Neuro-Optometry and the United States Legal System

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ABSTRACT:
Due to the very nature of the patients that they treat, neuro-optometrists may become involved with the United States legal system. The patient may retain an attorney, often to interact with a third-party payer responsible for medical treatment reimbursement or monetary damages. An attorney may also retain a neuro-optometrist for forensic purposes. This paper explores areas of the legal system and specific case management that an optometrist should be familiar with when working with patients that suffer from a brain injury. Aspects of the relationship between the optometrist and an attorney will be explored.

Keywords: Acquired brain injury, closed head injury, legal system, neuro-optometry, traumatic brain injury

Introduction
A patient receiving neuro-optometric care for eye and vision sequela from Closed Head Injury/ Traumatic Brain Injury/Acquired Brain Injury (BI) may allege another individual or legal entity is liable for damages, including payment of injury-related care costs. As an agent for this individual or legal entity, the third-party payer (often an insurance company, government agency, etc.) can deny responsibility for these claims. Frequently, legal counsel is retained by BI patients to represent them in proceedings against the liable party. Once litigation begins, the liable party’s insurance company retains legal counsel. The BI patient becomes the plaintiff in any legal action while the liable individual/legal entity becomes the defendant. The treating optometrist is thus drawn into the legal system.

Optometrists that work with this patient population may serve as professional (forensic) experts either on behalf of their own patient or may be retained by the plaintiff attorney or by the defense to refute evidence put forth by another eye care provider. The “defense” may be either a defense attorney or the patient’s own insurance claims manager. Subpoenas for medical records, depositions, consultations with the patient’s attorney, testimony preparation, and actual mediation/arbitration/trial testimony all become a standard part of optometric practice. A close working relationship with the BI patient’s attorney can be vital to the outcome of the case.

This paper will explore some of the many aspects of the professional cooperation between the optometrist and attorney in the United States legal system. This provides opportunities for practitioners to add a further dimension to patient care while growing and enhancing personal and professional relationships.

Review of the United States Legal System
When a person is harmed by another person’s negligence or intentional activities, the United States legal system generally provides compensation for some of the damages resulting from the harmful event(s). The person harmed is commonly called the victim or the injured party. The person causing or perpetrating the harm is typically called the tortfeasor or the responsible party. Most claims by injured parties against the tortfeasor are made with the tortfeasor’s insurance company. To the tortfeasor’s insurance company, the victim is considered to be a “third-party” claimant.
Victims usually turn to their own insurance company and file a “first-party” claim to help them pay for the care of their injuries. Victims usually seek care through their health insurance company or through their own automobile or casualty insurance company. For example, a victim of a motorist’s negligence in a motor vehicle collision would file for benefits with the victim’s own automobile insurer under the Personal Injury Protection Medical Payments provision of the victim’s own automobile policy. This provision is sometimes called PIP Medical.

Under typical United States laws of negligence, a victim almost always has a duty to reasonably and diligently mitigate his damages. If the victim fails to pursue care for injuries in a reasonable amount of time and prudent manner, the victim will generally forfeit some, or potentially all, of the compensation from the tortfeasor for that portion of the victim’s damages.

For optometrists in the United States, the practical aspects of this discussion can be distilled to:

1. Victims need care providers who understand the basics of the United States Legal System.
2. Care providers of victims need to understand the health insurers’ and automobile PIP Medical insurers’ claims processes for injury claims.
3. Care providers need to develop appropriate documentation to satisfy the claims processes – not only for the victim’s first-party insurers, but also for the victim’s third-party claim.

**Neuro-Optometry’s Role in the United States Legal System**

Optometry is the primary profession that directs and provides services to those that suffer from visually-related functional sequelae of brain and peripheral head trauma. The recognition of BI-related vestibular, cognitive, and psychological sequelae by the optometrist generally leads to referrals to appropriate rehabilitation professionals. Management of structural sequelae is best coordinated, and potentially even co-managed, with other medical and health-related professionals.

