When an expert witness is *not* needed

Strategies for proving medical damages in smaller cases using the treating physician

By Chuck Geerhart

When I was asked to write about use of experts to prove damages, I made a counter proposal: how about a discussion of ways to avoid the costs of experts? If you have a big case such as paraplegia caused by an accident, you have to retain the full panoply of experts. This includes a physical medicine and rehabilitation ("PMR") doctor (physiatrist), life-care planner, and an economist.

The PMR expert examines the patient, reviews all medical records, and writes a detailed report (often running 20 pages or more) outlining history, diagnosis, prognosis and all present and future health care needed for the life of the plaintiff. The cost, just to get a thorough report (but not deposition or trial testimony), can easily exceed $10,000.

One advantage of using a PMR as your expert is that she can potentially act as the medical expert for all purposes at trial, unless there is some dispute about medical causation, for which you may need treaters or other retained specialists. If the PMR doctor is deposed and testifies at trial, you can add $10,000 to $15,000, depending on how long the deposition lasts and whether the trial testimony is for a full or half day. The doctor will also charge prep time to get ready to testify. Total cost can thus be $20,000 to $25,000 through trial.

The life-care planner ("LCP") uses the PMR report and prepares a detailed report explaining the cost of all the health care needed. The cost for this can approach or exceed $10,000, (again, excluding deposition and trial testimony). This is because good LCPs often make many phone calls to health-care providers to establish cost. At $350 per hour or more, the time adds up. If the LCP has to testify, add $5,000 to $10,000. Total cost: $15,000 to $20,000.

The economist takes the LCP report and crunches the numbers, providing total dollar damages over the expected life expectancy of the plaintiff, and then reduces to present value dollars per CACI 359 and 3904. Note that under the comment to CACI 359, defendant bears the burden of proof on proving present value: "It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613B614 [no error to refuse instruction on reduction to present value when defendant presented no evidence].)"

The economist's charge just for preparing the report can easily be in the $3,000 to $5,000 range. Testimony will cost $4,000 to $6,000. Total cost: $7,000 to $11,000.

The total of the above costs[1] is $23,000 for pre-testimony work, and through trial $42,000 to $56,000. In a catastrophic case worth $1 million or more, these costs are not a big deal – they are a necessary part of building your case. But if your case is more modest, such as a tibia fracture, these costs could become an impediment to getting the case settled.

Look first to the treating physician

Most personal injury lawyers, whether young or old, do not routinely have a stable of paraplegia or wrongful death cases. Most of us have a wide range of cases in terms of damages, such as the classic neck/back strain/sprain, with possible disc injury; concussion with possibility of mild traumatic brain injury ("MTBI"); shoulder tears; knee tears; broken arms; broken ankles or tibias. Here are some suggestions on how to tailor your use of damages experts to the case at hand.

The first thing you need to decide is whether the overall value of the case merits going full bore with retained experts. Even in a catastrophic case, you should first look to the treating physicians and surgeons for expert testimony. This means calling their office and asking if they will talk to you, either on the phone or in person. Some will refuse to talk to you; at Stanford, for example, it is standard policy *not* to talk to the patient's lawyer absent a subpoena.

If the treater will talk to you, find out if the treater has the opinions you need about causation and prognosis (both are allowed as non-retained expert medical testimony). You then ask the doctor if she is willing to testify. If so, you can then choose to use the treater either as a non-retained or retained medical expert depending on how far you need the doctor to stretch on opinions beyond the treatment rendered.[2]

In a case I tried in 2012, the plaintiff had a severe injury to her esophagus due to ingesting a chicken bone on a pizza. She underwent 13 surgeries. We used as experts her surgeon (testified live) and her treating otolaryngologist and plastic surgeon (both testified via video deposition). The jury verdict gave us every dime we asked for. The surgeon was on the stand for three hours, and was unflappable, because he knew this patient's history cold. And I didn't have to pay thousands of dollars to get him up to speed (he did charge for prep time, but it was a lot cheaper by many thousands of dollars than getting a retained expert ready to go). Also, he really cared about this patient, and the jury could tell.

