Maximizing the use of spinal injury experts: From discovery to direct exam

By Victoria Lazar

Experts are critical to building a winning spinal injury case. Choosing the right experts can help lay the foundation for a substantial result, whether via settlement or trial verdict. For some, and particularly for young lawyers, working with experts can seem daunting. They are, after all, experts who are highly qualified in their fields of expertise. The fear of seeming inexperienced or lacking in knowledge can get in the way of utilizing experts to their full capacity. Quality expert analysis and testimony can come at a hefty price to clients, so wasting valuable time is not an option. It is crucial to maximize the effect of an expert's time, analysis, and opinions as early on in the case as possible. This requires early consideration as to which experts are necessary to tell the story of the plaintiff's spinal injury. And then once they have been retained, to make sure to use every single opportunity to learn from the expert to not only build the client's story, but to shape how we, as attorneys, will tell it.

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Picking the right spinal injury expert

Spinal injuries can require a wide array of medical care including, but not limited to, orthopedics, neurosurgery, pain management, radiology, and physical therapy. However, hiring an expert in each field can be costly and duplicative, and thus requires close scrutiny of the witnesses you wish to call at trial. The type and number of spinal injury experts will vary based on the nature and extent of the plaintiff's injuries, treatment, and future care needs. The types of experts the opposing party designates will also play a role in determining who will testify for the plaintiff in rebuttal.

While California does not place a statutory limit on the number of experts a party may call, it is within the court's discretion to limit the number of experts who will testify on a given issue.[1] However, a trial court may not use its power "to control the orderly conduct of the proceedings, to prevent cumulative evidence, and to limit the number of witnesses, if it destroys a plaintiff's evidentiary presentation."[2] But just because you *can* hire an expert in each field of expertise, should you?

There are a number of factors to take into consideration before retaining and designating experts:

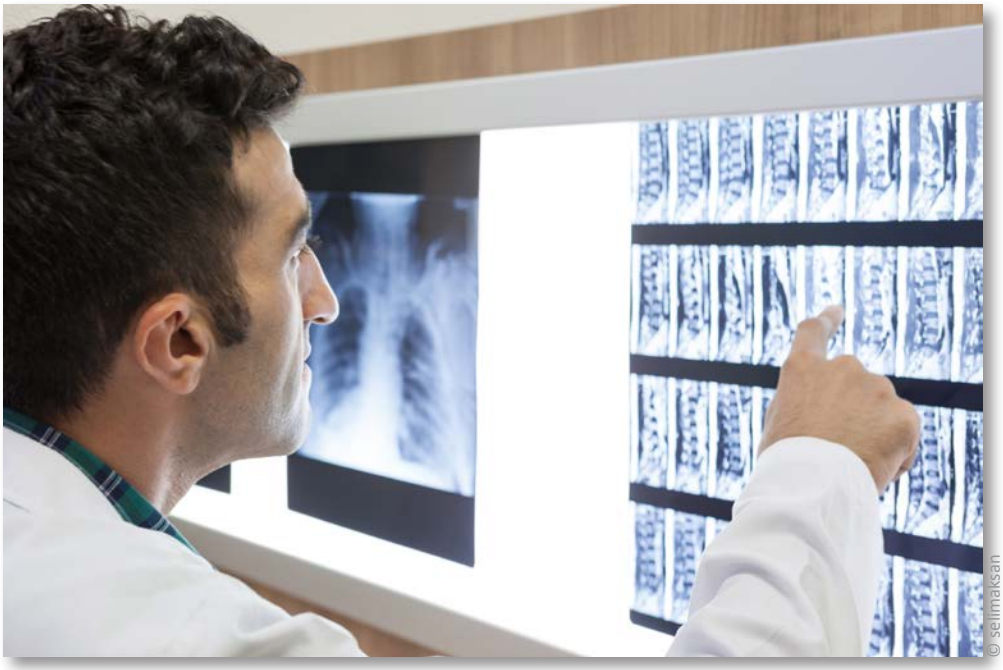
(1) What are the client's goals?

It's important to consider the client's goals and their vision for the case. Some clients are risk averse and keen to take early opportunities to settle, where others may be prepared to ride the case out through trial. If the client is interested in resolution early on, consider the ways that a carefully chosen expert can help add value to a settlement demand or mediation brief. For example, a discussion of a spinal injury expert's opinions on future care recommendations, and the cost of that future care, such as surgery, injections, medication or therapy. Doing so can showcase the client's economic damages early on.

(2) Who to retain

Common diagnoses in spinal injury cases can include strain or sprain, disc herniation, fractured vertebrae, and spinal cord and/or nerve root compression. But not every spinal injury requires the same experts. Understanding the plaintiff's medical records, injuries, and past treatment at the outset will help determine what experts are needed. Where a plaintiff's radiologic imaging depicts underlying degenerative changes with a new, acute injury, an expert radiologist may be the key to not only showing a jury the visual evidence of injury, but also in explaining why pre-existing, degenerative disc disease is not proof that the incident did not cause the plaintiff's injuries. Conversely, a radiologist may not be necessary where

> Prepare the expert for deposition as if it were trial.



