficult discovery question or a sticky evidentiary issue, please share it with us. We are committed to learning from each other, and rely upon your experience and insight to accomplish this goal.

The ABA and the TIPS TASK FORCE on the SOLO PRACTITIONER have evinced much concern at the participation of single practitioners and members of small firms. Therefore, the Trial Techniques Committee is proud to be co-sponsoring six programs at the Annual Meeting which we believe will be entertaining and are designed to meet the special concerns of our members. On Monday, August 8, 1994, our program will address the heart of the issues confronting all sole practitioners and small firms, "MAKING A PERSONAL INJURY PRACTICE PROFITABLE". The panel will examine certain underlying economic factors in accepting and/or rejecting representations, analyzing liability and damages, protecting and keeping your clients even when you turn down their cases, successful and professional marketing to attract new clients and the management of both your cases and your law firm including the file and utilization of computers from the perspective of both the plaintiff's lawyer as well as that of defense counsel.

We will also be co-sponsoring on Tuesday, August 9, 1994, from 9:00 a.m. until noon, "WINNING THE DIFFICULT CASE AGAINST THE LARGE FIRM". This workshop will demonstrate practical solutions to overcoming the "paper blitz" of the large firm, and will discuss successful techniques of inexpensive research and preparation. This presentation will be most beneficial to all levels of practitioners and will include quite practical handout materials to be shared among the attendees and their law firms.

On Sunday, August 7, 1994, we will be co-sponsoring a program based upon the recent United States Court decision in

the *Daubert* case, "THE EXPERT WITNESS--A COMPLETE USER'S GUIDE". Our panel of four experienced trial counsel will dissect the questions surrounding the initial investigation, the discoverability of expert information, the taking and defending of expert depositions, and the use of expert testimony at trial.

On Monday, August 8, 1994, we are especially delighted to co-sponsor a presidential showcase program, "POST RODNEY KING: SECTION 1983 CIVIL RIGHTS LITIGATION". We expect the participation of prosecutors as well as police. This presentation will discuss successful techniques in preparing various aspects of these civil rights cases, including selection of both federal and state forums for these cases. This discussion is addressed to practitioners who had previously shied away from accepting these cases as well as those who often practice in this arena. This program will include helpful methods of educating yourselves on the various aspects of civil rights cases, including the police language, preparing your client for deposition, preparing pleadings and pre-trial motions, utilization of expert witnesses, preparation for jury selection, and suggestions for the use of demonstrative evidence. This will be a popular program.

Of course, we will also be co-sponsoring on Tuesday, August 9, 1994, from 9:00 a.m. until noon, the ever popular, "NUTS AND BOLTS OF A PERSONAL INJURY AUTOMOBILE CASE". The panel will examine several aspects of the bread and butter case for most practitioners including, case intake and review, dealing with your client (ethical considerations), the art and skills of negotiations, preparation for trial and the trial. This practical presentation is geared to all levels of practitioners, including those with limited trial experience.

Together with the TIPS Committee on Employer Relations, we will be co-sponsoring a program entitled, "MEDIATION OF A SEXUAL HARASSMENT CLAIM". The presentation will include a panel of accomplished attorneys along with the representatives from the American Arbitration Association. The AAA has implemented a pilot sexual harassment mediation program in its Denver office and has agreed to discuss its efficacy with us.

I look forward to seeing all of you in New Orleans in August. I am certain that it will be exciting and worthwhile.

EDITOR'S NOTE

By: Wendy Fleishman
New York, New York
and
Peter C. Richter
Portland, Oregon

The "Summer, 1994" edition of our newsletter begins with a reprint of a chapter entitled "An Integrated Philosophy of Advocacy" (reprinted with permission) from Bill Barton's book, *Recovering for Psychological Injury* (2d Ed.). William A. Barton is a Newport, Oregon lawyer who has tried over 500 jury trials as part of a practice specializing in claims of victims of sexual molestation. We believe that this chapter is a good outline of how to develop a theme for your case which applies to lawyers who represent both plaintiffs and defendants.

The second article, written by Karen Ohnemus Lisko, Ph.D., is entitled, "How can female attorneys be most effective in the courtroom?" Dr. Lisko is Research Administrator for Tsongas Associates, a national trial consulting firm based in Portland, Oregon. Her expertise is in the area of communications, and we believe that this article will be useful for all courtroom communicators, without reference to gender.

Our next article, written by Robert Klein, Esquire, focuses on selection of a jury in a legal malpractice case from the defense perspective. We believe that this how-to article is both useful and entertaining.

Our last article, written by a preeminent plaintiffs' attorney, Roberta D. Pichini, Esquire, tells the true tale of a negligence jury trial in Philadelphia, in which the jury awarded a woman plaintiff almost $6,000,000 as a result of a slip and fall on slippery ice. The jury found that the plaintiff's multiple sclerosis was triggered by the traumatic fall.

We are striving to make this newsletter an important and useful resource for both plaintiff and defense lawyers. We encourage your comments and your contributions. If you have an article that you would like to publish, please call Wendy Fleishman at (212) 735-2303 or write to me c/o Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022. We look forward to hearing from you.

