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THE ROLE OF THE ATTORNEY IN THE INVESTIGATION AND PREPARATION OF THE PERSONAL INJURY CASE

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THE PURPOSE and function of this paper will be to advance effective tips and suggestions for the attorney in connection with the preparation for presentation of personal injury litigation claims. The paper will not extend, however, to actual in-court interrogation, which will be covered by other papers in this symposium.

The initial or first active role of the attorney in the personal injury case so far as concerns the medical aspects is precipitated by the first client interview. This stage entails not only obtaining a knowledgeable history, but astute observation, inquiry, and evaluation of the significant details. In some instances, the full appreciation of the significance of the details will necessarily involve requesting or directing further inquiry or treatment by treating physicians or specialists.

Many experienced attorneys prefer that the initial interview be recorded, which provides the advantage of being able to refresh the memory of the client at a later date, as well as to eliminate any misunderstanding as to what information was imparted. It is important to realize that at the early stages following injury, many things are overlooked by the client and some element of confusion and contradiction may exist. One of the outstanding personal injury trial firms maintains two or three tape recording machines of the Norelco or Sony type, which are loaned to the injured person for the purpose of taking it home and having a family or group recording made of significant information.

Indeed, in some instances a recording in permanent media, as distinct from a tape or wire recording, may be of great assistance at a later date in establishing the impaired state of thinking or health. Addition-

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ally, in the rare case where details are remembered initially and subsequently forgotten, the recording itself may be admissible at the time of trial under the rules that render admissible a recording of a past memory when no present memory exists.¹

Some attorneys feel that the recorded interview should be made in a more relaxed atmosphere, hence more informal, whereas others prefer that the interview be on the basis of interrogation with written notes and memoranda made during the progress of the interview, either by the attorney or the secretary present. A decision as to which approach should be used will vary greatly with the personality and experience of the attorney, the personality and state of health or confusion of the client, the prior background and knowledge of the attorney regarding the client's pre-accident health, prior accidents, and other factors. The decision may be further affected by the attorney's own knowledge of the medical aspects of the problem involved.

With some frequency, persons other than the injured client are present or available who can supply added, corroborative, or corrective information. It is imperative that their identity is clearly established so that it may be easily ascertained whether the client or such other persons contributed the information in question. Oftentimes, members of the family may supplement that which the injured client may relate, or even disagree with the injured client. Illustratively, members of the family may have observed problems or difficulty of gait, posture, and discomfort of which the client himself may not be aware. Similarly, a spouse may be cognizant of the fact that the injured person has difficulty in sleeping, such as restlessness, or postural changes brought about by discomfort.

Some experienced attorneys prefer a set format, controlling the content and sequence of the interview and the interrogation, complete with check list. Others prefer a more flexible approach adapted to the persons involved and the circumstances. In the latter procedure, the check list should nonetheless be utilized to assure that all of the desired

¹"[W]here, however, a witness has no independent recollection, but testifies merely from his knowledge or belief in the accuracy of the paper, it is proper that such paper should be put in evidence or read to the jury as auxiliary to the witness' testimony or as a statement adopted by him." *State v. Gross*, 31 Wash. 2d 202, 214, 196 P.2d 297 (1948). See also 3 WIGMORE, EVIDENCE §§ 734-64 (3d ed. 1940); 5 JONES, COMMENTARIES ON EVIDENCE §§ 2378-80 (2d ed. 1926); 98 C.J.S. *Witness* § 358 (1957); 70 C.J. *Witness* §§ 770-71 (1935); 58 AM. JUR. *Witnesses* § 593 (1948); 82 A.L.R.2d 522 (1961).

and available information is obtained, and to make a record of what information is to be obtained by the client and provided at a later date.

The interview will, in any event, cover not only details of the accident and the physical experience involved, but also the sequelae that indicate injury and consequences of injury. Identity of all occupants of the vehicle and of other persons present may lead to other sources of information as to the nature of the impact and injury. Often, persons injured are in a state of shock or confusion and are not able to relate all significant information. Additional data may frequently be obtained from others involved in the accident, observers who came upon the scene, witnesses, tow truck operators, ambulance drivers, and investigative officers.

