



Robert Glassman

PANISH | SHEA | BOYLE | RAVIPUDI LLP



Jon Davidi

PANISH | SHEA | BOYLE | RAVIPUDI LLP



The benefits of using treating doctors at trial

TESTIMONY OF TREATING DOCTORS IN A PI TRIAL CAN PROVIDE A UNIQUE BLEND OF CREDIBILITY, RELATABILITY, AND EXPERTISE

An underutilized but valuable trial tool is the use of treating physicians' testimony to bolster your client's case. This testimony typically presents low risk with very high reward because jurors tend to see treating doctors as less biased than retained experts, and, treating doctors can still provide critical opinions on causation.

In addition to their credibility and the potential impact on juror perception, tapping into treating physicians' testimony in a personal

injury trial can also foster a more genuine and relatable narrative. Unlike retained experts, who may be perceived as detached or financially motivated, treating doctors often have an established relationship with the injured party. This pre-existing connection allows them to articulate the medical aspects of the case with a personalized touch, humanizing the complexities of the injuries and treatment. By weaving the treating physicians' insights into the broader narrative, you not only

enhance the legal arguments, but also create a more compelling and accessible story for the jury, resonating on a human level and reinforcing the authenticity of your client's experience.

Retained vs. non-retained experts

In personal injury cases, the terms "retained medical expert" and "non-retained medical expert" refer to whether a medical professional is hired and paid by one of the parties involved in the case or if they are a truly independent expert

offering their opinion without being directly compensated by either party.

Retained medical expert

A retained medical expert is a professional hired by one of the parties involved in the case, such as the plaintiff (injured party) or the defendant (alleged wrongdoer). The party retaining the expert pays for their services, and as a result, there may be concerns about bias or a perception of bias, as the expert is being compensated by the party with a vested interest in the case. In most cases, plaintiffs and defendants may use retained experts who are experienced and have testified hundreds or thousands of times. Some retained experts primarily testify for plaintiffs, some for defendants, and some do both.

Non-retained medical expert

A non-retained medical expert, on the other hand, is an independent professional who provides their expert opinion without being hired or paid directly by either party in the case. Non-retained experts are expected to provide unbiased and impartial opinions, as they are not financially tied to the outcome of the case. Typically, non-retained experts include witnesses who are not hired by either party but are expected to give testimony beyond that of a lay person, such as a treating doctor or an EMT.

Benefits of non-retained medical experts

Using a non-retained medical expert, especially a treating doctor who, for example, performed surgery on an injured plaintiff, can offer several benefits in a personal injury case at trial. Here are some advantages:

1. Credibility and trustworthiness

- Treating doctors often have an established relationship with the patient, which can enhance their credibility and perceived trustworthiness in the eyes of the court and the jury.
- The fact that the treating doctor has been involved in the patient's care and has first-hand knowledge of the injuries

and treatments can make their testimony more compelling.

2. Familiarity with the patient's medical history

- Treating doctors are usually familiar with the patient's complete medical history, including pre-existing conditions, which can provide a more comprehensive understanding of the plaintiff's health before and after the injury.

- This familiarity can help the court and the jury assess the extent to which the injury in question is related to the incident being litigated.

3. No perceived financial bias

- Non-retained experts, particularly treating doctors, are not hired or paid by either party in the case. This absence of a direct financial interest can eliminate concerns about bias, as the expert is not financially motivated by the outcome of the litigation.

- This can enhance the perception of objectivity and independence in the expert's testimony.

4. Consistency in medical records

- Treating doctors' testimony is more likely to align with the medical records and notes they have maintained throughout the patient's treatment. Consistency in medical records can strengthen the expert's testimony and enhance its reliability.

5. More informed about treatment

- Treating doctors have direct access to details of the plaintiff's treatment, including surgeries performed, medications prescribed, and the overall course of recovery. This detailed information can be crucial in presenting a comprehensive and accurate picture of the plaintiff's medical condition. Treating doctors often see the plaintiff more often than an expert witness on either side.