AN INTEGRATED PHILOSOPHY OF ADVOCACY

By: William A. Barton[1]

What is a chapter denominated "An Integrated Philosophy of Advocacy" doing in a legal cookbook on psychological injuries? Theory and practice, philosophy and practicality: In litigation the two overlap -- but not perfectly. There are many "how to" books, but none of these address "Why?". This is the most important chapter in this book. It is both philosophical and practical. The theoretical is relevant in litigation, and for a good reason. Until lawyers understand why their arguments are philosophically correct, they are skilled, but sterile, technicians.

Lawyers do not create social truths; we help jurors find and rediscover them. The gist of many truths is woven within the jury instructions. When you understand why all parties are equal before the law, and you explain it to jurors, then you are in elite company. It is a lineage that can be traced to John Locke, Thomas Jefferson, and many others.

Other chapters focus on the "how to" aspects of trying psychological injury cases. A consistent philosophy of advocacy, grounded upon professionalism and social ethics, is the foundation to courtroom wins, and more importantly, true success both in and out of the practice of law.

"An Integrated Philosophy of Advocacy" is composed of separate, but related, propositions. This chapter is divided into subsections discussing each of the philosophy's propositions. Trial lawyers:

1. Articulate the social ethics which generate the case theme;
2. Understand why what we do as lawyers is very important;
3. Confront the personal fears which limit us;
4. Know how to economically and efficiently process the claim through the judicial system; and
5. Possess the nuts and bolts skills necessary to actually try the case well.

Most seminars and treatises deal only with the final trial phase. "An Integrated Philosophy of Advocacy" views courtroom "how-to" skills as tools to be used in constructing a case which reflect the ethics of a moral case theme.

Forget the excitement of cross-examination and closing arguments. The first step to "winning advocacy" is to embrace the correct philosophies and concepts. Juries and judges quickly sense the inherent legitimacy, and compelling sincerity, of a lawyer who understands why it is important, and in furtherance of compelling social ideals, for their side to prevail.

The precepts to this integrated philosophy are:

1. The world does not need more technicians; it needs lawyers who think first of morality and ethics, and then of self-interest. By effectively representing the aggrieved, trial lawyers serve as social engineers. The resulting jury verdicts help define the legal and social relationships of our society.

2. Our judicial system is predicated upon fault, with accountability defining responsibility. The deterrent effect of significant verdicts in cases (such as products liability and medical negligence) promotes safety within our society through financial accountability.

3. Jury service provides citizens an opportunity to make a statement of what is important for the community. Our's is a participatory democracy. The ballot box and jury box are cornerstones to citizen involvement.

4. Our liberties, loved ones, personal health and properties are our most treasured possessions.

5. At all times, each lawyer is an officer of the court with concurrent responsibilities to the client, the judicial system, the profession of law, and him or herself as an ethical human being.

6. Each lawyer is independently accountable legally and morally for personal conduct and professionalism. In other words, a client's or another lawyer's shortcomings are no justification for our own.

Each succeeding generation is presented with an opportunity to further refine the morality of its predecessors. Explain to the jury that we need not learn morality from scratch, but need only reawaken what our forefathers knew, and what we have half forgotten.

The most primal concepts of morality embodied within the court's instructions are:

1. All parties are equal before the law.

2. Anyone who breaks the community's rules is fully responsible for the (legally defined) consequences of misconduct.

3. A wrongdoer takes the victim "as is." Predisposition is no defense. This is a subdivision of the first, and largest, concept: all parties are equal before the law.

4. People and safety are more important than profit.

A significant verdict is legitimized by demonstrating how it is grounded in the bedrock of the community's values.

Do not just give the jury facts and arguments dripping with self-interest. Provide moral congruence. How does a verdict for the plaintiff both affirm and further moral quality of life choices?

Every case possesses within it the seeds of a theme, a proposition that rises above the facts, providing the scaffolding for your arguments. Perhaps it is found with the plight of the plaintiff, a lie by the defendant or the conduct of an indifferent defense attorney. Quicken your sensitivity to the right and decent.

This is not to suggest that your side is always pure, but as an advocate you must choreograph the facts to support that which is most poignant, compelling and redeeming within your case. This counsel is generic and applies to all cases, even the simplest of intersectional collisions.

HOW CAN A FEMALE ATTORNEY BE MOST EFFECTIVE IN THE COURTROOM?

By: Karen Ohnemus Lisko, Ph.D.[2]

How can female attorneys be most effective in the courtroom? Conventional wisdom abounds. I once heard an attorney at a CLE seminar advise her colleagues to wear a red suit during opposing counsel's closing argument to create a distraction for the jurors -- presumably what one might call a "modern day Clarence Darrow."[3] Amid all the conventional wisdom, some certainly has merit and some is nothing more than speculation. However, more reliable information exists from legal communication research and post-trial interviews with actual and mock jurors.