It is to be assumed that the experienced attorney practicing in the personal injury field will have become reasonably acquainted with the types of injuries most commonly encountered. This will carry with it detailed knowledge of various fact patterns of accidents and mechanics of accidents, as well as knowledge of the most common complaints, bodily limitations, bodily function changes, and symptomology that may result from various types of accidents and injuries. Such a background of knowledge is imperative and is of great assistance not only in directing the line of inquiry, but also serves as an excellent guide line to the propounding of questions, the answers to which may elicit information concerning overlooked indications of injury. Based upon prior knowledge and experience, the attorney is able to note the significance of various facts, or suggest medical evaluation and treatment based upon observation, such as: one of the client's shoulders is carried higher than the other, or the plaintiff sits uncomfortably, alternating from one haunch to the other. Similarly, such background information will be of assistance in ascertaining the probability and effect of psychogenic overlays which so often accompany soft tissue injuries.

The information thus obtained may direct the attorney to the need for further observation by physicians, family, or fellow employees, so as to note the presence or change of signs and symptoms of injuries that become known at a later date. There should be intermittent interviews with the client and other persons having pertinent knowledge, such as members of the family and fellow workers who may have noticed impaired efficiency, earlier fatigue, or disability. The client should be directed to report such subsequent occurring problems

promptly, and in full detail, to the attorney and to the treating physician. Without such reporting, the conditions may be overlooked or considered unrelated to the accident. The consequence will be that accident produced injuries and disabilities will not be put in proper perspective, and as a result, there will be a dearth of testimonial proof at the time of trial. Documentation of injury and its sequela is greatly facilitated by instructing the client periodically to write and mail in a summary of medical treatment, disabilities, and discomfort at an interval of one or two months. Such summaries should be meticulously reviewed by the attorney so that he can determine whether or not to have the client come in for further conference and elaboration.

Illustratively, in many of the so-called rear end or whiplash injury accident patterns, the immediate consequences are limited to a fuzziness of thinking; and at a later date there may be difficulty in swallowing, headaches, movements of the head, neck and arms, memory, vision, or hearing impairment; to be followed still later by manifestations of injury in the low-back structure. Physiologically, the low-back structure is of a more sturdy nature and may not manifest any signs of strains, sprains, or worse injuries. Attention is characteristically directed to the conditions which are the most painful, with the result that less painful but perhaps more serious injuries may be overlooked. The experienced attorney will alert the client to watch for and promptly report indications of injury and disability that may appear at a later date. This may be numbness on a transitory basis, loss of coordination, sensation of an extremity being "asleep," sensations of prickling, tingling, balance, fatigue, memory, or coordination problems. These conditions frequently arise on a delayed basis by reason of the swelling either at or near the nerve roots or along the nerve patterns, and such swelling may diminish at a later date.

Experience and good sense would require that in the case of cuts or lacerations, inquiry be made about other scars upon the person of the injured client or even upon the persons of other members of the family that have healed in a keloid state. It is basic knowledge that keloidal scars do not respond to remedial steps by way of plastic surgery and may be troublesome indeed. Prior family history, not only of the individual, but other members of the family may alert one to repetitive tendencies of certain types of illnesses that may be precipitated by or aggravated by injuries such as diabetes mellitus. Knowledge of the symptoms of the early onset of diabetes, such as inordinate thirst, in-

creased frequency of urination, and loss of weight, could be imperative and should be related to the client so that the client would recognize the symptoms at an early stage and promptly report them to the treating physician. Even a treating physician is skeptical of the client's attempt to relate an injury, disability, or problem to an accident that was not promptly reported to the physician by the patient. Oftentimes the timing of the onset of the symptoms is critical to the treating physician in determining whether or not the accident was a contributing cause.

Either during the course of the interview or at the conclusion thereof, the client should be given detailed instructions as to what type of information is to be recorded and periodically reported to the physician and attorney.² Written, as well as verbal instructions should be given, and background information sheets provided³ which will permit a leisurely reporting of all prior illnesses, accidents, and claims. Relatively "old conditions" may be reactivated or aggravated by a subsequent injury. An abnormal body condition may be worsened, and the degenerative processes of even a normal arthritic involvement may be speeded up or accelerated by reason of the injury. The plaintiff's attorney may rest assured that at a later date the defense counsel will make exhaustive inquiry by undercover investigation, as well as pre-trial discovery regarding prior illnesses or accidents. Also, every effort will be made to contend that the present complaints, symptoms, and disabilities resulted in full or in part from a pre-existing condition or a prior or subsequent injury.

