

Proving damages through the testimony of treating physicians

Treater testimony is the foundation upon which you will construct your damages presentation

By Alex Behar

Proving your damages in a personal-injury action is just as important as establishing liability. Too often, attorneys invest disproportionate time and resources arguing fault percentages in auto-collision cases. They assume their well-credentialled, retained damage experts alone will carry the burden of establishing past and future special damages.

This is a mistake. Establishing liability means little if your life-care plan is excluded and your retained experts do not have the necessary foundation to provide compelling opinion testimony.

The defense-retained damage experts will likely be diametrically opposed to the treatment plan offered by your retained experts. This leaves the jury to question which side in an equally balanced expert battle they find more compelling. That's a gamble not worth taking.

To establish that your damage presentation is more equitable than that offered by the defense, you need the support of your client's treating physicians. Jurors give more credence to treaters – the providers who have actually cared for your client – as opposed to hired experts. These treaters are further useful in overcoming hearsay and foundational objections by the defense. This includes lien treaters who have provided care and treatment to your client.

Presenting treater testimony in your case-in-chief takes diligence and planning. It is a multi-step process. If done effectively, it will provide you with leverage, flexibility, and credibility in every phase of the litigation process.

This article focuses on how to prepare and present compelling treater testimony to validate your damages presentation. It addresses deposition tactics, use of treater testimony in making effective demand letters, and ultimately, trial presentation. Compelling treater testimony is often your greatest evidence. Here is a proactive approach to establishing your damages early, putting the insurance carriers on undisputed notice of your claims, and setting you up for success as the litigation proceeds.

Why treating-physician testimony is necessary

Treating-physician testimony is often critical to overcoming hearsay objections to your damages presentation at trial. In



People v. Sanchez (2016) 63 Cal.4th 665, 686, the California Supreme Court held that expert witnesses cannot relate as true, case-specific facts asserted in hearsay statements, for which the expert has no independent knowledge, unless they are independently proven by competent evidence or are covered by a hearsay exception.

Before *Sanchez*, courts interpreted Evidence Code sections 801 and 802 to allow a medical expert to testify to matters "whether or not admissible, that is of a type that reasonably may be relied upon by an expert" and "state on direct examination the reasons for his opinion and the matter." Many courts permitted medical experts to rely upon medical records and patients' hearsay descriptions of their symptoms to form the basis of their opinions. (*Id*. at 678.)

Post-*Sanchez*, the defense bar has been successful in arguing that damage experts can not recite as true those diagnoses, findings, and conclusions contained in a plaintiff's medical history to lay the foundation for their opinion testimony, as such statements are hearsay.

It should be noted this defense argument equates to a vast expansion of the *Sanchez* criminal court ruling. The Court in *Sanchez* specifically indicated that medical records could be relied upon by experts as permissible background information

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consistent with Evidence Code section 801: "That an adult party to a lawsuit suffered a serious head injury at age four would be a case-specific [hearsay] fact. The fact could be established, inter alia, by a witness who saw the injury sustained, by a doctor who treated it, or by diagnostic medical records." (*Sanchez*, supra, at 677.)

Regardless, you must be prepared for this objection. If you have retained a medical expert who is basing her opinions upon findings in your client's prior medical, billing, or radiology records, you should obtain testimony of that prior treater to assure the admissibility of your expert's opinion. For example, if your retained orthopedic expert is opining that your client will need a future surgery based upon a treater record which diagnoses post-traumatic changes to a joint, the testimony of that treater is necessary to lay the proper foundation for your expert's opinion.

Then you will have the admissible helpful opinions of the treater, as well as allowing your expert to build upon that testimony with their own opinions as to prognosis and reasonable and necessary future care.

You can also use *Sanchez* to your advantage against the defense. Often, defense counsel will comb through your client's prior medical records to establish a relevant pre-existing condition. If defense has not similarly laid the proper foundation for these prior records through treater testimony, move in limine to exclude these records as case-specific hearsay.

Think of the treater testimony as the foundation, or building blocks of the pyramid for which you will construct your damages presentation, ultimately culminating in a well-founded specials figure.

Preparation

The best course is to notice and depose select treater depositions to make sure you have marshalled all necessary evidence well in advance of trial. Coordinating and preparing for treating-physician depositions requires time, diligence, and investment, especially for non-lien treaters.

First, you need to properly subpoena the medical, billings, and imaging records from the facility/treater. A subpoena, rather than a simple HIPPA authorization, is required in order to obtain a custodian of records declaration from the facility. The custodian declaration, evidencing that the records are true and accurate business records, is an important component to ensuring these records are admissible at time of trial.

Review these records and determine who are the relevant treaters you need to testify. Consider deposing the attending physician as they can discuss the entire course of care at the facility and authenticate the records, including the radiology they relied upon as well as wound photographs documenting your client's injuries.

Emergency-room doctors and first responders can authenticate the critical initial observations of your client. This includes blood-pressure readings, loss of consciousness, Glascow Coma Score, hypotension, altered mental state, post-traumatic amnesia, tire markings to the face and body, or broken teeth. These findings are often critical to your retained neurologist's opinions as to the diagnosis of a traumatic brain injury as well as its severity.