This discussion of courtroom effectiveness for female attorneys first addresses the most persuasive element of trial which transcends gender. Following that, we will look at judges' and juries' expectations of women lawyers as well as a review of women lawyers' unique challenges and strengths.

What most influences judges and jury verdicts?

To get a perspective on what really matters, let's talk about *the* major predictor of verdicts overall: the evidence. The evidence supersedes who is on the jury, who is on the bench, and who is delivering the arguments. While all of these factors are important, none of them outweighs the importance of the evidence. What does matter is *how* the evidence is presented.

Whether female or male, the attorney plays the critical role of storyteller and has the charge of weaving the evidence together. Research and jury debriefings confirm that jurors typically make sense of all the evidence by turning it into a story of what they think really happened in the case.[4] The smartest thing an attorney can do is to anticipate that decision-making process and fit the evidence, witnesses, and motivations into a cohesive story. (If holes exist in your story, be aware that jurors are usually more than happy to fill in the gaps for you.)

What do judges and juries expect from women lawyers?

Judges and Juries Aren't that Different.

First, a note about the distinction (or lack thereof) between "judges and juries." When it comes to rendering verdicts, the two are more similar than many people might think. A landmark study conducted by the University of Chicago Jury Project[5] several years ago studied 3,600 criminal trials. After comparing judges' completed questionnaires with actual jury verdicts, the study revealed that the two were in agreement 78% of the time.[6] More recent studies have confirmed these findings. It stands to reason, therefore, that many of the same expectations exist for judges and juries.

What Specific Behaviors Do Judges and Juries Expect?

From my discussions with several hundred actual and mock jurors, I have been repeatedly struck by the fact that their expectations of attorneys are consistent with everyday social conventions. Jurors generally resent rudeness and sarcasm. Jurors expect attorneys to treat witnesses, the judge, and their adversaries with respect. In examination of a witness, jurors typically relate more with the witness than they do with the attorneys or judge. If an attorney is hostile or rude toward a witness, jurors usually resent the attorney. However, when witnesses are rude back to the offending attorney, jurors will then turn their criticism against the witness.

Within the purview of social expectations, we often hear jurors voice a subtle double standard toward female attorneys compared with their male counterparts. The general rule of thumb for appropriate courtroom "etiquette" is that it reflects societal norms. Jurors expect female attorneys to be professional and polite. The podium thumping style demonstrated on Perry Mason generally falls flat in the modern-day courtroom. Jurors often deride a female attorney for being "hard" while the same behavior from a male may be defined as "assertive." To the extent that this disparate perception changes outside the courtroom in coming years, it is likely

jurors will bring that changed perception to the courtroom as well.

Jurors expect female attorneys who are present at counsel table to take an active role at trial. For example, in an out-of-state sexual harassment case where a female defense attorney was a silent presence at counsel table, jurors later expressed annoyance at what they called an "obvious attempt to manipulate pro-female sentiment" for the defendant. Neither is the defendant's act of discrimination against the inactive woman attorney by giving her a token role lost on jurors. (The same is true, incidentally, when local counsel is a mere silent presence rather than an active participant.)

Most importantly, judges and juries expect attorneys to be prepared. When we conduct post-trial interviews with jurors in states where such practices are allowed, we always ask how each attorney could have made his or her case presentation more effective. Jurors repeatedly comment that attorneys need to be more organized in their openings and closings and avoid rambling. By the same token, many jurors are dismayed by (and frequently resentful of) what they term the "unnecessary redundancy" of witnesses testifying to the same thing. Certainly, repetition sometimes has its place. In those instances, however, it becomes important to set the stage in opening statements for *why* the redundancy is necessary.

What unique challenges do women lawyers face and what unique strengths do they possess?

So far, this article has focused on the fact that the most important persuasive elements in the courtroom transcend attorney gender. However, there do exist patterns of communication and demeanor that are often unique to women lawyers. Such patterns present themselves both as challenges and strengths.

Female Lawyers' Challenges.

First, the challenges. Frequently, women of any profession are more prone to use something called "powerless language".[7] (Years ago, the term used was "women's language"[8], before more enlightened research linked the communication behavior to social status. However, in the past, women's social status has been lower.) The importance of "powerless language" rests in the fact that extensive research has linked this behavior with lowered credibility in the courtroom.[9] Lawyers and witnesses are perceived to be less credible when they speak quietly, speak slowly, use frequent fillers, such as "ums" and "uhs" and use intensifiers, such as "sort of", and "very". Women lawyers who end their sentences with an upward inflection also appear more uncertain.

One element that I just mentioned -- rate of speech -- surprises many experienced attorneys. Many attorneys erroneously believe that speaking slowly enhances credibility. The opposite is true. Speaking more rapidly (without losing articulateness) keeps jurors' attention more and often increases the speaker's dynamism.

Women attorneys should speak in their loudest, most pleasant voice at a more energetic rate. Jurors rate attorneys who use a conversational, energetic speaking style as significantly more credible than attorneys who use more erudite, somber styles as are so often exhibited in the courtroom.

