

The objection "calls for expert opinion" in a medical malpractice deposition

When deposing a physician defendant, asking about expectations is an effective way to circumvent objections that the question "calls for expert testimony"

By Benjamin T. Ikuta

"Ben, you took a shitty deposition."

Those words to me were from the defense attorney *representing* one of the defendant physicians in my medical-malpractice case. While it was several years ago, the words really stung. I thought I had taken a thorough and complete deposition. The defense attorney involved was widely considered to be the best trial attorney in the state amongst medical-malpractice defense attorneys.

His client, an anesthesiologist, was a peripheral defendant. I had attempted to elicit testimony that was critical of the two target neurosurgeons in the case. As expected, the defense attorney objected on the basis that the questions called for expert opinion and instructed his client not to answer, citing *County of Los Angeles v. Superior Court* (*Martinez*) (1990) 224 Cal.App.3d 1446. When he did allow his client to answer as to opinions formed at the time of treatment, the anesthesiologist simply stated that he was focused on the administration of anesthesia and was nonetheless not qualified to opine on the neurosurgical treatment. In addition, he testified he was unaware of the reasons or specifics of the neurosurgical complications relating to the surgery at issue.

The underlying case should have involved a simple cervical laminoplasty due to moderate spinal stenosis. Instead, the surgery took seven hours. The patient lost 4.5 liters of blood (almost the entire amount of his body supply), requiring five transfusions of packed red blood cells, four transfusions of frozen fresh plasma, and additional transfusion of platelets. The

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



patient had had significant SSEP intraoperative neuromonitoring losses showing nerve damage, had a cerebral spinal fluid leak, had acute blood loss anemia, and hypotension due to hypovolemia. He spent the next month in the ICU and on death's door. When finally discharged, he had catastrophic injuries, including hemiparesis on the entire left side of his body.

What the operative report neglected to mention was that the two neurosurgeons allowed a surgical *resident* to cut into the spine *unattended*, where he broke off a blade into the patient's carotid artery. In fact, the fraudulent operative report listed no complications. Likewise, none of the intraoperative complications were effectively conveyed to the deponent anesthesiologist, who was trying to keep the patient alive on the operating table.

The defense attorney told me I left a lot on the table and that his client would have given me invaluable testimony against the neurosurgeons if I had just asked the right questions. He told me that I foolishly neglected to ask about the anesthesiologist's *expectations*.

County of Los Angeles v. Superior Court (*Martinez*) (1990) 224 Cal.App.3d 1446 held that a party may not ask the present-sense expert opinion of a defendant physician

Many attorneys believe that the only possible objection justifying an instruction not to answer a question at deposition is either privacy or privilege. (See *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1014.) However, *Martinez* held that a defense lawyer may properly instruct a client not to answer a question eliciting an expert opinion as it is a violation of Code of Civil Procedure section 2034.210 et seq.

In *Martinez*, a newborn tragically suffered severe brain damage as a result of oxygen deprivation at delivery. The family sued two obstetricians and a county hospital for medical malpractice. At deposition, the defendant physicians were questioned about their present medical opinions regarding the interpretation of fetal monitoring strips. The physicians' attorneys objected and instructed not to answer on the basis that the questions called for premature expert opinions in violation of Code of Civil Procedure section 2034. The attorneys did not object based on the attorney work product or the attorney-client privileges.

The trial court granted the family's motion to compel, but the Court of Appeal reversed. It explained that "the present expert opinions of a party physician concerning the care given are irrelevant unless the physician is designated as an expert witness." *Martinez* explained that section 2034 provided a detailed legislative scheme for discovery of expert witnesses and it was improper to elicit or seek expert opinions prior to designation. In short, the appellate court held that there was "no reason to disrupt the carefully crafted legislative scheme for the regulation of discovery of the identity, qualifications and opinions of expert witnesses."

It is questionable whether *Martinez* is still good law. The California Supreme Court in *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 34 explained that "a treating physician does not *become* an expert only when nonpercipient opinion testimony is elicited." (Emphasis in original.) Our high court went on to explain that "what distinguishes the treating physician from a retained expert is not the content of the testimony, but the context in which he became familiar with the plaintiff's injuries that were ultimately the subject of litigation, and which form the factual basis for the medical opinion." (*Ibid.*)

Schreiber then found that a treating physician "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." (*Ibid.*) Indeed, the court cautioned that defense lawyers "would therefore be prudent to ask a treating physician at his deposition whether he holds any opinions on these subjects, and if so, in what manner he obtained the factual underpinning of those opinions." (*Ibid.*; see also *Baker-Hoey v. Lockheed Martin Corp*. (2003) 111 Cal.App.4th 592, 601 ["[W]hile the treating physician is not a retained physician, the treating physician is clearly an expert"].)

These remarks in *Schreiber* are arguably dicta given that it is not directly tied to *Schreiber's* holding that an attorney declaration under Code of Civil Procedure section 2034.260 is not required for non-retained, treating physician experts. However, dicta from the California Supreme Court is still binding. (See *Aviles-Rodriguez v. Los Angeles Community College Dist*. (2017) 14 Cal.App.5th 981, 990 ["Generally speaking, follow dicta from the California Supreme Court"].)

