The 39 Steps

by Rodney Peyton OBE

Mr Peyton is a leading medico-legal expert, who has been called the world's number one surgical coach for his global delivery of medical and legal training in all five continents and more than twenty-five countries including the United States, throughout Europe, the Middle East, the Far East as well as in Australia and New Zealand.

Specifically, in regards to Medico-legal issues, our reporter interviewed him in relation to his extensive experience of acting as an expert witnesses, and in particular about his "39 Steps" of learning from over 30 years of practice.

His comments are divided into five major areas:

- Medicolegal practice
- Accepting instructions
- Writing reports
- Court procedures
- Continuous professional development

These steps provide a useful guide, not only to those starting out in medico-legal practice but also as an aide-memoire for more experienced practitioners.

MEDICO-LEGAL PRACTICE

1. Medical Expert's Credo

The basic principle of medico-legal practice is to understand the job is to help the litigant, their legal advisors and the court to clearly understand the nature of medical evidence in individual cases, allowing them to fully comprehend the issues involved so they can make better decisions. This indeed should be the "Credo" of anyone involved as an expert in the litigation process, medical or otherwise.

2. Avoid Litigation

When it is obvious there is little chance of success in a case, it is important to make sure the client and their legal advisors understand this up-front so that they can avoid expensive litigation. It is not the doctor's

duty to decide whether or not a course of action should proceed, that is a matter between the clients and their legal advisors. It can be surprising what outcome occurs in the "heat of battle" in court but a doctor would be failing in his duty if he did not give clear advice.

3. Manage Client's Expectations
Remember in medicine that bad outcomes after treatment are not necessarily due to medical negligence. The client may not understand this. Even when there has been some element of the breach of duty, this may not have had prolonged effects. For instance, a scaphoid fracture may be missed initially but then properly treated with splintage after one to two weeks. If everything heals, then an outcome after one year where a client complains they feel some weakness in the wrist, on the balance of probabilities this would be due to the fact that they fractured the wrist in the first place and not because of any delay in putting them into splintage. Again, it is important that legal advisors understand this up-front so they can manage their client's expectations particularly in regard to the value of the claim.

4. Maintain Integrity
At all times act with integrity. Remain independent and objective no matter which side instructs you. As an example, in personal injury cases such as "whiplash", do not be temped to vary the prognosis in similar cases, dependant on whether acting for the plaintiff or the defendant.

5. Provide a bespoke CV
Your CV should be adapted so that it is appropriate to the particular case in hand. However, do not be tempted to exaggerate your qualifications and experience, as these are generally in the public domain and can easily be checked. Your reputation is your brand, so guard it jealously.

6. Network
Form professional relationships with your legal colleagues so that they learn to trust you and therefore your opinions. This can be a very personal matter. Inevitably queries will arise from claimants in relation to your reports and some may even complain if they dislike your opinion. A close professional relationship with the instructing solicitor can help to deal with such issues. Always remember your network is your net worth.

7. Educational Activities
Offer training to groups of lawyers on medico-legal issues. This allows them to talk to you face to face outside court situations and to form judgements about how you communicate and answer questions. One way of doing this is to offer one time "Learn at Lunch" seminars for small groups.

8. Form Alliances
It is important to align yourself with barristers and trial lawyers. Be available to give advice, being open and approachable. Case conferences are an excellent opportunity for them to assess you in relation to your likely strengths as an expert witness in Court and may result in them referring their instructing lawyers to you when issues arise in particular cases.

9. Terms of Business
Have a clear business contract. Instructions should form a contract so that expectations are clear on both sides. In particular, be clear about who is responsible for your fees and the timeframes involved for the production of reports and for payment.

10. Cost of Reports
Set your rates at the outset and these should not vary depending on the strength or otherwise of a particular claim. At times you will be asked to forgo your fees in particular circumstances. Make this very much an exception rather than the rule.

11. Stand Out from the Crowd
Be timely in your response to any queries from lawyers, in your production of reports and in the quality of your advice. In order to increase you practice, you must be perceived as faster, better and most efficient than your colleagues.

ACCEPTING INSTRUCTIONS

12. Be Clear on Instructions
Always read your instructions carefully. Most of the time these are quite general, particularly in Personal Injury cases. In medical negligence, they are usually much more detailed and give an outline of the case as perceived by the lawyer. Whenever possible, obtain a detailed statement from the claimant in relation to their specific complaint and the timeline. Determine whether this is a general screening report, and therefore not for court purposes, a liability/causation report or a condition/prognosis report as they have different requirements and attract different costs. Make it a rule to obtain your costs prior to sending out your report or at least make sure that the lawyer is in funds. This is important in order to get paid whether or not the claimant agrees with the content. It is not unheard of for claimants to refuse to pay if the report does not favour their case and then go to another lawyer to try and obtain more favourable comments.

13. Screening Reports
In medical negligence cases, always offer a screening report in the first instance. This is less detailed than either of the others and the goal is to advise whether:
- there is likely to be a case
- not likely to be a case or
- it is not possible to determine on the basis of the evidence which has been made available.

