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Avoiding the transformation

BE CAREFUL NOT TO INADVERTENTLY TRANSFORM YOUR TREATING-PHYSICIAN WITNESS INTO A RETAINED MEDICAL EXPERT

In personal-injury actions, treating physicians are often able to provide valuable testimony in support of the plaintiff's case. A treating physician who has spent a substantial amount of time with the plaintiff, and who is intimately familiar with his medical history and prognosis, may be in a unique position to provide opinions concerning plaintiff's injuries, past and future medical care, and/or the reasonable costs of such care, provided the testimony falls within the witness's area of training, specialized knowledge, and experience.

At the time of expert disclosure, a plaintiff's treating physicians are usually designated as "non-retained" experts. However, it is possible to inadvertently transform a *non-retained* expert into a *retained* expert in the course of litigation, by providing the physician information and documents related to the lawsuit. If the physician's opinions are developed in reliance on such litigation-derived information, a series of procedural protocols relating to retained expert designation, set forth in Code of Civil Procedure sections 2034, *et seq*., may be required.

If a non-retained expert is tranformed into a retained expert after initial disclosures, and without appropriate law and motion, the result can be the wholesale exclusion of all opinions based upon litigation-derived information. Plaintiffs' attorneys must be careful when consulting treating physicians, to refrain from carelessly providing information or documents to non-retained experts that would trigger the transformation.

The versatility of the treating physician's opinion testimony

A treating physician is usually a practitioner who has provided medical treatment for the plaintiff, independent of litigation. Of course, such physicians may testify as percipient witnesses; however, while "[a] treating physician is a percipient expert, . . . that does not mean that his [or her] testimony is limited to only personal observations." (*Ibid.*) Evidence Code, section 700, allows for the admission of expert opinion testimony where the witness "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

In 1997, the Court of Appeal, in *Plunkett v. Spalding* held that if a party intended to elicit opinions from a treating physician on matters relevant to a lawsuit, beyond that physician's diagnosis and prognosis related to the patient, such treating physicians were considered "retained" experts requiring declarations at the time of the offering party's expert disclosure. (*Plunkett v. Spaulding* (1997) 52 Cal.App.4th 114.) However, two years later, the Supreme Court overruled *Plunkett* in *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39-40, holding that a non-retained treating physician, like any other expert, may provide "both fact and opinion testimony" without the need of a declaration.

In *Schreiber*, the Supreme Court held that a treating physician does not become a "retained" expert within the meaning of former Code of Civil Procedure section 2034(a)(2) (now Code of Civil Procedure, section 2034.210(b)) simply by testifying to opinions he is qualified to render by virtue of those opinions relating to matters beyond the scope of diagnosis and prognosis. (*Schreiber v. Estate of Kiser*, *supra*, 22 Cal.4th at 39.) Thus, treating physicians "may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience." (*Ibid.*)

The Court of Appeal further broadened the scope of admissible non-retained expert opinions in *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120. In that case, the court made clear that non-retained experts may provide opinions concerning *any matter* to which they are qualified to testify. For example:

> A treating physician who has gained special knowledge concerning the market value of medical services through his or her own practice or other means independent of the litigation may testify on the reasonable value of services that he or she provided or became familiar with as a treating physician, rather than as a litigation consultant, without the necessity of an expert witness declaration.

(*Ochoa*, *supra*, 228 Cal.App.4th at 140.)

The range of subject matters within which the non-retained expert may opine at trial extends beyond the scope of their treatment of the plaintiff. "[T]o the extent a physician acquires personal knowledge of the relevant facts independently of the litigation . . . 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." (*Id.* at 140, emphasis supplied.)

This open door allows parties to offer expert opinion testimony into evidence at trial on any matter, without serving a declaration setting forth the scope of his/her testimony and expertise, or requiring production of prior reports, and without requiring the offering party to make the non-retained expert available for deposition. (*Huntley v. Foster* (1995) 35 Cal.App.4th 753, 756 ["The disclosures are not required for treating doctors even if the doctors may be presented with questions at trial that call for an expert opinion."].) Requiring an attorney to analyze the witness's anticipated

Ward, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2017 Issue

testimony and submit the analysis to the opponent "would invade the absolute protection given by the work product doctrine to the thought processes of an attorney in preparation for trial." (*Ibid.*)

The risk of transforming a treating physician into a retained expert

Before any party can offer the opinion testimony of a *retained* expert in evidence, that party must comply with the disclosure requirements set out in Code of Civil Procedure sections 2034.210 and 2034.270, 2034.415. If a party fails to (1) submit an expert witness declaration, (2) produce reports and writings of expert witnesses under Section 2034.270, or (3) make that expert available for a deposition under Article 3, then on objection, the trial court must exclude the expert's opinion from trial. However, a party offering the opinions of a *non-retained* expert witness need not submit an expert declaration, produce reports and writings of the expert witness, or make that expert available for a deposition under Article 3. (*Ochoa, supra,* 228 Cal.App.4th at 139; *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39; see also Cal. Prac. Guide Civ. Pro. Before Trial Ch. 8J-6.) So long as the treating physician remains a *non-retained* expert, these particular steps are not required.