Direct responsibilities include functional/structural visual system diagnoses and treatment recommendations and regimens. Indirect responsibilities include family communication, inter-professional and intra-professional coordination, and assisting the patient’s attorney in claims procedures and with possible litigation.

Extensive clinical or forensic medical reports are written with the optometrist’s professional opinions. Treatment services are prescribed, carefully monitored, and documented, as these records become part of the claim and/or the legal proceeding.

**Data Collection**

When the patient is involved in an injury claim or litigation, the optometrist generally collects functional and structural visual system data for two purposes and in two different roles. There is the clinical component which neuro-optometrists are accustomed to providing but many are not familiar with forensic evaluations and expert support roles.

When the plaintiff attorney or the defense desires a separate, independent expert to provide visual system data and professional opinions regarding the claimant or plaintiff, they will generally want their forensic neuro-optometric expert to perform a separate examination and to review all previous findings. Professional opinions will be rendered and a forensic report written.

Depending on the circumstances, the plaintiff or the defense may have the option of not sharing this report with the opposing attorney. However, the retaining attorney will usually want this expert to be available to testify and substantiate the forensic report and professional opinions in an arbitration or other court proceeding.

**Reports**

Emphasis is often placed on the lay readability of the report. The terminology should be basic, the style concise and emphasis placed on relating the patient’s visual symptoms and visually-based difficulties to the optometric diagnoses and the expected outcomes of the proposed treatment option(s). Writing an appropriate report presents unique challenges as it may become evidence in an ongoing or future litigation. Every word in the report is open to challenge and interpretation. A word or phrase can be taken out of context, possibly dramatically changing the meaning or intent of the word or phrase.

Proper report writing minimizes the opportunity for a statement or an opinion to be misconstrued. It is vitally important that every sentence in the report be able to stand on its own merit and logic. Every sentence must be a complete statement or thought. Precise and specific data are preferable to general or non-specific data. Examples 1 and 2 illustrate a paragraph more and less susceptible to challenge and misinterpretation respectively. Note each sentence in example 2, the less...
susceptible paragraph, states directly or relates directly to the motor vehicle collision. Presumed inference or reference to a previous sentence or paragraph should be avoided. Nouns and phrases may need to be repeated sentence after sentence to avoid confusion. Pronouns should be only used if the person's name or referenced noun is already stated in the sentence.

**Plaintiff vs. Defense – Strategies**

The plaintiff attorney desires to provide the optimal platform for testimony and support. Strategically, the plaintiff attorney puts the client's case in the most favorable position by requesting the following from the treating and/or expert neuro-optometrist:

1. **Accurate assessment and reporting:**
   a. The comprehensive optometric testing; including (in addition to the basic eye health and eye refraction areas) binocular function, ocular motility, visual motor guidance and integration, visual processing, and visual perception.
   b. Eliciting written documents that communicate clearly the findings and the treatment goals.

2. **Facilitation of referrals to other health care professionals involved in BI treatment protocols.**
3. **Preparation to communicate clearly and accurately in a deposition.**
4. **Assistance with procuring professional journal articles and other reference materials as part of the collection of sources for opinions and treatment recommendations.**

The neuro-optometrist retained by the defense generally performs record reviews and “independent” examinations to form expert opinions. The defense attorney’s and/or the retaining insurance company’s strategy is often based around minimizing the financial impact on the tortfeasor and/or the insurance company. Common defense areas for inquiry may include:

1. Attempting to relate the victim’s injuries to pre-existing medical conditions.
2. Alleging the diagnoses are inaccurate, according to selected testing by defense medical experts.
3. Retaining a medical physician as an expert to “de-bunk” the plaintiff’s neuro-optometrist expert and/or the plaintiff’s other treating physicians or care providers who have endorsed this care.

Personal injury attorneys, specializing in BI victims, typically interact with the patient’s healthcare professionals. Those healthcare professionals who are skilled forensically, and are familiar with the value of visual system evaluations and rehabilitation care showed be paid special attention. Table 1 includes some of the healthcare providers who may be part of the patient's treatment.