Using treating doctor deposition testimony at trial

The use of deposition video clips of treating doctors in a trial can be a powerful tool for trial lawyers. Pursuant to Code of Civil Procedure section 2025.620, subdivision (d), a party may use the deposition testimony of a treating or

consulting physician (or of any expert witness), even if the deponent is available to testify. That means you do not have to prove the doctor's unavailability in order to use their deposition testimony in lieu of live testimony. However, be sure that your deposition notice of the treating doctor under section 2025.220 reserved the right to use the deposition at trial, and you must also comply with subdivision (m) of section 2025.340.

One significant benefit of using deposition video clips of treating doctors is the opportunity to present the doctor's testimony in a more engaging and compelling manner. By playing video clips, trial lawyers can showcase the doctor's demeanor, body language, and tone of voice, which can significantly impact the jury's perception and understanding of the testimony. This visual representation can enhance the credibility and authenticity of the doctor's statements, making them more persuasive.

Moreover, deposition video clips allow trial lawyers to highlight critical portions of the doctor's testimony effectively. They can selectively choose the most impactful and relevant portions of the deposition and present them to the jury. This focused presentation helps streamline the evidence and eliminates unnecessary details, ensuring that the key points are effectively communicated to the jury.

Practically speaking, using the treating doctor's deposition testimony is a cost-effective way to put on your case-in-chief. Rather than spending thousands of dollars to have the doctor appear at trial in person for a half day, you can conduct your direct examination of the doctor during the deposition, designate the portions you wish to play at trial, and play the deposition video for the jury at a fraction of the cost. An added benefit in that situation is that the defense will be limited in their cross-examination. Typically, they will not conduct a full and proper cross-examination during the deposition and, most of the time, they also will not want to pay the thousands of

dollars it usually costs to have the doctor appear in person for a more thorough cross-examination.

Using medical illustrations with the treating doctor

Effectively conveying the extent of a client's injuries is crucial for a trial lawyer. To do that, medical illustrations can be invaluable tools that offer numerous benefits. First and foremost, medical illustrations have the power to simplify complex medical concepts and conditions, making them more accessible to the jury. By visually representing the injuries in a clear and concise manner, these illustrations help the jury comprehend the severity of the client's injuries and the impact they have on their daily life.

Using your treating doctor to walk through medical illustrations with the jurors makes for a more engaging direct examination and further bolsters the credibility of the witness. In a lot of trials, jurors at times feel that the testimony has become dull and have trouble staying focused. Getting your expert out of his seat with a laser pointer to walk through a surgery, step by step, is a great way to bring life back into the courtroom.

Medical illustrations also possess the advantage of being highly detailed and accurate. They can provide a precise depiction of anatomical structures, showing the exact areas affected by the injuries. By highlighting specific injuries, such as fractures, dislocations, or internal damages, these illustrations offer a comprehensive visual representation that words alone cannot achieve. Showing the procedures your client has undergone as a result of the injury, and will need to undergo in the future, is a powerful way to demonstrate your client's non-economic damages and the real extent of the harm. The precise nature of medical illustrations helps the jury better understand the injuries, making the information more compelling and memorable.

Moreover, medical illustrations allow for a side-by-side comparison of pre- and

post-injury conditions. By presenting the jury with a visual contrast, the attorney can effectively demonstrate the significant changes and damages caused by the incident. Whether it's illustrating the difference in mobility, functionality, or physical appearance, these comparative illustrations enhance the impact of the evidence and strengthen the client's case. We'll also often get a colorized illustration of our client's actual radiographic images, like an X-ray or MRI, so that the jury can easily see the injury, or the post-surgery hardware that's going to be in our client's body forever.

Another benefit of using medical illustrations is their ability to transcend language barriers. In diverse jury settings, where jurors may have varying levels of medical knowledge or speak different languages, visual representations can bridge the gap in understanding. Medical illustrations provide a universal language that allows jurors to grasp the information presented, regardless of their individual backgrounds or fluency in medical terminology.

Medical illustrations simplify complex medical information, provide accurate depictions, enable side-by-side comparisons, and transcend language barriers. By leveraging the power of visual communication, trial lawyers can effectively engage the jury, evoke empathy, and strengthen their client's case for a fair and just outcome.

