DIRECT EXAM OF EXPERT ON COMPLICATED SUBJECT MATTER
THE ART OF EXPLANATION

I. INTRODUCTION

Many cases involve complicated subject matter. A trial lawyer's presentation requires making the complicated understandable to a jury. The lawyer should not equate understandable" with "dumbing down". The trial lawyer should not insult the jury's collective intelligence by presenting complicated subject matter in a manner the jury may perceive as condescending. The trial lawyer's role requires finding ways to walk the fine line between effectively simplifying the complicated and insulting the jurors.

Hopefully, this presentation provides you with some tools and ideas to achieve that delicate balance.

II. INITIAL IMPRESSIONS

A. Your Initial Impression

Remember your first reaction to the complicated subject matter. In most instances, your first exposure caused lots of head scratching. In personal injury cases, complex subject matter usually involves medicine or engineering. It takes time to educate yourself on the subject. That education process should serve as a guide to how you will educate a jury. DO NOT FORGET THE QUESTIONS YOU RAISED AND HOW YOU ARRIVED AT THE ANSWERS. The jury will be forced to go through the same process but in a compressed period of time and without the benefit of a give and take with you or your expert. ASSUME THE JURY WILL HAVE THE SAME QUESTIONS YOU HAD AS YOU WENT THROUGH THE EDUCATION PROCESS AND BE PREPARED TO WALK THEM THROUGH IT.

B. Initial Impressions of Others

Involve your office staff in the education process. Try to explain to them the subject matter as you learn it. Their initial impressions and questions often forecast the jury's.

Involve your family and/or friends (at your own risk). Initial impressions from people who have little or no exposure to a law practice and other cases may provide good insight.

In obtaining the initial impressions of others, make sure to use as much of a question and answer format as possible. You want to be sure you get valid responses rather than polite "yes that makes sense" responses.

III. PRACTICE EXPLANATIONS

Gathering impressions from others forces the trial attorney to explain the subject matter. The process of making the explanations often raises questions in the attorney's mind as well as the person to whom the attorney makes the explanation. It may also give insight into the various mechanisms of explanation that may be effective with a jury.

Practicing explanation also provides insight into the jury's attention span. When your explanation causes a listener's eyes to glaze over you will know that the explanation will not work with a jury.

IV. BUILDING BLOCKS OF THE EXPLANATION TO THE JURY

You must explain the complex to the jury throughout the trial. However, you must build that explanation as the trial progresses. What you explain to the jury in Voir Dire should be decidedly different from what they hear and see in the Opening, from the witness stand and in Closing. Too much too soon carries major risks.

Voir Dire creates the opportunity to pain the complex with a very broad brush. Consider it a summary sentence.

Example: Exploding jet ski case. Explosion caused by defective fuel system design.

Voir Dire should include basic summary statement such as, "you will hear that (Name of client) severed his spinal cord when the jet ski he was sitting on exploded. The explosion threw him into the air. He landed on his back on the dock next to the jet ski. You will hear that the jet ski exploded because explosive fuel vapors leaked into the hull, filled it and were ignited by a spark when the starter switch was turned on."

Opening creates the opportunity to explain the defect that caused the fuel to leak into the hull. The explanation should be more detailed than the Voir Dire summary, but cannot overwhelm the jury with technical information. They are not ready for it.

Example: A jet ski is just like any other motorized vehicle you have driven. It is run by an engine. The engine needs fuel. In this case, gasoline. Fuel system experts will explain this jet ski's fuel system in detail when they take the witness stand. But in essence, this jet ski fuel system was very simple. The gasoline goes from the gas tank, through a rubber gas line and into the engine. The last step in the gasoline's trip from the tank to the engine is to go through a carburetor that controls how much gasoline leaves the fuel line and enters the engine at any given time. In that sense the carburetor is like your heart. Your heart pumps and pushes blood through your body. But the jet ski carburetor and your heart have one very important difference. Your heart doesn't stop pumping. A jet ski's engine is not always running. It stops for long periods of time. What happens to that fuel and that carburetor while the jet ski is sitting, sometimes for long periods of time? What happens when that jet ski is sitting in the hot summer sun for long periods of time? The fuel heats up. It creates flammable vapors. It fills the gas tank and forces the gas out of the tank and into the gas line where the carburetor is supposed to stop it. But if the carburetor is bad, the gas can push past it and get into the hull. Over a long enough period of time, the fuel builds up. With enough heat the flammable fuel vapors build up. When there is the right amount of flammable vapor in the hull, an ignition source will ignite the vapors and the hull will explode. We will show you that this carburetor was defectively designed because it was made to fail when the pressure in the line was too high for too long. This pressure build up was foreseeable, not unusual, and had to be taken into consideration in the design of the carburetor. It wasn't in this case and (client name) paid the price with his spine.