Female Lawyers' Strengths.

Research shows that, in general, women are more adept than men in using listening skills and in reading nonverbal behavior. Both skills are especially helpful during jury selection and witness examination. Being an effective listener is inherently linked with being an effective questioner. If you sense some underlying concern on the part of the potential juror or witness, probe for that concern (provided it doesn't help the other side more).

Conclusion

While evidence is by far the strongest predictor of verdicts, the manner in which that evidence is organized and presented is clearly important. Female attorneys who are most effective are ones who understand that an important element of persuasion boils down to making judges' and jury's *perceptions* fit counsel's presentation of the evidence. By making use of effective communication techniques that have been proven persuasive, you'll be able to ensure that your case is at its strongest.

"HAVE YOU EVER HAD A PROBLEM WITH AN ATTORNEY?"
Jury Selection in the Era of Legal Malpractice.

By: Robert Klein[10]

Most trial lawyers have been taught that it is absolutely essential when defending a professional in a lawsuit to ensure that no prospective juror is harboring some kind of bias against someone in a similar profession with whom that juror has had a negative encounter in the past. For many years, therefore, defense counsel have typically asked prospective jurors (if the question had not already been asked by the plaintiff's attorney) whether they had ever had some kind of negative experience with, for example, a physician or an accountant. Where a prospective juror responded affirmatively, that juror would then be prompted to explain the nature of the encounter and dialogue would then ensue between the attorney and the prospective juror, potentially and inadvertently infecting the entire panel of prospective jurors by openly discussing the negative and often times, personal encounter that juror experienced.

As a general proposition, open-ended questions have been encouraged, even when questioning a juror who may have a potentially prejudicial story to tell, since it is generally rare to encounter a venire which includes more than a limited number of prospective jurors who have had negative encounters with most professional groups, and particularly the medical profession. To the contrary, heartwarming stories of physicians who have saved a family member's life often outnumber negative, anecdotal tales of malpractice.

Having spent the early part of my career trying predominantly medical malpractice cases, I approached my first legal malpractice case with these principles in mind. Much to my dismay, however, when I asked the members of the venire if any of them had ever had a problem with an attorney, virtually every hand on the panel went up! And if the situation were not already looking grim, my anxiety increased dramatically as I began to appreciate the obvious zeal with which the various prospective jurors began to tell their individual "horror stories" concerning prior contact with members of our esteemed profession.

Obviously, I told myself with remarkable insight, this was not going to work. Worse still, it was highly unlikely that I would be able to get six viable jurors out of this group, given the prejudice which was occasioned by the tales of woe that were related by many of the members of the venire.

Over the course of the succeeding years, I have been attempting to refine the process of selecting jurors in legal malpractice cases to promote at least a *reasonable* opportunity to select jurors who can be fair and impartial to lawyers, while simultaneously avoiding the wholesale prejudice which you invariably experience where jurors are asked traditional questions about problems which they have experienced with attorneys. In full recognition of the fact that jury selection is a uniquely individual process, and that the method which one attorney uses for selecting a jury may not work for another attorney who has a completely different style, I nevertheless believe that it is worthwhile to relate some of the techniques which I attempt to use when picking a jury in a legal malpractice case, which may provide some useful information for other attorneys who are faced with the difficult task of having to defend their brethren before contemporary American juries.

Confront the Bias

At this point, I have determined that it is most important to directly confront the common attitude of the American public concerning lawyers in general, rather than avoiding that often uncomfortable stereotype. Nevertheless, I attempt to do that by injecting some kind of humor into the jury selection process from the moment that I hit my feet, to get the issue out in the open immediately. Typically, I will ask the members of the panel if they all agree that "everyone hates lawyers." Occasionally, I will relate some quote about lawyers -- including the common misquote which is attributable to Shakespeare, which deals with the imposition of extreme bodily harm upon attorneys -- in order to let everyone on the panel see that many of them share

a common, generally negative attitude toward attorneys.

Role in Reverse

Once this topic has been raised and a general bias is acknowledged by numerous members of the panel, I will then typically "reverse field." Most commonly, I will do that by simply asking the members of the venire if there is anyone on the panel who knows an attorney whom they like. I cannot begin to tell you the reaction; the peer pressure is readily apparent. The jurors will often look at one another, and it becomes clear that no one wants to be the first to raise their hand, to actually *admit* that they know an attorney whom they like! After that, however, you will generally get a smattering of hands, and prospective jurors will begin to tell you about attorneys who are friends or neighbors, with whom they have an excellent personal relationship. You will then begin to get additional stories from other jurors that are positive in nature, e.g., one member of the panel may tell you about a lawyer who helped his family fight a bank that was attempting to foreclose on their home. Another juror may relate a story about an attorney who went to bat for that individual in some form of criminal or civil proceeding, with good results.

