The Occupational Therapist as an Expert Witness

Diane DeMaio-Feldman

Key Words: jurisprudence • patient advocacy

This article provides an overview of the occupational therapist's role as an expert witness in civil litigation. It includes a description of the role and the qualifications of the occupational therapy expert witness. The material was drawn from the author's experience.

Throughout the course of occupational therapy training, the special relationship that occupational therapists have with their patients is emphasized. As defined by some professionals, the therapist's role includes serving as an advocate for patients and helping them to obtain their greatest level of independence. This advocacy may involve many forms and include many forums; however, the courtroom is not usually included in this list. Since the profession was established, the role of the occupational therapist has continued to grow and change. Although this role varies from setting to setting, the services provided customarily encompass an initial interview and assessment of the patient as well as treatment planning and implementation. One new addition to the traditional array of services is the role of the expert witness. For therapists who work either in the public or private sector, litigation is a commonplace occurrence for clients involved in personal injury cases. If the current trends continue, the occupational therapist's involvement in the litigation process may become equally commonplace.

In recent years, therapists increasingly have been called upon to testify in civil courts of law about the impact an injury has had on a client's life. The purpose of this "expert witness testimony" is to provide the jury and/or judge with an objective assessment of the degree to which the injury has affected the client's ability to function independently. In the courtroom, the occupational therapist's responsibility is to present fair and professional testimony on the functional limitations that have resulted from the client's disabling condition as well as on the client's residual functional capacity. Using that testimony the judge or the jury can then decide on a fair compensation to be awarded. Prior to the involvement of allied health professionals in the litigation process, attorneys tended to focus primarily on the liability aspects of the case and used descriptions of functional limitations that were essentially based on impressions and not on professional evaluations.

Lawyers trained and experienced in working with the disabled have been using expert witnesses in legal proceedings for many years. Different states use various cases as their legal precedents. For example, in the state of New Jersey, the 1953 case of Pincus v. Sublett determined that the opinion of a witness who possesses a particular skill is admissible whenever the subject matter of the inquiry is such that laypersons require an expert's assistance to form a correct judgment on the issue (Freeman & Freeman, 1972). Each state has developed its own rules of court and rules of evidence which determine whether a person is qualified to testify as an expert.

Diane DeMaio-Feldman, MA, OTR, is a private practitioner and consultant in southern New Jersey; she is also a doctoral candidate in the Department of Occupational Therapy at New York University. (Mailing address: 124 N. Yarmouth Avenue, Longport, New Jersey 08403.)
Literature Review

A number of articles review the role of different professionals as expert witnesses; that is, nurses (Karcher, 1983; Rosen, 1984), physicians (Erwin, 1983), dentists (Meckler, 1982), psychiatrists (Diamond, 1983), and vocational rehabilitation counselors (Deutsch & Sawyer, 1985; Deutsch, 1985). A review of occupational therapy literature, however, revealed only two articles dealing with the therapist as an expert witness (Shriver, 1985; AOTA, 1985).

Occupational therapists have only briefly defined their role in the legal process although they are in fact functioning as expert witnesses. A vocational rehabilitation counseling survey conducted by Brandon (1983) documented that three of 35 attorneys surveyed hired an occupational therapist as an expert witness. Two of the therapists were employed once and the third was employed two to five times. Although this sample is small, it reflects a trend toward involvement in litigation which many predict will grow.

The question concerning a patient's functional limitations and his or her residual functional capacities is of primary concern in these articles. Deutsch (1985) notes that functional disability refers to the degree to which an anatomical dysfunction directly impedes the patient's ability to handle activities of daily living and work-related tasks. In essence, the occupational therapist provides the basic evaluation of function that may be used to support a judgment about a patient's ability to perform a specific job. The therapist then discusses the implications of that evaluation for transferability of skills and the availability of the same or similar jobs in the current market.

Litigation

Civil litigation is the process whereby an injured person resorts to court proceedings to recover monetary compensation for injuries received as a result of the actions or inactions of other parties. Within the legal system, different reasons for legal action exist. The most prevalent areas in which the occupational therapist may become involved include negligence, product liability, worker's compensation, and medical malpractice. An auto accident could be the source of a negligence action based on the conduct of one or more of the automobile drivers. A product liability action would arise as a result of an injury received from a defective product, such as an exploding soda bottle. Any injury sustained by an employee in the usual course of employment would form the basis for a worker's compensation action. A medical malpractice action arises from an alleged wrongful done to an individual in the course of treatment by either a physician, an allied health professional, or the health facility.

In brief, the litigation process begins with the filing of the complaint by the plaintiff, which is then answered by the party who is alleged to have caused the wrong (the party is known as the defendant). After the filing of the complaint, a process known as the discovery begins. The discovery process is intended to enable the opposing parties to determine the testimony that will be elicited at the trial, not only from the experts but also from the parties to the action or any other witnesses to be called at the time of the trial.