The client should be directed to report periodically any supplementary information to the attorney handling the case and to process through the attorney all medical bills for reimbursement so that the contents may be noted as a guide to treatment, injury, and disability. Inasmuch as the measure of damages for medical care and treatment is the reasonable value thereof, care should be taken to see that bills are received for the full amount of customary charges, even though a

² Diary forms are available at small expense from the Lawyer and Judges Publishing Co., Inc. of Tucson, Arizona. Such forms may be provided the client to record acute flare-ups, medical treatment, and expenses.

³ The client should be given appropriate forms to fill out background information at a more leisurely time. Such forms are available through Trial Lawyers Service Co., Belleville, Illinois, as part of the publication *Preparation and Trial of Neck and Back Sprain Cases* authored by Stanley E. Preiser. Indeed, the text referred to has detailed suggestions as to history to be obtained and inquiry to be made from time to time.

reduced charge was made because someone was treated under Workmen's Compensation laws or the equivalent thereof.

Case histories obtained or recorded by the physicians are often incomplete or inadequate. It is the proper responsibility of the attorney to see that the case history is supplemented from time to time by the patient so that the treating doctor's records will be complete and will properly support his testimonial opinion of causation. In this connection, the experienced counsel will make detailed inquiry as to recent physical examinations for employment or insurance and records of prior illnesses or injuries that may be available through prepaid or group medical insurance underwriters. Details of prior injuries, claims, litigation, and settlements must be ferreted out, with every effort made to obtain pertinent depositions, medical reports, and transcripts of testimony.

In the event the client has given a statement to the carrier for the presumed responsible defendant, copies of such statements should be obtained as provided in "The Covenant"⁴ entered into by the overwhelming majority of the insurance industry and the American Bar Association. Upon written request, such carriers must provide copies of statements to any person, including parties. A form should be prepared for that purpose to be executed by the client (as well as by any witnesses), requesting that copies of the statements be promptly sent to the attorney for the injured person.

Copies of all hospital records, including emergency or out-patient rooms should be obtained, as well as reproductions of the physician's notes. Summaries provided by hospitals or physicians are frequently incomplete and sometimes in error and may require early correction or supplementation.

Rather than obtaining premature and perhaps excessively optimistic medical reports, the attorney should arrange to obtain photocopies of the physician's office records as well as the hospital records detailing the condition, its progress, and treatment. If the attorney is not fully competent to understand and evaluate such entries, he should, without reluctance, arrange for them to be translated into lay language by a

⁴ 3 MARTINDALE-HUBBELL LAW DIRECTORY 219A, § 5b (1969): "If any witness making a signed statement so requests, he shall be given a copy thereof." This statement was originally adopted January 8, 1939 by the National Conference of Lawyers, Insurance Companies and Adjusters, and by the American Bar Association and was subsequently supplemented February 20, 1955 by an agreement that the word "witness" shall be construed to include "party."

competent person. The cost is relatively inexpensive as compared to the gain to be derived. It is better that reports be delayed until a long range evaluation can be obtained.

It is sometimes appropriate in requesting a written report to ask the physician to comment as to when he can, with reasonable medical certitude, assure that the client will have regained the pre-accident state of health. This also tends to limit excessively optimistic reports.

It is imperative that attorneys realize that physicians, by their very training, think in terms of, "What is the medical cause?" The medical cause or etiology may be ascribed to something totally unrelated to the accident, which indeed precipitated, accelerated, worsened, or contributed to the disability. Herein lies one example of the great importance of a clear understanding of the semantics involved. A physician must be thoroughly educated to the difference between medical etiology and legal causation or causation in fact. This can be easily illustrated by the reference to diabetes mellitus. Most physicians would readily state that an accident was not a factor in the causation or aggravation of the diabetes mellitus condition. By training they are taught that a diabetic is a descendant of a diabetic ancestor, and if he lives long enough, the condition will become overt. Yet the same physician, when appropriately questioned or informed, will be very quick to admit that the accident was a precipitating or aggravating factor—a triggering influence which precipitated a dormant condition into an active or worsened one. As another example of lexical confusion, the physician's concept of permanency is ordinarily relegated to the rather limited areas of amputation and death (and in these days of homotransplantation, some question exists as to the permanency of these two conditions). However, with an understanding of the semantics involved, the physician will readily relate that the condition which has continued for a prolonged time is now chronic and will recur from time to time with remissions and exacerbations in variable degree for the indefinite future. This adds up, as a practical matter, to "permanency."

