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Defending your treating physicians' opinion testimony

KNOW YOUR TREATING PHYSICIANS' OPINIONS, AND GET THEM ADMITTED

In most personal-injury cases, your client's treating physicians are a powerful resource. They have direct experience with your client and can verify the client's injuries, course of necessary treatment, diagnoses, prognoses, and future treatment. Treating physicians ("treaters") can also offer the opinion that a given event caused injury to your client. Most often the treater will draw logical inferences based on the type of incident and the timing of the patient's complaints and symptoms. When the plaintiff's own doctor says that the incident likely caused plaintiff's injuries, this can be very persuasive opinion evidence to a jury.

You may have encountered a recent shift in defense strategies to keep out treating physicians' causation opinions. This hinges on whether the treating physician has access to the patient's prior medical records, medical history, and accident facts. If the treater has not seen the past medical records, the defense will argue the treater cannot exclude prior conditions or other causes, and thus cannot say whether the incident caused injury. If the treater has been given the prior medical records, then the defense will cry foul and say the treater is now a retained expert, who was not properly disclosed. Thus the defense tries to create a "Catch-22" to block the treater from offering causation opinions.

This line of attack is based on incorrect law, or a failure of the treating physician to understand what is and is not permitted. Treating physicians may offer causation opinions, without reading the past medical record. Your client's treating physicians have foundation and are fully qualified and entitled to opine on the cause of your client's injuries with or without pre-incident medical records. Also, there are ways of bolstering these treaters' foundation by informing them of the past medical records without converting them into retained experts.

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Medical opinions by non-retained treating physicians

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. (See, *Salasquevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d. 379).

A treating physician may be designated as a non-retained expert. Unlike a retained expert who receives information relevant to the case for the purposes of litigation, a non-retained expert offers opinions based on "independently acquired" facts, e.g., knowledge acquired through their experience treating the patient. A non-retained treating physician may testify as to "facts acquired independently of the litigation, that is, facts acquired in the course of the physician-patient relationship and any other facts independently acquired." (*Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 140.) A non-retained treating physician may offer opinions regarding plaintiff's medical conditions and the cause of plaintiff's injuries. The physician's admissible opinions "*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, emphasis added.)

In practice, treating physicians are usually willing to offer the opinion that the particular incident caused a particular injury. For example, in an auto accident causing neck injury, the treating orthopedist will note that the patient had no symptoms before an auto accident, and after the incident showed cervical pain and bulges in cervical MRIs. On that basis, the physician will often opine that the accident caused the particular injury.

However, some physicians will not be comfortable with opining on causation. They take the attitude that their job is to treat medical conditions, and they are not overly concerned with the cause of the conditions. It is important to learn the physician's perspective before they give deposition or trial testimony, to gauge their willingness to analyze causation opinions.

Treaters may offer causation opinions without reviewing prior medical records

Opinions of experts must be based on proper foundation. Experts may rely on foundational matters "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801.) Here, the physician may rely both on their experience with the patient, and their own experience with the type of accident and resulting injuries as known in their medical practice.

Where physicians offer these opinions that are helpful to plaintiff, we can expect an attack from the defense, particularly, an attack on the foundation for the physician's opinions on causation. If the physician does not have access to the patient's prior medical records, the defense will criticize the doctor's ability to rule out prior causes. Thereafter, you might face a motion in limine to preclude the causation opinions of your treating physicians.

Such MILs should be resisted with the above case law. It should be emphasized that treating physicians are authorized to give causation opinions. As noted above, case law broadly supports the physician's legal right to offer such opinions. As recognized in *Schreiber*, "opinions regarding causation . . . *are inherent in a physician's work*." (*Schreiber, supra,* 22 Cal.4th 31, 39, emphasis added.)

You may also encounter a defense argument that causation is an issue requiring expertise in "biomechanics," that is, the physics of the forces required to cause injury. This is contrary to all the case law cited above. Medical causation is an ultimate question for the jury, and opinions on medical causation can only be offered by a medical expert. Case law firmly establishes that physicians may opine on causation with no requirement for any expertise in biomechanics.

Plaintiffs should also emphasize that the legal standard for medical causation is "more likely than not," i.e., 51 percent. "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." (*Jones v. Ortho Pharmaceutical Corp*. (1985) 163 Cal.App.3d 396, 403) Also, under the substantial-factor test, to legally cause an injury, the event "must be more than a remote or trivial factor. It does not have to be the only cause of the harm." (CACI 430.)

Thus the treating physician need only testify that, more likely than not, the incident made some non-trivial contribution to causing injury. This can act in conjunction with other causes, or with the presence of pre-existing conditions that pre-dispose toward injury.

If the physician feels comfortable giving causation opinions, it is legally within his or her province to do so. Any attacks on the foundation of their opinions will go to the weight of the testimony, not the admissibility of the testimony.

Bolstering foundation for medical causation: Hypothetical questions

Treating physicians may not feel comfortable expressing an opinion on causation if they do not know the patient's medical history well enough. Also, if a physician is willing to offer causation opinions, the defense remains free to attack the foundation for those opinions. It is common for the defense to bring up events from the past medical records, such as prior pain in that body part, to say that the injury was always present.