After I began using this form of voir dire, I found, much to my delight and (often surprise), that there are an extraordinary number of people who are willing to relate positive experiences which they have had with attorneys. I try to get a number of those positive experiences related by members of the venire before I then turn back again to the negative experiences which others have encountered. In doing that, however, I am generally careful to point out -- through assistance from several of the prospective jurors on the panel -- that the most common complaint which is voiced by prospective jurors is that they are unhappy with the treatment which they have received at the hands of an attorney who is representing someone else.

This becomes rather critical, since I have found that the vast majority of jurors who have negative comments to make about attorneys will also agree that the attorney whom they dislike or who has otherwise caused them some kind of difficulty was, in fact, simply doing a job in representing his or her own client. Many of those prospective jurors will also then admit that it truly was not the attorney's fault that they did not prosper through a particular piece of litigation, or that they otherwise received a bad result with regard to a particular transaction, to the extent that the attorney was simply doing what he was obligated to do in order to fully and properly represent his client.

In many instances, the prospective jurors will ultimately concede that their anger should more properly be directed at their former adversary, and not their former adversary's attorney. In addition, many of the jurors will also agree that they were very pleased with their own attorney, even with regard to that same transaction or piece of litigation, and that their own attorney did everything that was possible on their behalf to promote a good result.

Obviously, the styles and techniques for picking a jury vary dramatically from attorney to attorney. However, as a gener-

al proposition, I would highly recommend consideration of this type of approach to jury selection in a legal malpractice case, rather than the traditional approach which has been used more commonly over the years for other forms of professional liability litigation. While it is of course true that no defense attorney can prevent a plaintiff's lawyer from asking questions of prospective jurors which may elicit negative anecdotes, I have found that the more experienced trial attorneys in the plaintiffs' bar are as cognizant as a defense attorney of the prospects for losing an entire panel if the plaintiff's attorney insists upon eliciting repeated examples of inappropriate conduct by attorneys with whom the prospective jurors have had dealings in the past. Generally, therefore, the plaintiff's attorney is as concerned about the public's perception of attorneys as is defense counsel.

Telegraph the Court

As a secondary point, I would also suggest that this issue be brought to the attention of the trial court judge right from the outset of voir dire. Often, you can head off a situation which is literally going to force you to bring in a fresh panel of jurors, because of the prejudice which has been occasioned by remarks of prospective jurors on the original panel. With a little bit of advance planning, this kind of problem can be avoided.

Use ALL of Your Skills -- You Can Win

Clearly, we all agree that it is a difficult job, at best, to defend an attorney in a legal malpractice action. This suggested style of voir dire is simply one of the many tools which can be utilized to minimize what many feel is a virtually guaranteed plaintiff's verdict whenever an attorney is on trial. In my experience, attorneys can win legal malpractice claims in the court room. It is equally clear, however, that you must use every tool available to "balance the scales" or otherwise start your client off on equal footing with the plaintiff, where your client happens to be an attorney.

EVALUATING THE "UNUSUAL" MEDICAL CAUSATION CLAIM -- CAN A MINOR "SLIP AND FALL" TRIGGER DEVELOPMENT OF CHRONIC PROGRESSIVE MULTIPLE SCLEROSIS?

By: Roberta D. Pichini, Esquire[11]

INTRODUCTION:

Sandra McIlhenny has multiple sclerosis. As a result of her multiple sclerosis, she can't walk without assistance, can't drive a car, can't work to support herself and can't take care of herself or her two young daughters. There is a great deal more that she can't do and the bad news is that her condition will continue to worsen.

Without round-the-clock supportive care, she will require institutionalization for the rest of her life. Mrs. McIlhenny is thirty-eight years old.

The story of what happened to Sandra McIlhenny and what caused this devastation to her life formed the basis for a successful negligence action that was tried to verdict before a jury in the Court of Common Pleas of Philadelphia County, Pennsylvania. The jury concluded that a relatively minor slip and fall on icy steps triggered the development of the signs and symptoms of multiple sclerosis. The jury awarded the plaintiff $4,000,000.00. When delay damages were added, the total award amounted to almost $6,000,000.00.

As counsel for Mrs. McIlhenny, it was obvious from the beginning of the investigation of the claim that medical causation would be the central challenge of advocacy in the case. Assessing the merits of the claim before agreeing to undertake representation was a multi-faceted process which is the focus of this article.

THE FACTS:

Sandra McIlhenny's story began over seven years ago, on a wintery day in the Philadelphia suburbs. Sandra began that day as she did almost every day--she went to work as a cleaning person for a professional cleaning service. She was a good worker and enjoyed her job. On that day, a Monday, she reported as she did every Monday to a local apartment complex where she, along with her co-workers from the cleaning service, cleaned the hallways and common areas of the complex.

On the Thursday before, the Philadelphia area had been hit with a heavy snowfall which dumped ten inches of snow on the area. It had stopped snowing during the early morning hours on Friday and there had been no further accumulation of snow. It remained bitterly cold and there was very little, if any, melting. On Sunday, another snowfall hit the area, dropping another two inches of snow. That new snowfall ended early Monday morning, the 26th of January, the day that would change the life of Sandra McIlhenny forever.

