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Have you been *Sanchezed* at trial?

The treating doctors can lay the foundation to prevent having your expert witness's testimony stricken

By Andrew S. Miller & Eean L. Boles

In many personal-injury trials, jurors will be required to resolve conflicting expert testimony on issues of injury causation and the necessity and cost of past and future care. Each of these topics will require opinion testimony by a competent expert. The outcome of the trial may very well hinge upon which side can present the most credible and persuasive evidence on these medical issues. Since the decision in *People v. Sanchez* (2016) 63 Cal.4th 665, many attorneys have faced repeated objections related to their retained expert's testimony. If the objection is sustained, you may fail in your burden of proof at trial. Your answer may be a cooperative and properly prepared treating physician.

Sanchez established that when "any expert relates to the jury case-specific out-of-court statements and treats the content of those statements as true … the statements are hearsay." (*Id.* at 665). This decision brought an end to the traditional practice of getting hearsay evidence before a jury by having a retained expert rely upon it as the basis for an opinion. After *Sanchez*, an expert can no longer "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at 686). Such objections will be less likely to apply to the testimony of a well-prepared and cooperative treater who should be able to lay a proper foundation to permit the introduction of his own medical records into evidence. Thereafter, other experts can reference them without running afoul of *Sanchez*.

There are several additional advantages to using a treating physician as a trial expert. Principle among these is the fact that the treating physician has a *physician-patient relationship* with your client. As a result, the treater is *duty bound* by the standard of care to exercise sound medical judgment in the diagnosis and treatment of the plaintiff. In other words, the treater has made a real-life diagnosis based on multiple contacts with the plaintiff that act as the foundation for her opinions and are within her percipient knowledge as a treating physician. This has led to a treatment plan that the treater personally developed in compliance with the medical standard of care. In addition, a treater testifying at trial will not be vulnerable to the classic "hired gun" line of attack because, in most cases, the treater was not selected by the plaintiff's counsel and has acted independently of the litigation.

The difference between a treater and a hired forensic expert is an important distinction

First, it is always important to remember what distinguishes a percipient witness, who is asked to recount something that he or she perceived, from an expert witness, who is asked to express an opinion based on their area of expertise about something in the case. Medical opinions, including opinions on the diagnosis and cause of injury, are the exclusive domain of the medical profession. Medical doctors are qualified (in fact, are the only ones qualified) to offer expert testimony relevant to medical causation. (*Salasquevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379).

A party must identify its expert witnesses before trial in response to a demand for exchange of expert witness information under Code of Civil Procedure section 2034.210. This requirement applies to both retained and non-retained experts. For retained experts and experts who are parties or employees of parties, the exchange must also include an expert witness declaration stating the general substance of the expected testimony and other matters. (§ 2034.210; *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 35). Failure to provide an expert witness declaration or failure to adequately disclose the expert's expected testimony may result in the exclusion of expert opinion. (*Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 139). But for a treating physician who is not "retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial," no expert witness declaration is required, and the exclusion sanction is unavailable. (§ 2034.210 (b); *Schreiber, supra*, 22 Cal.4th 31, 36).

"A treating physician is a percipient expert, but that does not mean that his testimony is limited only to personal observations. Rather, like any other expert, he may provide both fact and opinion testimony." (*Ochoa, supra*, 228 Cal.App.4th 120, 139). A treating physician is not consulted for litigation purposes, but rather learns of the plaintiff's injuries and medical history because of the underlying physician-patient relationship. (*Ibid.*; *Schreiber, supra*, 22 Cal.4th 31, 35-36). "[T]o the extent a physician acquires personal knowledge of the relevant facts independently of the litigation, his identity and opinions based on those facts are not privileged in litigation presenting an issue concerning the condition of the patient. For such a witness, no expert witness declaration is required, and he may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience. This may

well include opinions regarding causation and standard of care because such issues are inherent in a physician's work." (*Ochoa, supra,* 228 Cal.App.4th 120, 140, *quoting, Schreiber, supra,* 22 Cal.4th 31, 39).

The "code does not require an expert declaration with respect to a witness testifying as a treating physician, even if that testimony will include opinions with respect to subjects such as causation and standard of care." (*Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1520, *citing, Schreiber, supra,* 22 Cal.4th 31, 39). However, a treating physician can be transformed into a retained expert by giving her additional information and asking her to testify at trial to opinions formed on the basis of that additional information. *(Dozier, supra,* 199 Cal.App.4th 1509, 1521). Once your treating physician takes on the role of a retained expert, counsel is required to disclose the information called for in Code of Civil Procedure § 2034.210, subdivision (b), including a summary of the substance of the physician's anticipated testimony. *(Dozier, supra,* 199 Cal.App.4th 1509, 1521).