**Neuro-Optometric Testimony**

Testimony can be taken at deposition or given at trial. The attorney, plaintiff or defense and the optometrist should prepare for all testimony covering the following topics:

1. A thorough review of the records, including relevant parts of the case file. This may include the findings and opinions of other medical experts and specialties.
2. Journal articles and textbook references to support opinions and treatment.
3. The use of exhibits and models to illustrate major points.
4. Preparation and coordination with the attorney prior to any written or recorded testimony.

Continuing education in this field helps prepare the clinician and support their testimony. The College of Optometrists in Vision Development (COVD), the Neuro-Optometric Rehabilitation Association (NORA), the Optometric Extension Program Foundation (OEPF), the American Academy of Optometry (AAO), and other groups provide much of the underlying scientific and clinical expertise for this aspect of optometric practice.

**Neuro-Optometry vs. Neuro-Ophthalmology**

The defense may retain a neuro-ophthalmologist to render a professional opinion on the treating or expert neuro-optometric report and recommendations. Although this physician has no expertise or qualifications in this area, the court may allow them to testify, at least to some extent. If the defense expert does not support the plaintiff’s neuro-optometrists’ professional opinions, it is the plaintiff’s attorney’s responsibility to challenge the defense expert’s testimony.

There are many papers in ophthalmological, neuro-ophthalmological and physical medicine rehabilitation peer-reviewed journals, and textbooks, which are supportive of neuro-optometric diagnoses.
Table 1. Healthcare Providers That May Participate in the Care of Patients with BI

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<thead>
<tr>
<th>Healthcare Provider</th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>Neurology</strong></td>
<td>A medical specialty dealing with disorders of the nervous system. Specifically, it deals with the diagnosis and treatment of all categories of disease involving the central, peripheral, and autonomic nervous systems.</td>
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<tr>
<td><strong>Neuro-Otology</strong></td>
<td>A specialty dedicated to the care of the ears, which includes the hearing and balance systems. These surgeons are trained to operate within the skull on the parts of the brain and nervous system that are concerned with hearing and balance.</td>
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<tr>
<td><strong>Sports Medicine</strong></td>
<td>Specializes in preventing, diagnosing and treating injuries related to participating in sports and/or exercise.</td>
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<tr>
<td><strong>Physiatry/Physical Medicine</strong></td>
<td>A branch of medicine that specializes in diagnosis, treatment and management of disease primarily using “physical” means (such as physical therapy and medications).</td>
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<tr>
<td><strong>Neuropsychology</strong></td>
<td>The applied scientific discipline that studies the structure and function of the brain related to specific psychological processes and overt behaviors.</td>
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<tr>
<td><strong>Pain Management</strong></td>
<td>A branch of medicine that applies science to the reduction of pain.</td>
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<tr>
<td><strong>Chiropractic</strong></td>
<td>A health care profession that focuses on disorders of the musculoskeletal system and the nervous system, and the effects of these disorders on general health.</td>
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<tr>
<td><strong>Chiropractic Neurology</strong></td>
<td>The field of functional neurology that engages the internal and external environment of the individual in a structured and targeted approach to affect positive changes in the neuraxis and consequent physiology and behavior.</td>
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<tr>
<td><strong>Occupational Therapy</strong></td>
<td>Helps people who have conditions that are mentally, physically, developmentally, or emotionally disabling improve their ability to perform tasks in their daily living and working environments. They also help them develop, recover, or maintain daily living and work skills.</td>
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<tr>
<td><strong>Physical Therapy</strong></td>
<td>Provides services to individuals and populations to develop, maintain and restore maximum movement and functional ability throughout life. This includes providing services in circumstances where movement and function are threatened by aging, injury, disease or environmental factors.</td>
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<tr>
<td><strong>Speech-Language Therapy</strong></td>
<td>Address people’s speech production, vocal production, swallowing difficulties and language needs.</td>
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<tr>
<td><strong>Cognitive Therapy</strong></td>
<td>Seeks to help the client overcome difficulties by identifying and changing dysfunctional thinking, behavior, and emotional responses. This involves helping clients develop skills for modifying beliefs, identifying distorted thinking, relating to others in different ways, and changing behaviors.</td>
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<tr>
<td><strong>Vestibular Rehabilitation Therapy</strong></td>
<td>A specific form of physical therapy designed to promote habituation and compensation for deficits related to a wide variety of balance disorders.</td>
</tr>
<tr>
<td><strong>Massage Therapy</strong></td>
<td>Is the practice of soft tissue manipulation with physical, functional, and in some cases psychological purposes and goals.</td>
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and treatment recommendations. Introduction of appropriate papers from this supportive literature during plaintiff attorney’s cross-examination of the defense neuro-ophthalmologist may minimize the impact of this testimony.