If a treating physician is a general practitioner, it may be that the attorney will wish to provide him with photocopies of knowledgeable, reputable medical articles from the medical journals.⁵ Should opposing

⁵ Arrangements can be made for the treating physician, or any friendly physician, to inexpensively become a subscribing member to the service of Hoeber Publishing Co., Hagerston, Maryland, to whom inquiries can be made as to various medical phe-

counsel challenge the opinion evidence of the physician by contending that there are no articles in the reputable medical literature to support his views, the articles themselves may often be placed in evidence on redirect examination. Even if the offer is rejected, the physician should have been educated in the pretrial conference as to the procedure of informing the jury of the existence of such articles.

With some frequency, one is faced with the contention by defense medical examiners that the complaints are subjective and not supportable by objective evidence. Inquiry can be made as to whether or not the physician used the electronystagmogram which would have provided objective evidence of nystagmus which in turn may be the basis of impairment of vision, tinnitus, auditory and balance problems.

Critically important information as to bodily impairment following relatively mild injury may be found in texts written for physicians such as Ruth Jackson's *The Cervical Syndrome*. Although the volume is directed to the cervical area, the information contained as to impairment of function and structure changes induced by trauma will often apply to areas other than the neck.

The lawyer should keep in mind that when the physician feels there is no need of further treatment, he is not stating that the patient is well, but simply that medical science at its present stage has nothing further to offer. Moreover, it is imperative to keep in mind that the physician thinks primarily in terms of occupational disability rather than considering the full-man concept and functional disability that may impair daily personal activity. On the other hand, the lawyer may inquire into personal activities, such as hobbies engaged in by the client prior to the accident and the effect of the injury upon the continuation of such hobbies. Decreased efficiency in golfing, bowling, or similar activities, or the inability to participate therein, may be critically important evidence in supporting the disability resulting from the injury.

The fact that one has resumed gainful occupation even upon a full-time basis does not necessarily mean that there has been a complete regaining of health. Premature fatigue, awkwardness, loss of coordination, and decreased efficiency may still exist.

nomena and, upon request, photocopies of such articles will be forwarded to the member-subscriber. Arrangements can be made to have such copies evaluated by the treating doctor, who incidentally is thereby better informed. Thus, this material can serve as a means of bolstering his testimony on disputed matters at the time of trial.

Much has been written upon the concept that damages may be recovered by reason of the increased probability of disability.⁶ This concept could more simply be called "the juggling of the odds concept." Illustratively, if a given percentage of the populace in general may be expected to become epileptic without ever having been involved in an accident, the fact that the probability has been increased is a proper basis for damages if the necessary medical proof is adduced.

In the less common case of retrograde amnesia, success has been had, in some instances, by interrogation under a drug-induced hypnosis, such as under sodium pentothal. Such interrogation should be conducted either by or in the presence of an anesthesiologist and also preferably a psychiatrist. In some instances, the veil which has obscured or destroyed the conscious memory may be pierced and the memory restored. Even where there is no restoration of memory at the conscious level, information may be obtained in the hypnotic state which will lead to available witnesses or other evidence.

It is in the nature of contested litigation that the client is invariably directed to be examined by a doctor of defendant's choice. This visit and examination should be preceded by a careful review of all available information and a conference at length with the client himself so that he will be schooled in his attitude and demeanor at the time of the medical examination, as well as instructed to make pertinent notes and records with regard to the examination itself.⁷

A proper discharge of the duties of the attorney to the client requires knowledge as to medications taken from time to time, their purpose, and effect. Illustratively, the defense's medical examiners will often refer to the plaintiff's pain-free, full-range motion, whereas in fact the absence of pain and the range of motion are explained by the fact that the patient is under medication by way of pain killers,