It can be useful to bolster the foundation for a physician's causation opinions at trial with hypothetical questions providing additional information. Hypothetical questions are framed to assume the material facts in evidence, outside of the facts already known to that witness. The expert is then asked to express his or her opinion based on those assumptions. (*Rosenberg v. Goldstein* (1966) 247 Cal.App.2d 25, 30.) Hypothetical questions "must be rooted in the evidence of the case" and must be

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reliable and not misleading (*People v. Xue Vang* (2011) 52 Cal.4th 1038, 1045-1046; *People v. Gardeley* (1993) 14 Cal.4th 605, 617-618.)

Where your treating physician is on the witness stand at trial, you will be able to ask the physician hypothetical questions, posing assumed facts outside the witness' direct knowledge. These questions may include assumed facts based on the plaintiff's medical history outside of the physician's direct care of the patient.

In outlining the direct testimony of the treating physician, you should consider both positive and negative instances from the past medical records, or from testimony of persons who know the patient. For example, you may cite instances from past records that appear to show the patient was functioning well (or medical imaging showing no injury). Conversely, you can raise past issues that appear to show prior injuries, but frame these so as to allow your treating physician to rule these out as primary causes of the patient's current condition. This can be effective prophylaxis against the defense attempt to "sandbag" your treater with alleged alternative causes of injury.

Bolstering foundation for medical causation: Providing medical records to the physician

As noted above, non-retained treating physicians typically acquire information about the case through their own experience with the patient including records available during treatment. For a retained expert, the Code requires a declaration from the attorney stating the scope of the expert's opinions. For a non-retained expert, such as a treating physician, no expert declaration is necessary for these opinions – even opinions on causation of injury. "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, emphasis added.)

It can often be useful to provide the non-retained physician with some of the patient's medical records. This can provide further foundation to establish causation, usually by giving the physician enough information to opine that the patient did not have the medical condition before the incident, or had a minor asymptomatic condition exacerbated by the incident.

However, providing prior records risks transforming the non-retained treating physician into a retained expert. In *Dozier*, a medical-malpractice case, a treating physician testified at deposition that he could not opine as to standard of care. The witness was then provided additional medical records after deposition and before trial, with no notice to the opposing party. After receiving further records he attempted to offer opinions on the violation of standard of care at trial. The trial court ruled that this additional information transformed the non-retained physician into a retained expert who was forming opinions for litigation purposes. The appellate court agreed, holding that the trial court "was justified in precluding him from testifying to opinions he had formed for the litigation, including his opinions on the subject of Dr. Shapiro's compliance with the standard of care." (*Dozier, supra,* 199 Cal.App.4th at p. 1521)

Issue of notice as to treater's opinions

Dozier raises issues critically related to *notice* – that is, did the opponent get adequate notice of the treater's opinions and the potential use of foundational materials outside their treatment of the patient. Generally, in expert discovery, notice of the witness' intent to give certain opinions is given in the expert disclosure, and again at the witness' deposition.

In *Dozier*, there is a clear intent to deceive the opponent, as both the disclosure and the deposition indicated the expert would speak solely about his treatment, and that he had no opinions on standard of care. The *Dozier* court also criticized the plaintiff's expert for going beyond their deposition testimony. "'[A] party's expert may not offer testimony at trial that exceeds the scope of his deposition testimony if the opposing party has no notice or expectation that the expert will offer the new testimony.'" (*Dozier, supra,* 199 Cal.App.4th 1509, 1523, *citing, Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780.) Clearly, a central concern of the *Dozier* court was the plaintiff's attempt to surprise the defense with new opinion testimony at the time of trial.

If you want to bolster or expand your treating physician's testimony by providing the physician with additional records, there are several routes to take. First, you can designate them as a retained expert in your expert disclosure. This will fulfill the letter of *Dozier* and related cases and permit opinions based on wide foundations. However, there are drawbacks. A treating physician is usually not under the control of the party offering their opinion. Sometimes it is hard to know what they will say on the stand or if they will have an opinion at all. It is therefore difficult to fulfill the requirement of retained expert disclosure, to summarize the expert's opinions.

An intermediate route is to use the disclosure to designate "retained treating physicians" as a separate section, distinct from retained and other non-retained experts. You can disclose the treating physician as offering opinions based both on information gained from treatment, and also from information from other medical records. This disclosure can state the physician's scope of opinion to the extent it is known to you. Providing the defense the opportunity to depose this witness can deflect the idea that you have been "hiding" the opinions and/or foundations of this witness' testimony.

Know your treating physicians' opinions, and get them admitted

Treating physicians' opinions are an important resource that are often extremely beneficial to your case. If you have a witness that may be strong for you on causation, you have several ways to get this testimony admitted. Generally, the case law favors the admission of treating physicians' causation testimony, and it is well worth it to fight to get this testimony admitted.

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Word to the wise: Don't wait until the last minute to discuss the issues with your client's treating physicians. It is important to come up with a strategy as to how best to approach the testimony of each individual physician witness. Knowing the strengths and limitations of each witness will allow you to tailor your strategy to admit opinions helpful to your case.

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