Many attorneys falsely believe that a "retained" expert, as referenced in Code of Civil Procedure section 2034.210(b), is simply an expert that has been hired and paid by a party's lawyer. While this is often practically true, it is not the definition under California case law.

Ochoa, supra, discussed the distinction between retained and non-retained experts as follows:

> As the legislative history clarifies, 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.* The contextual nature of the inquiry is implicit in the language of [former] section 2034, subdivision (a)(2), which describes a retained expert as one 'retained by a party *for the purpose* of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action.' (Italics added.) *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.* (*Id.* at 139, emphasis supplied, citing *Schreiber v. Estate of Kiser*, 22 Cal.4th at 91.)

Moreover, in *Huntley v. Foster*, the court clarified that it is "[b]ecause a percipient expert is *not given information by the employing party, but [instead] acquires it from personal observation*," the statute does not impose the same procedural burdens on a party seeking to offer testimony of a treating physician as those required for retained experts. (*Huntley v. Foster, supra,* 35 Cal.App.4th at 756, emphasis supplied; see also *Hurtado v. Western Med. Ctr* (1990) 222 Cal.App.3d 1198.)

If it is true that a treating physician can remain a non-retained expert only so long as that physician is aware of the plaintiff's injuries as a result of "the underlying physician-patient relationship," then what happens when counsel provides the physician additional records or information obtained in connection with pending litigation? Shockingly, this could transform the treating physician into a "retained" expert, triggering the procedural requirements set forth in Code of Civil Procedure, sections 2034.260 and 2034.270.

In *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509, 1521-24, the plaintiff brought a medical malpractice case against a defendant doctor, Dr. Shapiro, for mishandling a high tibial osteotomy on the left knee. In that case, the plaintiff had to undergo subsequent surgery with another treating physician, Dr. Zeegen, to remedy the mistake, adjusting a screw that had penetrated into the plaintiff's joint. At Dr. Zeegen's deposition he testified that it would be "hard to say" whether the screw had initially been placed improperly by Dr. Shapiro or whether it had migrated into the joint over a period of time. Neither party retained Dr. Zeegen in the case; however the plaintiff designated Dr. Zeegen as a non-retained expert in his Section 2034.210 disclosure.

In response to a motion in limine filed by the defense to limit Dr. Zeegen's trial testimony to his deposition, the trial court held a hearing under Evidence Code section 402, and discovered that after his deposition, plaintiff's counsel provided Dr. Zeegen with copies of the Dr. Shapiro's deposition transcript and medical records related to the initial surgical procedure at issue in the case, which enabled Dr. Zeegan to form opinions relating to the defendant's standard of care, that he could not have made at the time of his deposition. The Court of Appeal held that:

> Plaintiff's] counsel *transformed* Dr. Zeegen, a treating physician, into a retained expert *by giving him additional information and asking him to testify at trial to opinions formed on the basis of that additional information*.

(*Id.*, 199 Cal.App.4th at p. 1521.)

The court made clear that the trial court correctly determined Dr. Zeegen's trial testimony on the subject of the standard of care would be that of a *retained* expert rather than merely a treating physician. Accordingly, where the plaintiff never informed defendants about Dr. Zeegen's postdeposition change of testimony, and therefore never gave them the opportunity to request a renewed deposition on that subject, the exclusion sanction for noncompliance with section 2034.210 was approporiate.

The transformative conduct in that case was private attorney consultation with Dr. Zeegen after his deposition, and providing him with records not arising out of the doctor-patient relationship. It may be tempting to meet with treating physicians to provide them with retained experts' reports, or the defense expert's IME report. This, however, may have an undesired effect, particularly when done after the physician's deposition.

Avoiding the exclusion of non-retained expert opinions

Some attorneys may be tempted to cower away, claiming the simplest way to avoid this problem is to eschew privately

Ward, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2017 Issue

consulting with a client's physician altogether. This move is unnecessary and may result in the dereliction of duty to your client. Unlike federal and ethical rules precluding defense counsel's unilateral contact with a plaintiff's treating physician (see 42 U.S.C. § 1320d *et seq*., 45 C.F.R. § 160.103 [precluding physician disclosure of "individually identifiable health information"]; *Lee v. Superior Court* (2009) 177 Cal.App.4th 1108, 1135-36 [recognizing HIPPA's protection of individually identifying health information]; *see also* Formal Opinion N. 1975-33, The State Bar of California Standing Committee on Professional Responsibility and Conduct ["the defense counsel should notify the plaintiff or plaintiff's counsel in all cases before communicating with plaintiff's treating physician"]), there is no ethical or legal restraint on a plaintiff's attorney from directly consulting with his/her client's treating physician upon obtaining the requisite authorization, to learn more about his client's condition. Meeting with a client's treating physician is a routine and expected practice that is often fruitful and can provide a more objective perspective into your client's case. However, the manner of this consultation should avoid providing information and materials to the treating physician that would result in the exclusion of her opinions at trial.