These providers also often note use of seat belts and seat belt signs/abrasions to your client's body, helpful in combating claims of lack of seat belt use by the defense. Further, to express the pain and suffering your client was acutely experiencing at the scene for your general damages.

Surgeons who performed operations on your client are important to depose. They can explain in vivid detail to the jury how these procedures were performed and why they were necessary. This includes the number of plates, screws, and staples administered to your client. These are easily understood facts that facilitate the jury's understanding of the ordeal your client has been through and explain why she continues to suffer from pain and limitations.

Lien providers should be deposed to lay the foundation for their billing records. It is our burden to show that these billings were incurred and represent the reasonable value of these services. (*Qaadir v. Figueroa* (2021) 67 Cal.App.5th 790, 797; *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1329; *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1275.) To meet this burden, the lien provider should provide testimony about the services she provided, the costs of these services, that the bills are still outstanding, and to clarify that no cash or gratuitous discounts will be provided.

These providers' depositions then need to be noticed via personal service. This is often the most difficult part of the process. Treating physicians are busy and facilities where they practice often will not accept service.

If you are unable to coordinate a mutually agreeable deposition time with the provider, have your process server complete service with a date and time of your choosing. If contacted by the provider before the deposition about rescheduling, accommodate to their request. Also consider conducting the deposition remotely pursuant to California Rules of Court, rule 3.1010. This will permit the treater to perform the deposition from a place of their convenience, which they will appreciate.

Medical illustrations are useful when deposing treaters. Present these illustrations to the treaters at their depositions and inquire if they are a fair and accurate depiction of the injuries at issue or fairly illustrate the surgeries performed. Then you can make a compelling argument that these illustrations are admissible trial exhibits, which will be helpful to the jury in understanding past care.

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As the patient's attorney, you may speak with the treater in preparation for the deposition concerning their care, treatment, and opinions as to the injuries at issue. This will help you determine the scope of your examination. Provide them with their chart notes to refresh their recollection of the treatment. Defense counsel, on the other hand, may not similarly ex parte contact the treater. (Cal. State Bar Form.Opn. 1975-33; *Torres v. Sup.Ct.* (Daily) (1990) 221 Cal.App.3d 181,188 [disapproved on other grounds by *Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal.4th 30].)

Be aware that your communications with this non-retained expert are discoverable. Further, if during this pre-testimony conference, you provide the treater with materials outside of their own physician-patient relationship with plaintiff (i.e., the treater's own records), this may transform the treater into a retained expert whom you will have to properly designate. (See *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509; Code Civ. Proc., § 2034.210.) However, if the treater is shown these additional materials for the first time during their deposition, the defense is given fair notice and opportunity to cross-examine, and you have a strong argument that the treater's non-retained status is maintained.

Any treater who provided significant care to your client will likely be deposed. The best practice is to be proactive and to notice the deposition, as opposed to letting the defense take the lead and control the narrative.

While effective, these depositions can be costly. These treaters will require you to pay for their deposition fees. Consider making a CCP § 998 offer to defense before these depositions to recover these expert costs should the offer be rejected.

Deposition

When conducting the deposition, your goal is to make the provider shine. Often, the deposed doctor saved your client's life by providing urgent medical care in a critical situation. Show them that you are prepared with good knowledge of the facts and medicine, and they will reward you with compelling testimony from the operating-room floor.

Treating-physician testimony is not limited to the opinions found in their records. Treating physicians "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." (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39.)

Consider asking these treaters if they agree with relevant parts of your life-care plan, especially if they have the foundation from ongoing consults with the plaintiff. Look through the records for other facts that the defense may have overlooked but that the jury will appreciate. Such as chart notes memorializing a consent to operate obtained from a relative. The treater may recall that relative or loved one was at the hospital every day and the difficult conversations they had concerning the precarious state of your client. When you present this relative to the jury as a damage witness, they will have greater credibility and impact with the jury.

Their time is valuable. Your exhibits should be succinct and in logical order. The focus should be on records that were either composed by the deponent or that were relevant to their treatment of your client. Consider separating and organizing your exhibits as follows: relevant consult notes, including the admission and discharge summary; operative notes; radiology reports and images.

Always include the custodian of records declaration at the beginning of each exhibit so there is no question as to its authenticity. Further, take the time to authenticate each record pursuant to the business-record exception. (Evid. Code, § 1271.) This will help ensure there are no issues with admissibility at time of trial. Discuss their resume, including education, licenses, and board certifications.

Ask about their training and experience in providing the care at issue, such as estimated number of similar surgeries performed. Further, their experience in caring for patients involved in motor-vehicle collisions. This is important to lay the foundation for causation opinions, including whether based upon their education, training, and experience, the injuries at issue were consistent with involvement in a car accident. Given the frequency of car accidents, most treaters will feel comfortable responding that they have treated hundreds of patients involved in motor-vehicle collisions. Such testimony lends further credibility to their opinions.