Two forms of discovery that an expert witness may be involved in are the use of the expert report (a) in answer to interrogatories and (b) in depositions. Interrogatories are simply questions to be answered under oath and returned to the requesting counsel. A deposition is testimony presented under oath, during which the opposing counsel questions the witness in the presence of a court reporter. The entire testimony is recorded, transcribed, and put into a booklet format by the court reporter for distribution to the plaintiff's and the defendant's counselors. In either case, it is crucial that the occupational therapist's records be complete and accurate in order to be used as a basis for testimony.

If the case goes to trial, the expert may be called to testify in court. Courtroom testimony can take place in one of two ways: through live testimony or a videotape deposition. Live testimony occurs in the courtroom and requires the witness to respond to direct questions posed by the party calling the witness and then to face cross-examination by the opposing party or parties. A videotape deposition is prepared out of the courtroom, usually in an informal setting and follows the same format as the courtroom testimony. Videotape depositions are now being used extensively because of the difficulty of scheduling court time and expert witnesses. Either situation requires an extensive amount of preparation by the therapist, in reviewing case records and preparing for testimony with the attorney.

Qualifications of an Expert Witness

Once a witness has prepared for testimony and acquired the necessary facts and documentation, the first area of contention will be the witness's qualifications to provide an expert opinion (Anderson, 1979). Definitions of the expert's qualifications are not always specified in the rules of court; but in cases where they are specified, they may be described as having two required elements: First, the witness must be specifically related to some science, profession, business, or occupation; second, the witness must
possess outstanding knowledge, skill, or experience in that field (Cleary, 1972).

Whether a witness is to be considered an expert is ultimately left to the discretion of the trial judge whose decision is conclusive, unless clearly shown to be erroneous as a matter of law (Freeman & Freeman, 1972). Although specific degree requirements have not been established, persons who have acquired advanced degrees and have significant experience in their field would most likely be found to have the necessary qualifications. Additionally, such factors as membership in and service to professional associations, subscriptions to professional journals, attendance at conferences, presentation of scholarly papers, publication of journal articles, and the attainment of awards and honors, are considered helpful in establishing the professionalism of an expert (Lynch, 1983). In addition to the foregoing qualifications expertise requires evidence of demonstrated practical experience in the assessment, evaluation, and treatment of individuals with disabling conditions.

An attorney relies on several criteria when selecting an expert witness. Deutsch and Sawyer (1985) have delineated five factors that come under consideration:

- Qualifications and attainment of appropriate certification and/or licensure
- Maintenance of continuing education
- Practical work experience
- Ability to present information in a clear, concise, and knowledgeable fashion to the jury and all other parties involved in the litigation
- Credibility as a reliable professional during testimony and cross examination. (p. 102 [1])

While it is clear that many therapists meet these basic criteria, it is the trial judge who decides whether the qualifications presented are acceptable. In any case, a review of a therapist's qualifications would include a definition of occupational therapy, its professional history and educational requirements, and the specific attributes of the witness performing the task of testimony (AOTA, 1985).

Once qualifications have been substantiated, the expert may perform in the capacity of an expert witness and testify on the basis of opinion and facts that have been derived from a prior assessment of the case.

The Role of the Occupational Therapist

An occupational therapist may be called as an expert witness because he or she has treated the injured person. The therapist may also be asked to testify as a consulting therapist on the basis of an examination of the patient that is performed only for the particular case.

A consulting therapist performs an examination and submits a report to the requesting party, who may be either the attorney for the plaintiff or the attorney for the defendant. Ordinarily, the consulting therapist will make a report on the basis of no more than one or two contacts with the patient.

On the other hand, the treating therapist, because he or she has regularly treated the patient, will make longitudinal reports. Because of the possibility that they will be called as a witness by either party to a lawsuit, treating therapists must be painstakingly consistent and thorough in documenting therapy in case it is needed in a future litigation. In my experience, the occupational therapy expert witness is usually a consulting therapist. However, the potential always exists for the treating therapist to be subpoenaed for testimony.

In either case, it is important for the therapist who plans to enter the arena of litigation to establish a sound philosophical base for his or her involvement and to operate from that base at all times. At no time should the occupational therapist lose sight of his or her ethical obligations. Mosey (1982) notes that “the ethical code of a profession serves as a guide for practitioners in determining what is moral behavior relative to clients and colleagues” [in addition to serving] “as a contract with the society to which the profession is responsible” (p. 64). Therapists performing as expert witnesses must view themselves as contributing to the rendering of justice and they must see the information they are offering as being significant to the outcome of the trial. Although an occupational therapist may serve as a witness for either the plaintiff or the defendant, both sides expect the occupational therapist to have professional skills and knowledge.