One approach may be to simply ensure that the treating physician has all the pertinent medical records she needs to provide comprehensive ongoing care for her patient. If there are medical records missing from her file that could significantly impair the physician's ability to provide competent and informed clinical care to her patient, she may request additional records in her patient's control. If that physician has an ongoing physician-patient relationship with the plaintiff, then the plaintiff's attorney may be asked to provide those missing medical records for clinical review in order to ensure the patient is receiving competent, informed, and comprehensive medical care. If a client's doctor requests medical documents for clinical purposes, then such a request would seem readily distinguishable from *Dozier* on the basis that the records obtained arose out of the *physician-patient relationship*, and not "for purposes of litigation." The downside to this approach is that it limits the documents the physician is able to review to those requested by the physician for clinical purposes.

Another way to avoid the transformative consultation might be to ask the physician, *at her deposition*, whether certain opinions would be informed or assisted by review of particular documents, and then providing those documents for her review then and there. Furnishing these documents for her review at deposition would be unlikely to trigger the same concerns addressed by the court in *Dozier.* Opposing counsel would have opportunity to cross-examine any opinions offered as a result of document review, and there would be no private consultation that would justify deeming the physician a "retained" expert for one side. However, this method runs the risk of not knowing in advance whether the opinions will be favorable or detrimental to the case.

Serve notice if opinion changes

It is important to note that in *Dozier* the appellate court implied that if the plaintiff's counsel had notified the defense of the physician's changed opinions, and Dr. Zeegen (treating physician) had been made available for a second deposition on those newly developed opinions, then it is likely no exclusion sanction would have been applied. Thus, the safer course of action if placed in similar circumstances would be to provide opposing counsel early notice of newly discovered opinions and work with the physician to schedule another deposition before trial.

Easterby v. Clark (2009) 171 Cal.App.4th 772, held that where the opposing party *is made aware* of the change in the expert's testimony, and *provided notice and an opportunity* to take that expert's deposition again, exclusion of the treating physician's changed opinion testimony may amount to reversible error. In that case, a dental assistant stepped on a wire connected to an X-ray sensor in Easterby's mouth and Easterby's head jerked to one side, causing pain on the right side of her neck. Easterby's internist referred her to Dr. John Regan, an orthopedic surgeon, who had determined that Easterby suffered from a degenerative condition of the cervical spine and that she had compressed spinal nerves and herniated disks. At Dr. Regan's deposition, he was asked by counsel whether he knew what caused the need for the surgical procedure, to which Dr. Regan responded "I don't know what caused it."

Three months before the start of trial, plaintiff's counsel wrote defense counsel a letter informing them that after Dr. Regan's deposition, he received a letter confirming that the plaintiff did not have a history of automobile accidents, leading Dr. Regan to have the opinion that the subject event in that case caused the need for his surgery. The court noted that the defendants did not attempt to depose Regan after receiving this letter.

Dr. Regan testified as to causation at trial and the defendants moved to strike Regan's testimony and the trial court granted the motion. The Court of Appeal reversed the trial court's order, reasoning that in contrast to *Kennemur, Jones,* and *Bonds*, the defendants learned approximately three months before trial that Regan would go beyond his original deposition testimony and offer a causation opinion at trial, *and chose not to depose him*. (*Easterby v. Clark, supra,* 171 Cal.App.4th at 772.) Accordingly, the Court of Appeal reversed the trial court's exclusion of Dr. Regan's opinion testimony.

It remains unclear the extent to which the concerns expressed in *Dozier* apply to communications with a treating physician before her deposition, where defense counsel has an opportunity to fully depose the treating physician and discover all of her opinions. The language of "transformation" in *Dozier* is disconcerting; however, *Easterby* appears to suggest that principal concern is to avoid party gamesmanship that deprives opposing counsel a fair opportunity to discover evidence that will be offered at trial. Conduct that mitigates such

Ward, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2017 Issue

prejudice will be far less likely to result in an evidentiary exclusion.

Conclusion

To maximize the value of a non-retained physician's expert opinion testimony at trial, attorneys should be careful when furnishing documents and information that would not otherwise have been available to them in the course of a physician-patient relationship. Being cognizant to avoid the transformation of a non-retained expert into a retained expert should encourage plaintiffs' attorneys to take full advantage of the unique access we have to treating physicians, and leverage helpful opinion testimony.

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