⁶ *McCall v. United States*, 206 F. Supp. 421 (E.D. Va. 1962); *Murphy v. City of Waterloo*, 225 Iowa 557, 123 N.W.2d 49 (1963); *Lorenc v. Chemirod Corp.*, 37 N. J. 56, 179 A.2d 401 (1962); *Schwegel v. Goldberg*, 200 Pa. 280, 228 A.2d 405 (1967); *Duncan v. Smith*, 376 S.W.2d 877 (Tex. Civ. App. 1964); *Mellis v. Merritt*, 44 Wash. 2d 181, 265 P.2d 1058 (1954); *Snyder v. General Electric Co.*, 47 Wash. 2d 60, 287 P.2d 108 (1955); *Fink v. Dixon*, 46 Wash. 2d 794, 285 P.2d 557 (1955); *Hinds v. Johnson*, 55 Wash. 2d 325, 347 P.2d 828 (1959); *Clevenger v. Fonseca*, 55 Wash. 2d 25, 345 P.2d 1098 (1959). See also Colson, *Sufficiency of Medical Opinion as to Causation*, 22 J. ACADEMY FLA. TRIAL L. 20 (1963), cited with approval by the Florida Supreme Court in *Carraway v. Armour & Co.*, 156 So.2d 494, 496 (Fla. 1963).

⁷ See PRIESER, TRIAL NOTEBOOK, FORM P8 (1967) for a sample of the type of data sheet the client should use for recording pertinent information during the defense's medical examination.

sedatives, tranquilizers, and muscle relaxants. Coincidentally, the defense's medical examiner rarely makes inquiry as to such medications, but upon cross-examination may be interrogated as to their role and effect, thereby reducing the weight of his testimony.⁸

From time to time, interrogatories will be propounded by the defense as to the injury and disabilities, and great care must be taken in assisting and verifying the answers thereto. Similarly, the client must be adequately instructed regarding the deposition during which all matters pertaining to the injury and disability will be delved into.⁹

Keeping in mind the variability of the thoroughness of medical examinations conducted by a physician on behalf of the defendant, shortly prior to such examination, a conference or conferences should be had with the client, reviewing with him all material theretofore supplied to or obtained by the attorney, including hospital records, medical reports, and the history of prior or subsequent illnesses or disability. Some attorneys follow the practice of being present themselves or having present a court reporter at such defense examinations, lest there be any misunderstanding or difference of opinion as to what transpired, including the extent and accuracy of the history obtained. In any event, the client's memory should be thoroughly refreshed so that, if asked, he can relate significant history, lest the inference be drawn at the time of trial that the client had dealt deceptively or treacherously with the defense's medical examiner. Similar conferences should, of course, take place prior to the deposition of the client, as well as prior to the trial itself.

In the appropriate case, motion pictures, with or without sound, may be made of the seriously injured, scarred, or otherwise impaired client. Such motion pictures can be of great assistance in communicating to the jury the extent of disability, impairment, or disfigurement. Such films are most effective when they show the helplessness of the plaintiff in performing everyday routine tasks, as, for example, cuts of the disabled or impaired victim being fed, dressed, or strapped to the toilet facility. These films are frequently made in variable form, namely, a shorter edited form for presentation at trial after preview by the court in chambers, and a much more lengthy film containing

⁸ The data sheet compiled by the client immediately following the defense's medical examination may be of great assistance in such cross-examination, *supra* note 7.

⁹ An illustrated form for predisposition instructions to the client may be found in TRIAL NOTEBOOK, *supra* note 7, Form P7.

matters that might indeed be properly objected to at the time of trial which would be submitted for settlement evaluation purposes.

Early and perhaps serial pictures, whether in still or motion picture form, may illustrate progress, earlier states, and changes in disability. Inquiry should be made as to family photographs, still or motion pictures, taken before the accident, which can be utilized for demonstration purposes. Even pictures of family outings showing the activities and sports in which the client is no longer able to participate may indeed be impressive and persuasive. Further documentation of impairment may be found by witnesses and records of previous sports participation. Illustratively, many bowlers are members of bowling leagues in which the score cards are preserved for a prolonged period of time. These records may persuasively substantiate impaired efficiency and coordination.