But what actually caused the plaintiff's injury?

In a case where causation of injury is disputed, testimony from a treating physician can be dispositive. As an example, consider a case involving spine injuries requiring decompression surgery. Medical imaging frequently reveals evidence of degenerative changes which defense experts will characterize as "normal wear and tear" unrelated to any trauma. If on direct examination, the treating orthopedic surgeon can explain how and why the injury requiring surgery occurred in the setting of these degenerative changes, it will be much more difficult for the defense expert, who has no physician-patient relationship with the plaintiff, to proffer persuasive contrary opinions. The defense expert can be forced to admit on cross-examination that he seeks to substitute his judgments for those of the treater who formed opinions based on actual contact with a real patient as opposed to a DME or a review of the records. Note how this establishes a basis for arguments based on CACI 221 (Conflicting Expert Testimony) that the treater's opinions should prevail based on the "reasons given" and the "matters ... relied on."

Most physicians, particularly those inexperienced in medical legal matters, will not be well versed in the nuances of an admissible opinion on the question of causation. Thus, it is important to make sure the physician is aware of the legal definitions and jury instructions on burden of proof, medical causation and other issues relevant to your case. Explain to the physician that the law requires that a causation opinion must be stated in a particular way. Use jury instructions to illustrate these concepts to a treater who lacks medical legal experience.

For example, many physicians are surprised to learn that the law does not require that the accident be the *only cause* of an injury, or that it need only be a "substantial factor," which is defined as more than "remote or trivial." (CACI 430.) Additionally, pre-existing conditions can render a plaintiff "unusually susceptible" to injury (CACI 3928), or that aggravation of a pre-existing condition is a legally recognized injury. (CACI 3927.) Perhaps most importantly, certainty is not required, only that it is "more likely true than not true" that the accident caused the injuries. (CACI 200.) When presented with the law as it relates to causation of injury, many treaters will be more willing to offer opinions on this crucial topic.

Okay, so how do I get this right?

An effective and persuasive direct examination will, in many cases, seek to establish several key points with the treating physician. The below list is not intended to be comprehensive and every case is different. But establishing the following facts through the appropriate treating physician at trial will always benefit the plaintiff:

- Multiple contacts with the plaintiff have occurred over time
- The plaintiff is a good and reliable historian who has never provided information proven to be inaccurate or exaggerated
- The plaintiff has at all times been actively involved in following the treatment plan
- The symptoms reported by the plaintiff correlate with the available medical imaging
- The symptoms reported by the plaintiff correlate with other objective clinical information
- The medical care and treatment provided in the past was both necessary and reasonable in cost
- Future medical care will be necessary
- The subject accident caused the injuries addressed in the past and future medical treatment
- The injuries and the treatment are painful
- The injuries and treatment can have significant impact on the plaintiff's everyday life

Things to consider

So, how do we know when to designate the treating doctor as an expert? Consider whether the physician is competent, qualified and credible, with a sound understanding of the facts beyond those observed firsthand. The strength of the treating physician's opinions and her ability to express them clearly is also paramount. If the witness may struggle under cross-examination, or makes a poor impression in general, you need to know this long before expert disclosures are exchanged. In most cases, these questions will be largely answered at the treating physician's deposition. In any case, the testimony of the treating physician should be supplemented with the testimony of a retained expert whenever possible.

Overall, the main goal is to admit as much useful medical testimony as possible to amplify the theory of your case. Only after determining the nature of a treating physician's opinions will you know what will be required from retained experts. Knowing the strengths and limitations of each witness will allow you to tailor your strategy to admit opinions most helpful to your case.

Andrew S. Miller is a member in the Rains Lucia Stern St. Phalle & Silver *Personal Injury Group. During his 30 years of practice, he has tried complex, high value cases to verdict in Alameda, Contra Costa, Fresno, Humboldt and Sonoma Counties. Andy has conducted dozens of binding arbitration proceedings involving claims of medical negligence.*


Miller

Eean L. Boles is an associate in the Rains Lucia Stern St. Phalle & Silver, *PC Injury Resource Group. He represents people who have suffered serious injury as a result of automobile accidents, defective products, dangerous premises, negligence, and intentional torts. Eean has both litigation and trial experience in the Greater Los Angeles area.*


Boles