Getting causation opinions from treating doctors

California case law is helpful to plaintiffs' attorneys seeking to use the plaintiff's treating doctors to establish causation of injury. The California Supreme Court case of *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, clarified the admissibility of expert testimony, including causation opinions from treating physicians.

To effectively leverage *Schreiber* in obtaining causation opinions, it's essential to consider the following steps:

1. Establish the treating physician as a qualified expert

- Under *Schreiber*, treating physicians can provide expert opinions on causation if they meet the qualifications of an expert witness, even if they are not retained. This includes having the necessary education, training, and experience in the relevant field. So, be sure to bolster your treating doctor's credentials during direct examination.

2. Demonstrate the treating physician's familiarity with the case

- *Schreiber* emphasizes that treating physicians can offer expert opinions based on their familiarity with the patient's medical history and treatment. Highlight the physician's long-standing relationship with the patient and their first-hand knowledge of the injuries and medical conditions.

3. Present causation opinions within the scope of treating relationship

- Causation opinions from treating doctors must fall within the scope of their treatment relationship with the patient. Emphasize how the opinions are a natural extension of the physician's ongoing care and are not solely rendered for the purpose of litigation.

4. Address potential bias

- While *Schreiber* recognizes treating physicians as potentially less biased, it is important to be prepared to address any challenges to their objectivity. Emphasize the physician's commitment to providing accurate and unbiased medical opinions based on their clinical observations and expertise.

5. Provide a foundation for the causation opinions

- To meet *Schreiber's* standards, ensure that the treating physician's causation opinions are grounded in reliable methods and data. This may include referencing the patient's medical records, diagnostic tests, and the physician's own observations during the course of treatment.

6. Engage in pre-trial motions or hearings

- Given the significance of causation opinions in personal injury cases,

consider filing pre-trial motions to establish the admissibility of the treating physician's testimony under *Schreiber*. This proactive approach can help mitigate potential challenges during the trial.

Conclusion

Maximizing the role of treating doctors in a personal injury trial can be a game-changer, providing a unique blend of credibility, reliability, and expertise. By strategically integrating treating physicians' testimonies, trial lawyers can not only strengthen legal arguments but also weave a more compelling narrative that resonates with jurors on a human level.

The distinction between retained and non-retained experts, especially in California, further underscores the advantages of relying on treating doctors. The inherent credibility, trustworthiness, and familiarity with the patient's medical history make non-retained treating doctors particularly impactful in presenting a comprehensive and unbiased perspective.

The utilization of treating doctor deposition testimony adds another layer of efficiency and engagement to the trial process. Not only does it offer a cost-effective means of presenting critical evidence, but it also allows trial lawyers to showcase the demeanor and tone of the treating doctor, enhancing the overall persuasiveness of the testimony.

Additionally, the incorporation of medical illustrations, guided by the treating doctor, provides a visually compelling dimension to the case. Simplifying complex medical concepts, these illustrations bridge potential language barriers and help the jury better grasp the extent of the injuries, reinforcing the authenticity of the client's experience.

Lastly, obtaining causation opinions from treating doctors, as guided by the *Schreiber* case, involves a strategic approach. Establishing the treating physician as a qualified expert, highlighting their familiarity with the case, addressing potential bias, and providing a solid foundation for causation

opinions are crucial steps in leveraging *Schreiber* effectively.

In essence, by maximizing the collaboration with treating doctors throughout the trial process, attorneys not only enhance the legal strength of their case but also humanize the narrative, ultimately increasing the likelihood of a fair and just outcome for their clients.

Robert Glassman is a partner at Panish | Shea | Boyle | Ravipudi LLP where he represents plaintiffs in large and complex personal injury cases. He was recognized by the Daily Journal as a California Lawyer of the Year in 2023. Email at rglassman@psbr.law.

Jon Davidi is a Trial Attorney at Panish | Shea | Boyle | Ravipudi LLP whose practice focuses on catastrophic personal-injury, wrongful-death, and product-defect cases. Email at jdavidi@psbr.law.

