



Presenting medical evidence at trial

Playing at trial the videotaped depositions of treating doctors is often preferable to live testimony

By OLIVIA K. LEARY

Personal-injury cases rely heavily on the testimony of the plaintiff's treaters. However, trials can drag on and expenses can skyrocket if each relevant treater is expected to appear, lay the foundation for their medical treatment and provide opinion and causation testimony. Further, trial schedules frequently need to be readjusted with limited notice and treaters' schedules are not generally flexible.

With our modern tools providing remote depositions and video recordings, plaintiffs' attorneys can avoid this mess by taking important treater depositions far ahead of trial. To do so, attorneys should affirmatively notice these depositions and gather the pertinent testimony early to be used in litigating the case, preparing experts for trial and during the trial itself.

Why treater testimony is necessary at trial for medical record admissibility

Treater testimony is critical to present at trial. Procedurally, any exhibit and testimony offered at trial must be relevant. (Evid. Code, § 352.) For a writing to be introduced as an exhibit, such as medical treatment records, imaging records, medical billing records, the writing must be authenticated and admissible. (Evid. Code, § 1401(a).)

Prior to *People v. Sanchez*, plaintiffs' experts were able to rely on medical records and other writings as a foundation for their opinion, regardless of whether the records were unauthenticated or inadmissible hearsay evidence. However, following the holding in *Sanchez*, experts were no longer able to rely on this. The *Sanchez* Court held, "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements

are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness." (*People v. Sanchez* (2016) 63 Cal.4th 665, 684.) Therefore, it is imperative that writings are properly introduced, subject to a hearsay exception like the business records exception or the recorded recollection exception. With regard to medical treatment records, the person best suited to do so is generally the treater who generated the record at the time of the patient's treatment.

In order to present evidence at trial as efficiently as possible, courts are often amenable to allowing videotaped deposition testimony to be introduced at trial, sometimes in lieu of live testimony. Code of Civil Procedure section 2025.620, subdivision (d) states: "Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340." Code of Civil Procedure section 2025.340 provides that any party intending to offer a video recording of a deposition of a treater or expert shall notify the court and all parties in writing of their intent with sufficient time for objections to be made and ruled on, and for any editing of the recording to be made if necessary. Therefore, videotaped deposition testimony of treaters is relatively easy to have admitted and used at trial and can be used to fill in down time between live witnesses, provide foundation for testifying expert opinions and streamline the presentation of the case.

The focus of treater's testimony

In addition to authenticating medical treatment records, treaters should provide valuable testimony regarding their observations of the plaintiff, opinions regarding causation, treatments provided and the plaintiff's future limitations and treatment needs. A treater, as a neutral party and not a retained expert, can offer this testimony very credibly. In particular, treaters that have provided treatment through insurance or not on a lien do not have any financial incentive with the outcome for the plaintiff and are generally regarded as even more believable.

Treater testimony, particularly following *Sanchez*, is imperative to facilitate your experts' review of the case and formation of opinions. If an expert is relying on medical treatment records or chart notes and a treater later provides more nuance, clarifies a notation or otherwise changes the explanation contained in the writing when testifying at trial, then the expert's opinions may be incomplete or, potentially, inaccurate. That is a huge risk when preparing for trial and can make your experts look unprepared and unbelievable.

It is important to note that medical records themselves present unique and complex hearsay issues. Medical treatment notes contain not only data, like labs, metabolic tests, and similar information but also can include notes containing the treater's opinions, comments by the patient, and other items that run afoul of the hearsay rule. Due to this, sometimes only a portion of the record will be admitted, and you will need to have the treater testify as to their opinions regarding treatment, differential diagnoses and future plans rather than relying on the record to stand on its own at trial. Therefore, taking treater depositions early allows for testimony to be given that confirms



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treatment and conclusions, and can also provide information for your retained experts to rely on for their own opinions. This includes, for instance, the plaintiff's future treatment needs and physical limitations that may be particularly relevant for the work of life care planners, vocational experts, and medical experts.

Best practices for gathering the critical treater testimony

Now that we know the "why," let's go to the "how." After beginning litigation, start identifying the critical treaters. These key treaters are often orthopedic surgeons, pain management specialists, physical medicine and rehabilitation specialists, neurologists, or others that have performed a detailed examination of the plaintiff, provided treatment, and made important diagnoses. One or a few of these treaters may be better served testifying live at trial, particularly if you know that this treater will be offering significant opinions or is a key member of plaintiff's treatment team. Others that provided more limited treatment or were in a more supportive role would be well-suited to have recorded deposition testimony played in lieu of their in-person appearance.

One practice pointer: Create a list of which treaters you should have testify live at trial and which can be done through a videotaped deposition. The depositions done via pre-recorded video should be organized and ready for presentation at trial. Often, at trial you may have open slots at the end of the day or gaps between live witnesses. You can then fill those gaps with pre-recorded video testimony of treaters if you are prepared.

Some treaters can be reached more easily than others to arrange a deposition. Usually, the best method is to send a subpoena for deposition, along with a cover letter that informs the treater that

the unilaterally set deposition can be rescheduled to accommodate their schedules. Thereafter, the treater can contact you and select a time that best works for them. Additionally, you can make clear that you are intending to take their deposition now in order to avoid their appearance at trial. This is usually appreciated and will make them more willing to provide complete and detailed testimony during their deposition.

Now prepare for the deposition. You should have a plan to cover the treater's education and work history to establish their experience and credibility. You should then move into the treatment the treater provided to the plaintiff. Sometimes, the treater will not recall the plaintiff and will need their recollection refreshed with their medical records. You should have the medical records prepared to introduce as an exhibit for the treater to review. Once they have looked at the records, ask them to confirm that the records were (1) prepared by them as they examined the plaintiff in the normal course of their business practice; and (2) are accurate and complete. Following this procedure will allow for these records to be authenticated and ensure that you have the foundation for the treater's treatment and diagnoses, and potentially provide for admission at trial.

After the treater confirms the records, walk them through the details contained therein. This includes the date they treated the plaintiff, their observations, their actions, their diagnoses and plans for future treatment. If permitted, you can also ask the treater to provide their opinion regarding the causation of the injuries, if they believed the incident at issue was a substantive factor in causing plaintiff's injuries and whether the treatment provided thus far was reasonable and necessary. This can further

bolster an expert's subsequent testimony regarding causation, future treatment costs, and other issues. Finally, a well-taken deposition of treaters can establish the damages and value of plaintiff's case, helping with case assessments for both sides.

Conclusion - Recorded deposition testimony at trial is a better option for most

Medical providers are frequently busy, overworked, and charge high hourly rates for their testimony. They appreciate the opportunity to have their testimony taken outside of trial to avoid the time requirements imposed by live testimony and the rigmarole of testifying in court. Most would rather get their actions and opinions on the record and be able to move on to return to their patients.

Similarly, taking treaters' depositions ahead of trial can cement the plaintiff's claims, damages and case value, allowing cases to resolve higher and earlier. Taking the initiative to set these depositions allows you to work up your case thoughtfully and show opposing counsel that you are a motivated and prepared adversary.

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