When Mrs. McIlhenny arrived at the apartment complex on that Monday, she found that all of the sidewalks around the buildings were covered with ice and snow, with the steps to each of the apartment buildings similarly covered with deep frozen footprints over which a layer of new snow had fallen the night before. It was obvious that the snow from Thursday before had never been removed from the steps and sidewalks by management and, after being trodden down repeatedly and after slight thawing and refreezing, deep icy ruts covered the steps.

Sandra complained about the conditions, but was told that her only alternatives were to either go home without pay or to work despite the condition. Mrs. McIlhenny was the sole support of two young daughters--taking the day off without pay was not a feasible option.

While making her way out of one of the buildings, Sandra was carrying under one arm the canister vacuum she used to do her job. She held onto the railing of the steps with her other hand, but felt her feet give way on the slippery steps. She fell down the steps on her back, raking her

spine along the steps and landing on her buttocks. She felt bruised, sore and dazed but, after resting for a brief period of time, she carried on with her work. She did not report the accident to management at the complex and did not seek medical treatment that day or in the month that followed.

Within a period of weeks after the fall, however, Mrs. McIlhenny began to feel worse. She had increasing pain and stiffness and she began to develop some additional, more frightening symptoms--numbness and tingling in the extremities and a feeling of "tight knots" in her back. She eventually sought out the services of her family doctor and a chiropractor. When they were unable to help her, she consulted a neurologist who performed an evaluation and reported the bad news that she was suffering from multiple sclerosis. Mrs. McIlhenny's symptoms did not end with the diagnosis of multiple sclerosis. Despite aggressive efforts at treatment, Mrs. McIlhenny's condition continued to worsen. Virtually every aspect of her life was affected. She suffers from the chronic, progressive variety of multiple sclerosis and her condition will continue to worsen without periods of remission. Although she has a normal life expectancy (if she receives proper care), she will soon be wheelchair-bound and entirely unable to care for herself and her children.

Sandra McIlhenny was referred to me by a lawyer in her small town. I was asked to consider a negligence action against the apartment complex whose duty it was to keep the steps and entrances to its buildings free of ice and snow.

EVALUATION:

Since the phases through which I passed in evaluating this case may be of some general use to other practitioners faced with the decision of whether to undertake the "unusual" medical casuation case, I set them forth in the approximate order in which I experienced them.

Are You Kidding? When faced with a causal relationship that at first blush appears to be tenuous at best, the first reaction must be one of skepticism. All those who practice in the area of personal injury are regularly faced with claims of medical causation which are related only in time to the alleged triggering event, usually trauma. Theories (most of which have been thoroughly discredited) have proliferated over the decades as to the relationship of trauma to diabetes, cancer and the like.

The advocate is well-served by a healthy skepticism, but only if that skepticism acts as a stimulus to prompt and comprehensive inquiry on several fronts. To be successful in advancing the "unusual" causation theory, the advocate must be prepared to proceed with confidence over solid medical or scientific ground and, further, to convince a lay jury of the plausibility of the theory.

Has the Medical Intelligentsia Spoken? The first line of inquiry is a thorough search of the medical research on the topic. What do the academics and researchers conclude about the connection between trauma and multiple sclerosis? If your firm does not have an extensive medical library, explore those in local medical schools or hospitals. Become familiar with the basic texts in the applicable specialty. Conduct a computer

search of peer-review medical journals in the specialty and assemble the current articles on the subject. Don't wait for an expert to do this for you. The time, effort and expense of in-depth medical research will not be wasted. To properly evaluate the unusual medical causation theory and to evaluate the credibility of experts and the soundness of their opinions, you must be acquainted with the basic medicine underlying your case. Without such familiarity, you not only will be unable to properly evaluate experts, you will be hampered at every step of the case.

My own research revealed only one neurologist who had written comprehensively on the subject. He advanced an impressive construct of medical and scientific data to explain why certain types of trauma (that which is direct to the skull or upper spine) can trigger the development of clinical multiple sclerosis in certain genetically-predisposed individuals.

One Expert Doth Not a Successful Case Make. The finding of a single medical article or expert to support an unusual theory can trigger the dangerous condition endemic to trial lawyers known as Premature Euphoria. When not recognized and nipped in the bud, it can be a long, painful and expensive condition to treat. A snap judgment to proceed with a case based on a single authority must be avoided at all costs. Since all those who routinely practice in the area of personal injury law have been made aware too frequently that certain "academics" view their ticket to long-term financial security as arising from the formulating of a colorable "scientific" theory which is "marketed" (usually successfully) to lawyers and (usually unsuccessfully) to juries, the discovery of one neurologist who had published on the subject did not, in and of itself, flood me with reassurance that my cause was just. Although I had noted basic neurology texts and articles which made passing reference to the apparent temporal connection in many patients between trauma and the development of the first signs of multiple sclerosis (or the exacerbation of symptoms in an already-affected patient), the absence of substantial data and enthusiastic affirmation of this expert's views was of concern.