14. Accepting Records
Unless there are only a few notes, around 20-24 pages, it is best to get them in hard copy as it is easy to miss information in cases which can sometimes have more than 1000 pages. It is vitally important to have all notes paginated. There are two good reasons for this, firstly is so that you can refer to specific pages in your report and secondly occasionally, for many reasons, some pages are not contained within the notes you receive. When your copy is paginated it is clear what you have received and what you did not as extra pages will not be paginated in chronological order or be paginated separately. This may become an issue in court as to whether the expert has or has not been provided in their pack with a particular piece of information.

15. General Data Protection Regulations (GDPR)
All notes must be kept securely. They should not be left lying around an office but locked in a filing cabinet when not in use. It is equally important to keep them securely when they are being transported, for instance to or from Court as well as ensuring that they are securely parcelled when being sent through the post. Only keep notes for as long as necessary and either destroy them or send them back to the lawyer at the earliest possible opportunity. When sending reports digitally, ensure that they are properly encrypted.

WRITING REPORTS

16. All Written Communications are Discoverable
Any oral discussions or written opinions may be discoverable and may be used in Court proceedings. Be careful about sharing initial opinions before all facts are gathered as you may have to explain any difference of opinion between what may be an initial thought and the definitive report.

17. Keep Contemporaneous Notes
Always keep any original notes so that you have a contemporaneous record of any interviews and discussions. Without notes you have limited chance to recall what exactly was said in the event of any dispute when a case comes to Court.

18. Separate Fact and Opinion
Make clear in your report what are facts, what is an opinion and your reasoning process as to how you came to any specific conclusion.

19. Range of Opinion
Remember, if the case gets to Court, there is usually a medical expert who does not fully agree, if at all, with your opinion. Understand, on most medical matters, there is a range of opinion as to the correct procedures, management of a case and the nature of informed consent. You will obviously favour your own method of working. That does not mean that others cannot reasonably disagree and manage a case differently.

20. Evidence Base
Almost always use an evidence base for your opinions. Evidence from textbooks or high quality, peer reviewed literature can easily overshadow experts who simply state "in my practice", "my experience" or "in my opinion"

21. Counter Arguments
When coming to a conclusion, always consider what counter arguments may be raised and be comfortable about how you could address them. Indeed, it is best if you can anticipate differing opinions in your original report and answer them at that time. This shows that you have considered the case from many angles, adding power and creditability to your opinion.

22. Personal Bias
Take time to reflect on your own biases. We all believe that how we set out to manage a case is the correct course of action and there is a tendency to re-inforce our thoughts by surrounding ourselves with like-minded individuals or deliberately look for an evidence base which supports our feelings, ignoring those which run counter. Be careful and critical when reading papers and journals and particularly those purporting to be a meta-analysis of a number of papers. If authors in these papers do not point out differences of opinion, they have either not cast the net wide enough on the subject or are displaying their own bias.

23. Logical Reasoning
Three mains types of logical reasoning are deductive, inductive and abductive. Deduction argues from the general to a specific and if the generality is correct then the specific is likely to be correct. For instance, if I have a jar of white marbles and I take marbles from the jar then those marbles are liable to white. In Court terms this is res ipsa loquitur.

Inductive logic starts from the specific and works back to the general, for instance if I have five white marbles in my hand, and they came from a specific jar, then therefore all marbles in the jar are liable to be white. Of course, this may not be true and is the basis of the null hypothesis in statistical research. Be careful of papers which state the results were "nearly reached significance" they either did reach it or they did not.

Finally, there is abductive reasoning. If I have five white marbles in my hand, and there are white marbles in the jar then the marbles in my hand came from the jar. This is a very big step and yet is one of the major causes of medical mistakes where a set of symptoms are assumed to indicate a particular disease process.

24. Changing Reports
There may be occasions when you are asked to change and modify your report once presented. Be clear why you have given your opinion in the first place and, unless there is new evidence, do not alter your report. If facts emerge which do materially influence what you have said, be transparent about the situation and produce an addendum indicating why you have altered your opinion. Occasionally, if such new information has not been shared beforehand, you may be ambushed in the witness box. Should that happen, ask for a recess to consider new evidence and never try to maintain a stance which new evidence renders unlikely or even untenable.

COURT PROCEDURE

25. First Impressions
Always behave professionally and that includes dressing appropriately for the Court. No matter what your feelings are on the matter, you are there to represent your point of view as an assistant to the Court. First impressions count and your goal is to present as a professional, creditable expert.

26. Remain Neutral
Do not blatantly takes sides, always accepting that you will hold particular opinion as to the merits of the case at hand. Remember, at all times your duty is an officer of the Court and as far as possible to provide transparent, unbiased evidence.

27. Servant/Leader
When in the witness box, you are in fact educating. You should see yourself as a servant/leader and as any good teacher you must do so from the point of view of those who are learning ie the Court and other lay

people. Remember, you may be senior in your profession but, unless highly experienced in Court, you are relatively junior in relation to the Court process. It is important not to come across as overbearing.

