

Treat them right

The joys and pitfalls of treating doctors


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By Miles B. Cooper

Something came up for opposing counsel at the last minute and he didn't show. That left us – the court reporter, videographer, and me – sitting in the conference room with the treating doctor deponent, the one who had been too busy, according to his office (disinterested, I suspected) to meet me face to face. "Doctor, while you're here," I began…

Treaters: the upside and the downside

Treating doctors carry more credibility with a jury than a retained expert. A treater, like a retained expert, is compensated to attend deposition and trial, true. But the treater actually treated. The retained expert can come across as a hired gun.

Treaters are rarely happy deponents. They want to treat. Two hours with you and your joyous opposing counsel is time they will never get back. They tend to dislike all lawyers, us types in particular (something about a decades-long battle called MICRA.) Often, they erect barriers that prevent you from speaking to them.

This means most treaters will be chilly at best, hostile at worst. But you can't treat them like a hostile witness: "You think I'm hostile now, wait 'til you see me tonight." If you don't immediately recognize this, re-watch My Cousin Vinny – a fun way to bone up on trial skills.

Work with me

So how do you work with a treater? The same way porcupines mate. Carefully.

Speak to the treater directly

Call and ask for an hour of the doctor's time. Meet in person. Pay for the time. Prepare for the meeting like a deposition – bring all the material you want the doctor to see. You can't do that over the phone, nor can you evaluate the doctor as a witness with all five senses. This includes other medical records, radiology, and graphics you may want to use at trial. Make sure the doctor knows at the beginning of your session how appreciative your client is of the care the doctor gave.

Some treating doctors will not speak to a patient's lawyer without a deposition. At the deposition, the doctor then shows up with counsel. I've heard of lawyers using their client as a wedge to open those doors. This is done either with a timed cell-phone call or by shadowing the client to an appointment. (I've also never heard of this method succeeding – but depending on the importance of your case, you could consider it.)

Give the doctor the information

A doctor wants to fix the problem. The doctor may not care how the problem occurred. The doctor may not care much about the patient's past history. And the doctor may be disinterested in the other care rendered. If the doctor renders opinions without all the information, the opinions can be eviscerated.

That means you need to get the information to the doctor, including the difficult topics. Perhaps your client forgot about a prior injury. Better to get out in front of it rather than wait for defense counsel to raise it.

If you cannot meet prior to the deposition, make sure you are ready for the deposition. Bring all the material to lay a foundation for the doctor's opinions. Put it in chronological order. Make sure the documents are Bates-stamped, and reference the number on the record. This makes it easier for the jury if the doctor is unavailable for trial.

Explain the burden of proof

Treaters rarely encounter our "more likely true than not true" world. If you don't explain the burden, the treating doctor typically assumes the defense's questions about medical certainty mean something far more substantial. Explain it. If you don't get an opportunity prior to the deposition, do it on the record.

Consider noticing the deposition

You notice the deposition, you control the initial direction of the event. You can employ certain tools at the beginning of the deposition that, if you go second, could be too late. For doctors who refuse to talk to you, this can make a big difference.

Ninety-eight percent of American doctors opt to swear to a healing oath (interestingly it is not required.) Consider reminding a difficult doctor about that oath. The obligation doesn't end with a closed suture. One important component of healing is the financial wherewithal to afford the care. The doctor's opinions about the care – the cause, the necessity, the cost – are part of that care. You can discuss this with the doctor at the beginning of the deposition.

No matter how many times the doctor promises to attend trial, consider videoing your direct exam of a treating doctor. Busy surgery schedule, sudden emergencies, changes of heart – the video will always be there even if the doctor is not.

Cause and effect

Back to our deposition room with the absent opposing counsel. We discussed the incident. A fall, an abrasion, an infection,

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but an amputation? Thanks to opposing counsel's schedule, the treating doctor understood the patient's history and, more importantly, supported the causal connection. The reconvening of the deposition led to resolution shortly after.

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