Nonetheless, the articles which attempted to disprove any connection between trauma and multiple sclerosis seemed to do no better than to bemoan the absence of any study in which such a relationship had been scientifically confirmed. The authors of such articles pointed to the lack of a reported "prospective" study, i.e.; one in which normal, healthy people were subjected to trauma and then developed multiple sclerosis. Since such studies are clearly unethical (it being against the law in most jurisdictions to hit people over the head in the name of medical research), and since it would be impossible to assemble a large enough (statistically significant) group of people genetically-predisposed to develop multiple sclerosis who had never exhibited any signs or symptoms, the absence of definitive proof of the connection did not, in my mind, serve to disprove the connection between trauma and the development of the signs and symptoms of multiple sclerosis.

Who would know best?

Testing the Medical Waters--What Do the People on the Front Lines Think? It seemed to me that, if there is a connection between trauma and multiple sclerosis (or any other condition), it of necessity must be apparent to those practitioners in the trenches, on the front lines, out of academia and down from the ivory towers of research medicine. In investigating my claim, I embarked on a decidedly unscientific and informal survey of practicing neurologists whom I had come to know over the years. I asked for brutal honesty about their experiences with trauma and multiple sclerosis symptoms and, in addition, for a confidential critique of the expert whose articles had given rise to the hope of a successful claim for Mrs. McIlhenny.

I was surprised by the uniformity of the response from practicing neurologists on the first issue. Virtually all told me the same thing--while they did not know precisely *why* trauma triggered symptoms of multiple sclerosis or even *if* it did, it was a common occurrence for them to see patients for the first time for complaints of recent-onset neurological symptoms, and to diagnose multiple sclerosis, several weeks after a minor accident which had required little or no treatment. A slight head injury, concussion or "whiplash"-type injury suffered in a minor auto accident several weeks before the development of the neurological symptoms which brought the patient to see the neurologist was a common historical event in these patients. Of course, this type of historical connection could easily be missed if the neurologist failed to take a probing history from the patient, since the patient may have never connected the two events and may not report the minor fall or other accident to the neurologist unless questioned directly.

This type of medical corroboration is of central importance to the evaluation of the "unusual" causation case. Support from a treating physician, in this case the plaintiff's own local neurologist, was the key factor in my decision to pursue the claim. This treating physician not only found a causal connection between the fall Mrs. McIlhenny experienced and the development of the signs and symptoms of multiple sclerosis, he explained his own experience with treating other patients who had presented with similar symptoms after trauma. This doctor was making important diagnostic and treatment decisions regarding the plaintiff and had done so for seven years. His firm conviction that the fall was causally related to the multiple sclerosis obviously would (and did) give a firm foundation to the opinion of an "academic" expert and go a long way in persuading the jury. Had he not been so obviously convinced of the causal connection, or had he been adamantly opposed, the case may have turned out very differently. I would have attempted to engage another "front line" neurologist to testify that such findings are common, but such testimony would have lacked the persuasive power generated by the practitioner who was directly involved in Mrs. McIlhenny's care.

I also asked the practicing neurologists I surveyed for their candid opinion on the expert who had published on the causal link between trauma and multiple sclerosis. Was he a charlatan or a respected professional? The neurologists I queried let me know that he was indeed respected and

"legit." I contacted this expert and he agreed to review the file in detail. He concluded that the trauma suffered by Mrs. McIlhenny (direct trauma to the spine) was of the type which can precipitate the signs and symptoms of multiple sclerosis in predisposed individuals. To my great relief, he agreed to become involved in the case.

Don't Press Your Luck. I determined early on in my evaluation that the treating neurologist would be called upon for his opinion as to the causal connection (based on his first-hand experience in treating this patient and other patients over the years), but that I would not attempt to advance a "scientific" opinion through him. He was uncomfortable with such testimony and candidly admitted that he did not know precisely why, from a scientific standpoint, trauma caused such a result. Given his candor and my decision to avoid offering him as a "theory" expert, he was invulnerable to cross-examination on any lack of scientific support. He readily admitted that he was not a researcher or academic and was not even terribly familiar with the medical literature on the subject. He simply was convinced of the relationship between significant trauma to the nervous system and the development of multiple sclerosis based on his experience in treating such patients.

Trying to advance an expert past his or her area of expertise courts disaster. The expert invariably crumbles on cross-examination, embarrassed over a perceived lack of scientific sophistication.

I wanted a practitioner to tell the jury about his experience, that's all. I decided to leave the science for the scientist. It worked well at trial. The treating doctor's testimony at trial was short, sweet and virtually unassailable on cross-examination. He was fully confident in testifying about his experience over the years in recognizing a temporal relationship between the first-time development of the signs of multiple sclerosis and certain types of trauma. His straightforward testimony permitted me to argue forcefully in my closing argument to the jury that the connection between trauma and multiple sclerosis was not only scientifically supported (as set forth by the more academically-oriented expert) but was borne out by the experience of those doctors who treat patients every day, like the plaintiff's own treating physician.

