MEDICAL LEGAL COMMITTEE

Credibility, Control Key in Court

By Benjamin F. Johns

Credibility and control. That advice about how to handle one's self in the courtroom was once given from legendary trial lawyer and former Chancellor Joseph H. Foster to Thomas J. Duffy, and was among the points that Duffy shared with members of the Medical Legal Committee at a July 25 discussion on medical malpractice litigation.

Duffy illustrated how the credibility and control theme played out by discussing a recent case involving the emergency room at Temple University Hospital that he successfully tried to a $21 million verdict.

That case involved a 56-year-old diabetic man with severe hyperglycemia who had been admitted to the hospital's emergency room several times. He ultimately suffered a debilitating brain injury soon after he was released from the emergency room. The theory of Duffy's case against the hospital was that, under the circumstances, their decision to release him was a breach of the applicable standard of care.

Duffy explained how he was able to use a procedural tool – a certificate of non-involvement – filed by one of the emergency room doctors who was trying to get out of the case to bolster his theory. This certificate, which essentially said that this ER physician did not treat the plaintiff, was useful in showing that no one was watching him for several hours, Duffy said. He supplemented this portion of the seminar by showing taped deposition testimony from one of these witnesses. He also told the audience how he prepared and showed the jury a "day in the life" story about the plaintiff. While he clearly is comfortable presenting taped videos and deposition testimony at trial, Duffy said that he prefers not to do so in his opening statement because of the risk that it could elicit objections and lead to a distracting sidebar conversation.

Duffy also shared several practice pointers and war stories. In the context of the Temple ER case, Duffy explained how he likes to affirmatively introduce bad facts (i.e., that the plaintiff liked to drink) to the jury himself. Duffy said that his general preference is to present his case quickly so as not to lose the jury's attention – something he referred to as the "Law and Order method." This also forces the defendants to try to match that fast pace.

As far as preparing for trial, Duffy reads every piece of paper in the file and prepares every case as if it is going to trial. He pointed out that a good motivator used by Foster was to have jelly doughnuts available for those who came into the office to work on Saturdays.

Duffy also shared some general observations about trends in the practice. Somewhat surprisingly, he said that the plaintiffs' bar has embraced the requirement of obtaining a certificate of merit for medical negligence cases. This has forced plaintiffs to evaluate cases more carefully and to be more selective in the cases that are filed. As Duffy explained, gone are the days where a "Dr. Detroit"/OB-GYN doctor could serve as an expert in an anesthesia case. Duffy also said that plaintiff's lawyers can no longer just sue with an injured person; you need to have both a coherent theory and medicine on your side.

Photo by Jeff Lyons

Thomas J. Duffy

Duffy had very complimentary remarks about the quality of lawyers who both bring and defend medical malpractice cases, describing the relatively small bar as the "gold standard" of trial lawyers. He did point out that the defendants tend to have an advantage from the outset because they will have a better understanding early on, based on speaking with the carrier and/or doctor, as to which cases they are likely to settle.

Benjamin F. Johns (BFJ@chimicles.com) is an associate with Chimicles & Tikellis LLP.

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