In depositions involving defendant physicians, I always carry a highlighted copy of the *Schreiber* opinion in case I deal with an obstreperous defense lawyer who over-objects on the basis of expert opinion.

Even though opinions formulated at the time of treatment are unquestionably discoverable, they will likely go nowhere

Even in *Martinez*, the court found that any impressions or opinions formulated at the time of treatment were clearly discoverable. The court was clear that "[q]uestions to the defendant physicians about their impressions and reasons for their action or lack of action at the time the medical procedure was performed are, of course, entirely appropriate." (See also *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1520 ["A treating physician unquestionably may be designated as an expert, and may be qualified to testify . . . on the subject of a defendant physician's adherence to the applicable standard of care"].)

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Of course, you should ask the deponent, in detail, any opinions that he or she formulated at the time of treatment. However, at least as to standard-of-care opinions, this will likely get you nowhere. Non-party treating physicians or co-defendants are unlikely to criticize or disparage their colleagues or the nursing staff. This is particularly true when the deponent, like in my case, practices in a different field of medicine. The medical-malpractice defense industry is a small one with only a limited number of carriers, and defense attorneys will fully prepare their clients not to make comments that could possibly criticize a co-defendant or another provider.

Ask about the deponent's expectations!

The most effective way to get what you need is to simply ask about the provider's *expectations* at the time of the care and treatment.

First, this is a very effective method to obtain testimony critical of other providers. For example, in my case, the anesthesiologist refused to provide any testimony that was directly critical of the neurosurgeons. However, I missed critical questions as to the anesthesiologist's *expectations*. Was it the anesthesiologist's *expectation* that a resident neurosurgeon would start the surgery unattended? Was he surprised when the resident started to cut through the cervical lamina without an attending present? Was it the anesthesiologist's expectation that the neurosurgical team would keep him apprised as to the complications of the surgery? Was it the anesthesiologist's expectation that the neurosurgical team would update him on the laceration of the carotid artery, causing major blood loss and anesthesia-related issues?

Not only are questions regarding expectations helpful as to unveiling previously unspoken criticism, they are also critical in combating the recognized risk defense as well as the defense-friendly CACI 505. CACI 505, titled "Success Not Required," states that a defendant physician is not necessarily negligent just because his or her efforts were unsuccessful or if the physician makes a mistake that is reasonable under the circumstances. Defense lawyers are trained to use CACI 505 in arguing that complications can occur even in the best of hands.

Asking about expectations helps show that these complications were not just recognized risks of surgery. I should have asked the anesthesiologist if it was his expectation that the surgery would last seven hours, causing him to cancel the rest of his patients for the day. Was it his expectation that the patient would lose almost the entirety of his blood and require multiple blood and plasma transfusions? Was it his expectation that this patient would end up in the ICU for a month? Was it his expectation that the patient would have a precipitous drop in blood pressure and heart rate, requiring the administration of pressors and epinephrine? Was it his expectation that the patient would be crippled for the rest of his life? These questions help combat the recognized risk defense and CACI 505.

Closing thoughts

When deposing any defendant physician or a treating provider, *always* videotape the deposition. If a deposition is important enough to take, it is important enough to videotape. Of course, the deposition of a party can be used for any purpose. (Code of Civ. Proc., § 2025.620, subd. (b).)

However, as to treating providers (which would include dismissed peripheral defendants in a medical malpractice matter), any party can use the video recording of such physicians "even though the deponent is available to testify." (Code of Civ. Proc., § 2025.620, subd. (d).) Such treating providers are often expensive and difficult to schedule. Even more importantly, defense attorneys are often far more prepared to cross-examine or question a witness at trial than they are at deposition. Using the videotaped deposition testimony without a strong cross-examination is a very effective way to present evidence at trial.

The defendant as an expert

Lastly, it is not uncommon in a medical-malpractice action for the defense attorney to try and sneak his client in as a non-retained expert as part of expert designation so that the attorney can ask his client expert opinions on the stand. You can object to such tactics as Code of Civil Procedure section 2034.210, subdivision (b) requires an expert witness declaration for "a party or an employee of a party." However, a better tactic is to notice that defendant's deposition as an expert witness. If the defense attorney is foolish enough to allow the defendant to be deposed as an expert or otherwise fails to withdraw the doctor as an expert, the attorney-client privilege is waived. (See *Shooker v. Superior Court* (2003) 111 Cal.App.4th 923, 925 ["[I]f the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition) the privilege is waived."]; *County of Los Angeles v. Superior* Court (*Hernandez*) (1990) 222 Cal.App.3d 647, 654-55 ["Under discovery rules, however, once it appears reasonably certain that the consultant-expert will give his or her professional opinion as a witness on a material matter in dispute, the attorney's work-product privilege terminates and the expert's knowledge and opinions are subject to discovery and disclosure"].)

Benjamin T. Ikuta is the founding partner at Ikuta Hemesath LLP *in Santa Ana, where he concentrates his practice entirely on medical malpractice on the plaintiff side. Ben can be reached at ben@ih-llp.com.*



Ikuta

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**