Any more detail could be deadly. It is also essential that some key diagrams and or pictures be used to help with the explanation. A picture of the jet ski, a cut away of the jet ski with hull, engine and gas tank labeled, a basic diagram of the fuel system inside the jet ski with only the gas tank, the fuel line, the engine and the carburetor shown and clearly labeled. It is too early to show a detailed drawing of the carburetor.

V. DIRECT EXAM OF THE EXPERT

A. WHEN TO CALL THE EXPERT/THE ORDER OF PROOF

a. It is crucial to call your expert at the right time in the trial. Too early can lead to jury confusion and inability to communicate the subject matter. Too late and the impact of the explanation may be undermined.

b. Factors to consider in scheduling the expert's testimony.

i. What basic factual information does the jury need to hear to understand the explanation?

ii. Who is best able to tell the story and provide the facts the jury needs to hear? Is it the defendant on adverse (rarely). Is it the plaintiff? (Perhaps, but that may mean the jury hears a good cross exam that can render the expert explanation will fall on deaf ears.) Are they non-party fact witnesses that can provide what you need with limited exposure to damaging cross exam?

iii. In a complicated medical situation, how do you get the medical facts into evidence? Should it be through a preparatory witness or through the expert? How much explanation of the medical facts will the jury need before they hear the explanation? Are the basic facts simple and easily understood such as a basic injury that becomes complicated because of failure to treat? Does the existence of the back injury need to be explained before the expert explains the complicated failure to treat?

iv. Examples:

1. Brain damaged premature infant. Damage caused by air emboli introduced by negligent nurse. Major point of defense is that brain damage due to recognized complications of prematurity. The medicine on prematurity complications, imaging studies, etc. is very complicated. The concept that air to the brain causing damage is simple. Decision. Call mother to the stand to explain the pregnancy, how well the child was doing in the NICU before the air emboli, the immediate catastrophic changes and then demonstrate therapy she provides to the child which shows the extent of the damage to the jury. This was done before the experts took the stand to start explaining to the jury, 1) how air emboli cause brain damage, and 2) why the records do not support prematurity as the cause of the long term deficits.

2. Lamictal overdose causing toxic epidermal necrolysis. Plaintiff had lots of baggage. Do not want him on the stand before the explanation. Had expert explain the condition and review the records to show where the defendant doctor had dropped the ball and why it caused the TEN. Adverse exam of doctor followed the explanation and the errors he made and the ridiculous explanation he gave were obvious to the jury.

3. Improper surgical catheterization. Plaintiff not available as witness. Adverse exam of two key support staff permitted explanation of the key facts before putting expert on the stand and before the defense could conduct any cross examination to introduce its defense into the case.

B. WHAT ORDER OF EXAMINATION

a. Once the witness is on the stand is there a preferred order of questioning that will make it easier to effectively explain the subject matter. One method is to summarize the opinions at the start before getting bogged down in detail.

b. Example: 1) introduce the expert with only the basic information. (Doctor so and so from Philadelphia), specialist in subject matter, 2) hired to review the case and help us learn what happened, 3) reviewed a list of materials, 4) based on those materials formed the following opinions _____, 5) return to qualifications such as how many years diagnosing and treating this condition, articles authored on the subject matter, other pertinent qualifications, 6) go through opinion one by one, 7) under each opinion have the expert explain the foundation for the opinion, 8) end with summary of the opinions.

C. WHAT EXHIBITS TO USE WITH THE EXPERT

a. Must create easy to understand visuals. Anatomical drawings are expensive but can be invaluable in showing what sounds complicated is easily understood. Juries learn more from visual demonstrations than lectures. (Examples from Bartowitz and Renn.)

b. Graphs of key information or timelines showing the key facts developing can prove an easy outline for expert to use to aid in making the explanation simple.

c. Reports can provide the outline for the presentation. (It may not go into evidence unless the expert reads it into evidence.)

d. Flip charts created by the attorney during the direct that provides summary list of opinions or key facts relied on by the expert.

D. WHAT LANGUAGE TO USE WITH THE EXPERT

a. The best way to communicate the complex is to find simple analogies.

i. Example: Stroke from emboli. Use a garden hose analogy. The hose is the blood vessel. The blood is the water. The brain is the garden. When the hose is blocked, the water stops flowing and the garden will eventually die. It won't happen instantly, so it can be reversed if prompt action. It will take some time for the cells to die so they will not show up right away on the imaging studies.

ii. Example: Bacterial endocarditis: The blood going through the vessels is like a river. The mitral valve is like a dam that opens and closes to control the water flow. When it doesn't work right, the water can get stuck in the back water of the stream and get scummy with bacteria like the backwater gets scummy with sticks, algae etc. When that happens and the scum breaks loose it can move past the valve and cause a blockage to the brain.

b. Use simple language. Not medical terminology.

i. Example: air emboli=bullets to the brain.

ii. Artificial urethral sphincter=shut off device.

E. HOW TO CONCLUDE THE EXAM

a. Summarize the opinions.

b. “Never would have happened if_____ (theme language)