Initially, when a therapist is contacted by an attorney, he or she should determine what the attorney wants, whom the attorney represents, and what the occupational therapist's relationship to the case is to be. Essentially, this process allows the therapist to screen cases to determine whether the referral is appropriate for his or her professional domain. The therapist may decide that perhaps the client would be better served by an evaluation by some other professional or by a therapist with a different specialty. The therapist may also feel that the requested evaluation would have to be performed too soon after an injury for a clear picture of functional loss to be determined. Occasionally, the therapist may feel pressured to do more than report on facts and opinions and may, for that reason, not wish to serve as a witness. Once the therapist has decided that a case is appropriate for his
or her review, a request to obtain all necessary documentation, reports, or previous test results is indicated. After reviewing all the documentation surrounding the previous treatment of the patient, the therapist is ready to perform the evaluation.

The evaluation process requires the expert not only to look at the disabled person’s remaining skills but also to evaluate his or her limitations in terms of ability or inability to make a sustained work effort. Applying this approach to liability cases requires the occupational therapy expert witness to be knowledgeable about the effects these limitations may have on the disabled person’s activities of daily living as they relate to self-care, work, and the use of leisure time. Residual limitations resulting from an injury may take many forms, such as decreased speed and accuracy of coordination, decreased range of motion, strength, or endurance; limited lifting, carrying, pushing, or pulling capabilities; or increased pain. All of these factors need to be assessed in the evaluation process, preferably with reliable and valid instruments and with reference to normative data to enhance the credibility of the final report.

The proper preparation of an expert report is essential for providing accurate testimony throughout the entire litigation process. The expert report should include, at the outset, the information that was reviewed prior to the examination of the patient. This provides the expert with the mechanism to refresh his or her recollection regarding all the documentation reviewed. A brief statement of the purpose of the examination and the date of the examination should follow.

As is customary in the evaluation process, the expert therapist will discuss any subjective symptoms expressed by the patient. Any reference to these comments by the patient that may later be placed in the report must always be clearly identified. Although the therapist’s opinions are based on both subjective and objective information, the subjective information must be identified to avoid the possibility that the therapist’s credibility will be questioned in court.

The objective findings are made during careful clinical observation of the patient or through the testing process using either standardized or nonstandardized methods. Reports of test results should identify tests used, their purpose, and the results of the patient’s performance as compared to the performance of appropriate normative groups.

Finally, the reports should include an overall assessment of the patient’s present and future function. This is essentially a summary of the findings and an interpretation of the meaning of these findings vis-à-vis the essential issue of the litigation.

Based on a considerable body of personal experience, I can state that serving as an expert witness is a worthwhile and gratifying task, but it may also be traumatizing for the uninitiated. Most occupational therapists never discuss, let alone receive any training in, how to perform in this exacting role. To lessen the strain, several authors (Deutsch & Sawyer, 1983; Brandon, 1983) have provided helpful guidelines for the neophyte. The guidelines by Brodsky (1981) are a good example. Although his remarks were addressed to another professional group, they are equally useful to occupational therapists:

1. Prepare all basic exhibits and outlines of testimony carefully, arranging them in an orderly sequence before taking the witness stand.
2. Speak loud enough for all to hear and do not talk too fast. Endeavor to obtain and hold the interest of the judge or jury.
3. Avoid unnecessary conversation with the judge or opposing counsel. Be courteous, fair, and frank. Keep calm and even tempered, even in trying circumstances.
4. State your qualifications fully, but without “puffing” or indulgence in the trivial. Do not be flattered by offers to concede qualifications; for this may be a ploy to prevent the judge or jury from learning important details.
5. After reviewing your qualifications, state your results and opinions. Follow with a clear and adequate explanation of (the) methods employed in reaching your conclusions.
6. Present testimony as you would wish to have it presented if you were the judge. Observe any doubts which may appear to arise in the judge’s or jury’s mind; and try to assist in resolving them. This, after all, is a primary function of an expert witness.
8. Avoid the appearance of being an incorrigible partisan. Face up to the strong points which may be presented by opposing witnesses. Endeavor to demonstrate that, while those points should be given consideration, they must be viewed in the context of the total picture.
9. If not prepared to answer a question, be honest enough to say so. A bluffer is easily detected; and then a cloud is cast over the entire testimony.
10. Be concise. After a point is made, stop talking. (p. 7)

Summary

The legal profession has begun to discover the contribution of the occupational therapist as an expert witness. The role of the therapist is to assist the plaintiff’s or defendant’s attorney in presenting evidence to the jury regarding injuries sustained by the injured party and implications of these injuries for functional capacity.

In preparing themselves educationally and clinically to meet these demands, occupational therapists must define their role more precisely. Through effective reporting, record keeping, and an understanding of the uses and benefits of legal intervention, occupational therapists can have a positive impact in the litigation process.
Acknowledgment

I thank Patricia Livingston, PhD, whose guidance and feedback were invaluable.

References


