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USING MEDICINE TO MAXIMIZE DAMAGES IN PERSONAL INJURY CASES

To maximize recovery in a personal injury case, it is important for plaintiff's attorneys to determine the nature, extent, permanency and future medical problems and expenses from the medical records.

Analysis of the Medical Records

To begin with, an analysis of the medical records should be done. The medical records should be summarized in a chronological format:

- to determine if the plaintiff has been consistent with his complaints and symptoms,
- to ensure the completeness of the records,
- to determine if the plaintiff has complied with the treatment regimen,
- to determine if the plaintiff returned to see the physician when instructed, and
- to identify the plaintiff's description of the pain and limitations on activity.

It is much more believable to a jury when a physician documents a plaintiff's complaints of pain and limitations on activity rather than relying on the plaintiff's own testimony. An analysis of the medical records can determine the types of medications the plaintiff was receiving and if he received the same medications from more than one doctor showing a pattern of abuse. Although each plaintiff experiences pain differently, even with the same symptoms, the type of medication can be an indication of the severity of the plaintiff's level of pain.

Documentation of Damages

The defense only has two arguments to minimize damages - pre-existing conditions or that the condition was not caused by the accident. Although pre-existing conditions are still compensable, it is important for the plaintiff's attorney to distinguish the plaintiff's condition before and after the accident. It is helpful to use a table to show how the location, timing, intensity, duration and medications were different prior to the accident from after the accident. It is important to show that the plaintiff now experiences symptoms for a longer duration of the day than prior to the accident and that his symptoms are more severe than prior to the accident. This can also be accomplished by discussing limitations on activity, comparing what the plaintiff was able to do before the accident, even with this pre-existing condition, with what the plaintiff's limitations are after the accident. (See Table 1).

Physicians are trained to write their notes in terms of medical diagnoses rather than limitations on activities. If a patient comes in and the physician says how are you doing and he says I still have back pain, that is what will go in the record. However, if the patient says I am unable to bend or lift like I could before the accident because of the back pain, that statement is more likely to get into the record, especially if a nurse takes the history before the patient is seen by the physician.

The defense will also argue that the injury was not caused by the accident. It is important for the plaintiff's attorney to show the medical relationship of the injury to the accident that resulted in the injury. If one cannot show a medical relationship of the injury to the accident, the plaintiff's attorney can resort to the temporal relationship of the accident to the injury.

Getting the Jury to Understand

It is important for plaintiff's attorneys to bring to life what the plaintiff went through when receiving medical treatment. It is helpful to describe in detail each medical procedure which the plaintiff experienced. Jurors do not know that a myelogram requires a needle to be stuck inside the spine to insert the dye. They also do not understand that massage therapy in physical therapy terms is not a pleasurable spa massage. It is a therapeutic deep tissue massage which directly pushes on the parts that hurt to try to loosen them up and this can be extremely painful.

Another way medicine can be used to maximize damages is by preparing a calendar of all the medical care which the plaintiff received and the time it took. (See Table 2). Physical therapy three times a week as well as doctors visits and home exercise programs can take a huge chunk of time from a person's life. This can be visualized in a calendar format. Also, a table can be made to compare plaintiff's activities before and after the accident, showing the plaintiff can no longer do that he once enjoyed doing.

Getting the Most from Expert Witnesses

Many attorneys obtain physician narratives in which the physician simply regurgitates the medical records in narrative form for which he can charge a lot of money. However, physicians do not understand the legal system and do not know what plaintiff attorneys need to show to prove their case. Consequently, it is important for plaintiff's attorneys to help the physician understand what is needed and to obtain statements from the physician that address the nature and extent of the injuries, the permanency of the injuries and any future medical problems and expenses which the plaintiff may face as a result of the injuries. This can be done in affidavit format which clearly and succinctly identifies each injury caused by the accident and the effect of each such injury on the plaintiff.

Consequently, the medical information is extremely important in maximizing damages. If the plaintiff's attorney is proactive and outlines with sufficiency the medical information for the defense, the case is more likely to settle for more money.

Table 1:

ACTIVITIES OF DAILY LIVING	
Before the Crash	After the Crash
Able to lift 36 pound grandson in a body cast 4 to 5 times per day for several weeks	10 pound lifting restriction, unable to lift grandchildren
Able to shower and dress herself	Difficulty in showering and dressing herself especially putting on a bra
Able to lift arm and fix hair independently	Difficulty lifting arm and difficulty fixing hair
Able to lift arm and able to put on makeup independently	Unable to lift arm and unable to put on makeup
Able to do laundry, vacuuming, cooking and grocery shopping	Unable to lift arm to do chores such as laundry, vacuuming, cooking and grocery shopping
Able to move full range of motion of right arm	Permanent limited abduction of the right arm 50°
Full use of right dominate arm	Loss of 40% use of right dominant arm
Able to move full range of motion of right arm	Unable to raise arm above chest, unable to place arm behind back
Able to drive van	Unable to drive van, had to get different car with different gear shift

Table 2:

CALENDAR

Sun.	Mon.	Tues.	Wed.	Thurs.	Friday	Sat.
HEP	HEP PT OT	HEP Dr. Nerve	HEP PT OT	HEP PT	HEP Dr. Bones	HEP
HEP	HEP PT OT	HEP Dr. Family	HEP PT	HEP	HEP PT OT	HEP
HEP	HEP PT OT	HEP	HEP PT	HEP PT OT	HEP	HEP
HEP	HEP PT OT	HEP	HEP PT	HEP Dr. Rehab	HEP PT OT	HEP

Lorie A. Brown, RN, MN, JD, of Brown Law Office, Indianapolis, Indiana is a practicing nurse-attorney who assists other attorneys with medical issues in their cases including medical research, case analysis and strategy and analyzes pre-existing conditions and causation issues. She evaluates the case to determine the nature, extent, permanency, future medical expenses and damages and presents the medical issues in a settlement brochure and/or at mediation. www.brownlaw1.com.