28. Address the Bench
When giving evidence, always speak directly to the judge and therefore, whether sitting or standing, tend to face the bench. Turn your head to face the barrister/trial lawyer when being asked questions or when you are asking for clarification but then turn to face the judge again in order to answer. All judges take notes, some use computers and others will wish to write. Be courteous and match your pace with the speed of the judge in recording the evidence.

29. Get Your Message Across
There will be multiple different personality types among the judges, barristers and solicitors. Some want quick, short answers, others a more detailed and factually orientated response while yet others are more focused on the social and emotional aspects of the case. Try to gauge and mirror these personalities when dealing directly with them by listening carefully to their questions and matching their speed of language. Such rapport will help you get your message across and remember the decision maker is the judge.

30. Dealing with Cross-Examination
Barristers and trial lawyers are trained to be adversarial in order to test the evidence on behalf of their respective clients. Their questioning, therefore, may raise the level of emotion, particularly when conducting cross-examinations and specifically with the use of the word "why". We all hate to have to justify everything we say but you must speak slowly and do not take anything personally. Answer the judge and do not get involved in a face off with a legal team. Keep calm, considering your thoughts and speak clearly and slowly to avoid any hint at being argumentative.

31. Keeping Emotions Under Control
Be empathetic but not sympathetic ie understand other's emotions but do not side with them. A lot depends on the skill of the lawyers, barristers and on the attitude of the judge on the day, all of whom will have their own biases. The best way to get your opinion across is to be professional, deliberate and evidence based. Present yourself as reasonable and thoughtful, being respectful to the Court and the Court process, setting out your argument against the relevant legal tests..

32. Three Start Up Questions
You may be cross-examined on absolutely everything, not just on your opinion. This can include your knowledge of the legal process. Remember the three questions which every barrister/trial lawyer utilises frequently at the beginning of an examination.

They are:-
• Do you know your duty to the Court, including your knowledge of the relevant legal tests?

• Are you an expert on all points on which you have given an opinion?

• Is there a range of opinion which reasonable and respectable doctors may hold?

Ensure you are clear on your answers to these before getting into the witness box.

33. Questions to Avoid
Stay away from specific legal, technical and ethical issues are far as possible. Stick to your report, your stated opinions and the reasoning behind them.

34. Lack of Immunity
Remember, as a medical expert you do not have immunity when giving evidence. Adverse criticism in public can have a marked effect on your personal, private and financial life. A number of experts have found themselves on the receiving end of severe public criticism which have led to orders for costs against them, whilst others have had prison sentences imposed for perverting the course of justice, for instance by changing their report and its conclusions without reasonable cause.

CONTINUING PROFESSIONAL DEVELOPMENT
35. Professional Recognition
Make sure you have the relevant professional recognition in your specific area of expertise. In UK medical terms this will require annual appraisal and five yearly revalidation, so that your name stays on the professional register held by the General Medical Council (GMC). This can be checked at any time by both the plaintiff's and the defendant's lawyers.

36. Court Etiquette
As well as keeping up to date in your own field, you must similarly be cognisant of the requirements of the Court process in any jurisdiction in which you appear as an expert witness. This can be more arduous than it appears, for instance in the British Isles there are at least seven different jurisdictions with sometimes obvious, and at others subtle, differences in procedure. This can even include how you address the judge. Check procedures with the instructing lawyers and the barrister/trial lawyer at the earliest opportunity.

37. CPD Training
Participate in specific training in medico-legal issues at least on an annual basis. There are online courses, conferences and indeed University degrees related to both medical and legal practice. Further, a medico-legal practice is a business and at least some of the CPD should be directed towards business acumen.

38. Presentation Skills
Constantly improve your presentation skills and not just in the Court situation. Offer to give talks in general and on medico-legal issues particularly from stage. Having to stand up and deliver content is one of the best methods of learning, particularly when being asked unprepared questions by members of the audience.

Writing up the salient points of anonymised medico-legal cases as case reports or blogs is another useful way of communicating with others and at the same time clarifying issues for yourself. The same is true of writing articles for magazines or editorials for appropriate journals.

39. Reflect on the Outcome
Do not become emotionally attached to the outcome of a case, but do consider it in the light of the evidence you gave, why it was preferred or not preferred by the Court and reflect to see if there are any further learnings for yourself. As Stuart Emery states, "the path to mastery in any subject is to correct not protect". Be open and honest with yourself and always seek to improve your practice, both in your reporting and in delivery of your reports.

These are the standards/disciplines that have proved most valuable to me in providing a large medico-legal practice covering both personal injury and medical negligence cases. Helping the legal profession, insurers and Courts to make fully informed decisions which impact on a client's physical and emotional wellbeing has proved very fulfilling and rewarding.

Finally, a successfully run medico-legal practice is not a one-person operation. It is a business which requires good administrative back-up with skilled and experienced secretarial staff and the services of a competent accountant to run the practice successfully. No matter how good you are as an individual expert, it is the back-up team which leads to a successful and a prosperous business.

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