If your case is smaller, such as a neck/back sprain with disputed disc injury, you are almost forced to use treating physicians, because the cost of hiring outside medical experts could make settlement impossible. If your case is worth $25,000 and you have $10,000 in expert costs, someone is not getting paid much, and it's probably your client; now you need to explain why your fee is higher than the client's net.[3]

Let's say your client has a tibial plateau fracture, which often implicates the need for a future total knee replacement. You could retain your own experts, but the treater may be able to give you exactly what you need. In a case I am handling now, after I had a 15-minute telephone conference with him ($350), the treating physician prepared a detailed four-page letter report ($950) opining that as a matter of medical probability, my client will need a total knee replacement in the future. Hiring an outside orthopedist to review records, examine the client, and write the same report would be in the $5,000 to $10,000 range.

Rather than hiring a life-care planner, I am using a nurse to prepare a spreadsheet with all the estimated costs of a knee replacement. The cost of the nurse is about $200, as opposed to probably $3000 or more for the LCP. I will then use the estimate in the demand letter. The nurse can testify at trial if needed.

Making it all work

How do you implement these suggestions in your case? First, if you plan to use a treating physician as your expert, you need to talk to the doctor before she is deposed. Otherwise, you may get surprises that the defense can exploit. It is amazing how much difficulty some doctors have grasping the evidentiary standard of "reasonable medical probability" or causation. The time you spend prepping them on these matters can make or break your case. I love to meet face to face with the treating doctor, but the reality is you are lucky if you can get a phone conference.

Next, once you know your treating physician is ready to offer helpful testimony, you can notice her deposition. You can also piggyback on the defense depo notice. In either event, you must serve a notice:

> NOTICE OF INTENT TO MAKE AUDIO-VIDEO RECORDINGS OF MEDICAL EXPERT DEPOSITIONS.
>
> PLEASE TAKE NOTICE THAT pursuant to CCP, § 2025.330(c) et seq, plaintiffs intend to make audio-video recordings of the depositions of medical experts Dr. Jonathon Quack set for May 10, 2010, and Dr. Gordon Pain set for

May 20. Plaintiffs may use the audio-video recordings at trial pursuant to CCP § 2025.220 and 2025.620.

What will happen at the deposition? Although most defense lawyers will not try to obstruct your videotaping of an expert deposition, some are confused about how videotaping an expert's deposition for trial works. They will object and say they are entitled to do a discovery deposition first (difficult if the doctor only has an hour allotted). What most defense counsel do not realize is that if they want their discovery deposition first, they need to move for a protective order. Defense counsel, upon receipt of a notice to videotape an expert for possible use at trial, may make a motion for a protective order that the video deposition be "postponed until the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent, or other means, for cross examination." (Code of Civil Procedure section 2025.420(b)(3).)

Unless the defense has a protective order in place, I videotape every minute of the doctor's deposition. If the defense attorney objects, I say we will let the trial court sort it out. I have never had a trial judge preclude me from playing an expert video deposition. Oftentimes the defense questioning elicits favorable testimony I can use at trial. Also, if the defense is taking the lead in the depo, you don't have to re-ask all the basic questions.

Before trial, you must identify the pages and lines of testimony you intend to play at trial. (CCP § 2025.340(m) and CCP § 2025.620(d).)

There has been much debate about the effectiveness of playing video deposition testimony at trial. But remember, jurors live in a video age. They are used to getting information from a screen. As long as you have a high resolution projector and excellent sound, the video deposition will be just as good as live testimony. And, you do not have to jump through hoops scheduling the doctor or other expert for trial. Not to mention you have just saved $5,000 to $10,000.

In conclusion, for those all too common cases we handle where the damages are not catastrophic, the plaintiff's attorney can avoid getting upside down on expert costs by using treaters, getting reports from treaters, and videotaping expert depositions for use at trial. Your clients will thank you when they see their net recovery!

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Endnotes

[1] If your client was employed or employable, and now cannot work in the same role due to her injuries, you may also need a vocational rehabilitation expert to perform testing and write a report. That cost can easily exceed $10,000. If your client has a brain injury, you may need neuro-psych testing, which can also exceed $10,000.

[2] See *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 35-39; *Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, 1421. A treating physician may be "transformed" into a retained expert, however, by giving the physician additional information and requesting him or her to testify at trial to opinions formed on the basis of that additional information. When this happens, the treating physician must be designated as an expert witness. *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1521, 1523-1524.

[3] In that situation, many attorneys will reduce their own fee so that it is not more than the client's net.