The defense may require the plaintiff to undergo an examination, called a Defense Medical Evaluation, by a neuro-ophthalmologist. If the court rules permit, the plaintiff attorney is allowed to have an observer at this evaluation. This observer can be the treating or plaintiff’s forensic neuro-optometrist. This clinician is then allowed to present testimony on that evaluation and findings. They are also allowed to offer professional opinions either supporting or disputing the findings used in the conclusions and opinions reached.

**Neuro-Optometrist / Attorney Working Relationship**

The patient’s attorney can assist and support the management of the patient’s rehabilitative care. Vision care may need to be coordinated with overall medical treatment and case management. The patient’s attorney can assist by obtaining and supplying medical records to those involved in the patient’s care. In some cases, the insurance claims process may require diagnostic testing with accompanying reports by other professionals, before any vision rehabilitation commences.

Any of the patient’s physicians, including the optometrist may choose to accept a settlement lien, which upon settlement or judgment, will be satisfied out of the patient’s share of net proceeds by way of a disbursed payment from the plaintiff attorney acting as an escrow. The patient/client then receives their final proceeds after the attorney’s payment of the outstanding care liens, insurance liens, and case expenses.

**Conclusion**

The clinical optometrist becomes an important diagnostic and/or treatment expert for the individual with functional and structural visual system sequelae from BI. In addition, they may become a plaintiff or defense forensic medical expert within the United States Legal System. The professional working interaction between the treating clinician and the patient’s attorney can support the optimum visual system recovery and legal outcome for the patient/client.
Example 1 and 2: A Comparison of Styles of Reporting in a Neuro-Optometric Document

Example 1: This paragraph is an example of writing that is more susceptible to misinterpretation.

Visually, Mrs. Smith states she now has trouble reading. She says the print looks funny. She notes that she skips, misreads and re-reads words and lines when reading, often losing her place. She experiences headaches, eyestrain and visual blur after reading. Occasionally, diplopia (double vision) will occur after extensive reading or computer work. This forces her to discontinue reading or doing computer work. Mrs. Smith states she doesn’t enjoy pleasure reading or reading her e-mail anymore.

Example 2: This paragraph is an example of writing that is less susceptible to misinterpretation.

Visually, since the October 10, 2005 Motor Vehicle Collision (MVC), Mrs. Smith states: “I avoid reading for pleasure, and I only read and reply to the most important e-mail.” Prior to the October 10, 2005 MVC, Mrs. Smith reports she both read for pleasure and wrote and answered e-mail for over four hours on most days. Immediately following the October 10, 2005 MVC, Mrs. Smith recalls she began skipping, misreading and re-reading words and lines when reading, often losing her place. Additionally, following the MVC on 10/25/08, Mrs. Smith notes that after reading or performing computer activities for approximately 30 minutes, she observes the beginning of a sharp headache, her eyes begin to hurt and the print in the book or on the computer begins to blur. If Mrs. Smith continues to push herself to perform reading e-mail or other extensive near-point visual activities, diplopia (double vision) will present. Mrs. Smith summarizes that, following this 10/10/2005 MVC, she can no longer read or perform computer work when the words “go double.”