But Will it Sell? My final inquiry was directed at public acceptance of the medical causation claim. Is this the kind of theory that jurors will accept? Does it ring true from the layperson's perspective? I embarked on yet another unscientific and informal survey. I questioned "real people" I knew, no lawyers, no doctors or other medical professionals. Would they accept the connection on a common sense basis? Once again, I was surprised by the uniformity of responses to my inquiry. Lay folks found the connection between head and spine trauma and multiple sclerosis to make perfect sense. Several people related instances of friends or family members who had developed signs of multiple sclerosis for the first time following a fall or auto accident. It appeared that my initial skepticism was not shared by everyone.

Is the Client "Clean?" It probably goes without saying, but the easiest way to lose

an otherwise successful case arising from an "unusual" theory is to discover too late that the plaintiff is vulnerable. The potential plaintiff's prior life, in all its facets, must be investigated *by you* to unearth any areas which would undermine your theories. The difficult causation problem can be won, but not if there is evidence that the signs and symptoms of the condition, in my case multiple sclerosis, pre-dated the trauma or if the plaintiff's credibility is subject to attack.

If there is bad news to be learned about the client, there is no time like the present. (Another truism of representing a plaintiff in such cases is that the case rarely gets *better* with time.) Start your *factual* investigation by learning all there is to know about your client and his or her history. Do it before suit is started.

You Gotta Believe. It has to hang together. It has to make sense. And *you* have to believe. If, at the conclusion of your preliminary investigation, you are still skeptical, think long and hard before you embark on the time-consuming, arduous and expensive course of litigating the case with the unusual causation theory. Don't expect the case to settle. In my experience, such cases do not. You must be prepared to try the case. If, after all of the above evaluation, it still doesn't feel right down deep in your gut, get out. If *you* don't believe, the jury never will. It's not the case for you. If, on the other hand, your evaluation has begun with the "Are You Kidding?" stage and, after careful and cold-blooded scrutiny, you are now at the "I'm a Believer" stage, the prosecution of the unusual theory case can be an exciting and exhilarating experience in advocacy.

Postscript. The story of Sandra McIlhenny is not over. Consistent with the vigorous defense mounted throughout the case, there has been no meaningful offer of settlement despite the jury award. The case is now on appeal and we are hopeful of a favorable result. We still believe.

NOTES

1. This is Chapter One (reprinted with permission) from William A. Barton's book entitled, *Recovering for Psychological Injury* (2d Ed.). Reprint permission granted from the Professional Education Group and William A. Barton. All rights reserved.

2. Dr. Karen Ohnemus Lisko is Research Administrator for Tsongas Associates, a national trial consulting firm based in Portland, Oregon. In that capacity, she has primary responsibility for the design of pretrial research that includes community attitude surveys, change of venue surveys, and trial simulations. Dr. Lisko has debriefed numerous mock and actual juries across the country. She has also provided expert testimony on the issues of jury bias and jury misconduct.

   Dr. Lisko also provides communication services, often in conjunction with pretrial research. These services include witness preparation for deposition and for trial, case strategy analysis, and consultation on opening statements and closing arguments. She lectures frequently to lawyers' groups and at bar association meetings.

   Dr. Lisko is an Adjunct Professor of Law at the Northwestern School of Law in Portland, Oregon. She is also News Editor for the quarterly publication of the American Society of Trial Consultants.

   Dr. Lisko received a doctorate in Communication Studies at The University of Kansas. It is the first doctorate of its kind to emphasize trial consulting techniques.

3. The story goes that Clarence Darrow once inserted a wire into a cigar, smoked the cigar during opposing counsel's closing and mesmerized the jurors as they watched for the ashes that were clinging to the hidden wire to fall. The jurors supposedly heard none of the other side's closing as a result and voted in favor of Darrow's client.

4. Bennett & Feldman. (1981). *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture.* New Brunswick: Rutgers University Press.

5. Kalven, Jr., H. & Zeisel, H. (1966). *The American Jury.* Boston: Little, Brown.

6. The remaining 22% of the time, juries were typically more lenient. One social scientist accounted for this disparity by theorizing that judges can be more rule-oriented than juries.

7. O'Barr, W.M. (1982). *Linguistic Evidence: Language, Power, and Strategy in the Courtroom.* New York: Academic Press.

8. O'Barr, W.M. & Atkins, B.K. (1980). "Women's language or "powerless language"? In Eds. Sally McConnell-Ginet, Ruth Borker and Nelly Furman, *Women and Language in Literature and Society.* New York: Praeger Publishers, 93-110.

9. O'Barr, W.M. op cit. See also Lisko, K.O. (1991). *Jurors' Perceptions of Witness Credibility as a Function of Linguistic and Nonverbal Power.* Unpublished doctoral dissertation, The University of Kansas.

10. Mr. Klein is a named partner as well as an established and well respected trial attorney in South Florida. His firm, Stephens, Lynn, Klein & McNicholas specializes in trial practice of a variety of areas, including professional malpractice.

11. Ms. Pichini is a partner in the Philadelphia firm, Litvin, Blumberg, Matusow & Young.