Consider showing a treater, particularly a surgeon who operated on your client, the actual radiology images evidencing the injuries as well as the resulting hardware that was implanted. These objective images are impactful. It further serves to authenticate the radiology images for use by your experts.

Treaters respond positively to the introduction of these visual aids. They often do not have significant litigation experience and may be unaccustomed to public speaking. Allowing them to use these visual aids during their testimony can provide confidence as well as improve their recall of the care. It helps to transform the treater into a teacher, educating the jury as to the excellent care they provided to your client.

Consider asking if the treater has a demonstrative of their own to illustrate the care and treatment provided, such as a prosthetic device to show the jury the hardware that was placed into your client or a skeletal figure to show how a part of the body moves. Again, juries appreciate visuals, as it helps them understand complicated medical processes.

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Anticipate objections from defense during these depositions, such as "outside the scope," "*Sanchez*," "calls for expert opinion." As explained above, these speaking objections are improper. Cite the caselaw above and proceed forward, properly allowing the judge to make the admissibility ruling at time of trial. Courts give deference to treater testimony and understand these depositions are foundational to respond to defense's admissibility objection. Consider granting defense a running *Sanchez* objection to make the deposition more efficient.

Appreciate too that by going through this process, you become more informed as to your client's injuries, in turn making you a better advocate for your client.

Demand letters

Favorable treating-physician testimony is impactful in a demand letter to the defense and insurers. As stated by the California Supreme Court in *Johansen v. California State Auto Ass'n Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16, an insurer's duty to settle within policy limits is to be determined by, "whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer."

To open up an insurance policy and prove a bad-faith denial, it is your burden to document to the defense and its insurers the severity of your client's injuries. Treater testimony is very effective in this regard because it is objective, admissible, and probative.

Include relevant portions of treater testimony in your demand letter. Make sure to state that the letter needs to be forwarded by defense counsel to its clients as well as insurers, as a denial of the demand places the defendant at significant financial risk. Remind them of joint-and-several liability for economic damages, as evidenced by the compelling treater testimony. (Proposition 51.)

Expert depositions

Treater testimony can neutralize contrary opinions of the corresponding defense expert. Consider, for example, a broadside collision resulting in a brief loss of consciousness, small subdural hematoma not requiring surgery, nasal fracture, and a slightly reduced Glasgow Coma Scale score at the scene. The defense neurologist opines in her independent medical examination report that the plaintiff suffered a concussion and no future care will be required.

The treating neurologist's chart notes diagnosed your client with "encephalopathy, likely concussion/traumatic brain injury (TBI)." Severity, i.e., mild, moderate, severe, not specified.

This is a deposition worth taking. Worst case, the treater authenticates the records and sticks to her diagnosis, unwilling to opine as to severity. Also consider the alternative. In deposition, after review of the U.S. Department of Veterans Affairs Classification of TBI Severity, given the abnormal structural imaging (nasal facture and subdural hematoma), she very well could agree this was at least a moderate TBI.

Either way, you obtain foundational testimony that can be used in your examination of the defense expert to undercut his opinion. A retained expert whose testimony is in conflict with a treating physician can change the jury's perspective of that expert, making her appear more like a hired advocate as opposed to an objective medical practitioner. Credibility is critical and the battleground is shaped in these depositions well before trial.

Trial

Treater testimony is also important for trial presentation. Witness coordination at time of trial can be difficult. Judges want courtroom time to be used efficiently. Often, you will be unable to schedule your witnesses in a seamless manner. It is also important that treaters testify before your experts who rely upon their opinions and records for admissibility purposes. Moreover, juries often like a change of pace with video deposition testimony in lieu of live testimony. Video deposition testimony is also more cost efficient than having every treater appear live in court.

For these reasons, it is a big advantage to have your treater deposition clips ready to go for trial. These clips can be used to fill gaps between live witnesses and keep your case-in-chief proceeding efficiently. They can also be used in your opening statement, to inform the jury of the objective injuries your client suffered. (Code Civ. Proc., § 2025.620, subd. (d).)

It is particularly effective if you are only utilizing a treater's testimony for a limited area, such as particular consult note or opinion. Rather than allowing the defense another cross-examination opportunity, simply play the specific foundational video clip from the deposition.

To do so, you must comply with the code. Code of Civil Procedure section 2025.620, subdivision (d) states that a party can only use deposition video recordings at trial if they have complied with Code of Civil Procedure section 2025.220 (deposition notice stating intent to use video at trial) and Code of Civil Procedure section 2025.340, subdivision (m) (must provide the page and line citations to opposing counsel and the court within sufficient time for objections to be made and ruled on by the court).

At time of trial, consider calling one or two of the most relevant treaters live during trial. If there are any issues with the admissibility of their records or opinions, you can provide the judge with a further foundation. It will also allow the jury the opportunity to see these treaters in real life, providing opinions that are often contrary to those of the hired defense experts.

Conclusion

Treater testimony can be your best evidence in an auto collision case.

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These physicians care about their patients and that compassion will be evident in their testimony. This testimony can be used in every aspect of the litigation to place you in the best position to get your client full compensation.


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