Even experienced trial lawyers frequently overlook the distinction between tests and procedures that a physician deems necessary to evaluate the injury and guide him in its treatment, and those further and additional procedures and diagnostic tools that are utilized to assist the attorney in persuading the triers of fact. In this connection, attorneys may be well advised to authorize the treating doctor to indulge in such further diagnostic and verifying tests and consider it a legal rather than medical expense. The physician is ordinarily delighted at the opportunity to provide persuasive proof of the correctness of his prognosis. The reluctance to indulge in such procedures, such as repetitive or serial X-rays at the expense of the patient is far outweighed by the advantages.¹⁰

There is no impropriety whatsoever in assisting the client in utilizing the proper terminology to describe his injury and disability, whether this be in consultation with the treating physician, the defense examining physician, or at the deposition, or trial level. For example, it is far better for the client to describe impaired function or the consequences of overexertion without describing the medical phenomena: far better to say "I cannot bend down to tie my shoes," or, "I can no longer wash the windows." However, lawyers must be careful to avoid being trapped by the client's exaggerations, distortions, or falsehoods. It is axiomatic that hell hath no fury like a juror who feels he has been lied to!

¹⁰ See WESTERN TRIAL LAWYERS ASS'N 1967 CONVENTION TRANSCRIPT 305 (published by the Trial Lawyers Service Co., *supra* note 3).

Special attention must be given to the psychogenic overlay problems. One may reasonably expect that a person who has sustained a sprain or strain may have far greater psychogenic overlay problems than one who has had an outright fracture or even amputation. The victim is angry and resentful, and is often treated by his friends and family as suspect. An understanding of the phenomena of the injury—that a sprained ankle frequently may cause weakness and recurring disability for years whereas the fracture will heal without difficulty in a few weeks—can be helpful.¹¹ Great care and consideration must be exercised in dealing with the client having a psychogenic overlay problem. He often feels misunderstood by family, friends, fellow employees, and employer. He may feel that his physician simply does not understand his problem and will not deal with him sympathetically. Thus, the decision as to whether or not to proceed to trial should be weighed against the probability of whether or not the client's own well-being will be impaired by the traumatic experience and tensions of the trial. Such consideration may indeed compel a settlement at a figure that would be less than that otherwise recoverable.

Frequently, based upon observation or information supplied, the attorney concludes that the client should be seen by a specialist. With almost equal frequency, some difficulty exists in persuading the treating physician or physicians to comply with the attorney's suggestion. With care and tact the dilemma can be solved, and the obstacle simply avoided. Why not suggest to the treating doctor that, inasmuch as the defense will no doubt require the injured person to be examined by a specialist, he (the treating doctor) similarly consult with a specialist in the particular field?

Many physicians, and even specialists, are appreciative of receiving what is sometimes referred to as a "medical brief." Such a document may set forth pinpointed references to portions of hospital records and medical reports as reminders to the very busy physician, and may be accompanied by appropriate excerpts from acknowledged medical literature. The medical brief should be sent to the physician in advance of the pretrial conference so that he may review it intimately and weigh and verify the conclusions advanced by the attorney. Even photographs may be of help as a reminder to the physician. Sample

¹¹ See WESTERN TRIAL LAWYERS ASS'N 1965 CONVENTION TRANSCRIPT 14 (published by Trial Lawyers Service Co., *supra* note 3).

medical briefs have been published frequently by the American Trial Lawyers Association.

Lawyers should refrain from practicing medicine. On the other hand, they are not required to abstain from using good sense in advising their clients. Clients should be encouraged to do that which they can within their reasonable tolerance of pain. Clients should be encouraged to attempt to resume and continue in employment or, if necessary, to seek rehabilitation or retraining. Fair consideration precludes the attorney from participating in needlessly making a mental cripple out of his client.

The attorney and the physician alike should consider functional evaluation of the whole man. One does not simply lose an eye or a limb. Much attention must be given to the particular activities and functions that are impaired, whether they involve employment or activities around the house. This is in keeping with the suggestion previously made that a physician generally deems a patient to be well when there is no further need or benefit of medical treatment. In truth, the physician may be attempting to convey to you that he has reached the end of the rope so far as concerns what medicine has to offer your client.

The attorney should scrupulously avoid urging upon his client dangerous procedures such as a myelogram, even though such might result in an improvement of the posture of the case at the trial level.

In conclusion, the role of the attorney is not only to understand and weigh the injuries, their sequelae, and significance. The role continues with the marshalling and collating of the evidence for orderly and effective presentation at trial. There are many midpoints, such as medical examinations, depositions, medical conferences, and other procedures. The proper discharge of the attorney's duty does not terminate until the ultimate conclusion of the case. His preparation for that role long precedes his being formally engaged to represent the particular litigant.