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a plaintiff has sustained traumatic spinal fractures requiring immediate, emergency surgery and spinal fusion. There, the acuteness of the injury is not in question, and the battle will likely lie with orthopedic experts to determine the nature and extent of the injury, including the plaintiff's future medical care needs and the cost thereof.

(3) Using a treater as an expert, or vice versa

Treating physicians are often the most credible source of information for jurors; they have personally provided medical care to the plaintiff, made care recommendations and referrals, and have spent time getting to know the plaintiff in person. This is particularly true if a plaintiff's doctor treated them both before and after an incident. Treating physicians serve as experts less often, leaving less room for a defense attack on the physician's prior medical-legal work, and avoiding the "hired gun" label. The jury's focus can remain on the physician's opinions and history of treating the plaintiff. And, depending on the doctor and area of expertise, they may charge less for record review, deposition, and trial testimony. However, there are also downsides to designating a treating physician as an expert. Where a doctor's inexperience in court may lend to their credibility and endear them to the jury, it can also require additional preparation to develop testimony on causation, opinions on future care needs, and rebuttal opinions. The treater may not hold up as well under a defense cross-examination leading to unnecessary holes in the plaintiff's case where there previously were none.

Conversely, consider retaining an expert early on to serve as the plaintiff's treating physician. In doing so, the expert can "quarterback" the medical care plan, making referrals to other medical specialties as necessary and becoming familiar with the plaintiff and their medical history at the outset. Importantly, this creates a physician-patient relationship between the plaintiff and the expert, giving rise to an ethical duty on the part of the expert to place the plaintiff's wellbeing above the physician's own self-interest. The expert/physician is bound to act in the best interest of the patient/plaintiff, thereby minimizing a defense attack on the expert's financial bias. Though this can minimize an attack, it does not eliminate it. When an expert serves as a treating physician the defense may suggest the plaintiff's treatment is largely attorney-referred, implying that a financial motive lies behind every treatment recommendation and opinion. It is important to address this issue head-on with reasoned medical evidence and expert opinion, as well as a motion *in limine* at the time of trial.

Also consider how to use the defense expert in the plaintiff's case in chief. Often, carefully phrased questions can elicit key concessions from defense experts in deposition that are compelling, favorable, and essential to proving the plaintiff's case. For example, an expert might concede that even though they believe the incident only caused "minor, soft tissue strains/sprains," that the incident "contributed to causing some harm" to the plaintiff. Such a concession may allow for a directed verdict on the issue of causation. For that reason, consider videotaping the defense expert's deposition and using clips of the testimony in the plaintiff's case pursuant to CCP § 2025.630(d) which provides: "Any party may use a video recording of the deposition testimony 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…." This strategy requires preparing carefully-crafted deposition questions to win the plaintiff's case during the defense expert deposition.

Discovery

Staying ahead of expert discovery is key. Be proactive. Some questions to ask early on: Where are the weaknesses in this case? If causation is disputed, did the plaintiff have a pre-existing injury? Did the incident exacerbate, or aggravate, a prior injury? In order to get the answers to these questions, it is important to take a number of steps: (1) Order and categorize medical records *before* sending to experts to ensure that the medical history is complete both

before and after the incident. Fill any holes in the medical timeline before providing information to the expert. This includes providing a copy of all pertinent records subpoenaed by the defense; (2) Provide all records to the expert early on. This will allow the expert to conduct a thorough review and advise if there is anything they are missing, or require in order to form complete opinions; (3) When objecting to the Defense Medical Exam, include a demand for the defense expert's report under CCP § 2032.610(a). In response, defense counsel must provide a copy of the report within 30 days of the demand, or 15 days before trial, whichever is sooner.[3] Providing defense expert reports to retained experts well in advance of deposition will not only allow ample time to prepare rebuttal opinions, but will also shed light on any holes or missing pieces in the expert's file. Last, prepare the expert for deposition as if it were trial. The expert should be ready to discuss *complete* future care recommendations and the rationale behind them, including the basis for opinions on the cost of future care.

Visual Aids. The deposition is a unique opportunity to use and be creative with demonstrative aids well in advance of trial. Work with the expert to select images from MRI films, X-ray images, or ultrasound-guided injections. Medical illustrations of key records in the plaintiff's file such as radiologic imaging or surgical procedures can bring the injury to life in a colorful yet understandable way that helps experts give an engaging explanation of an injury or treatment. If a client is concerned with mounting costs, there are a number of budget-friendly options available to the public. Scour the internet for medical illustrations or imagery that are consistent with the plaintiff's injuries. Utilize downloadable programs, such as "Snag It" to capture clips of free, online videos, simulations, or animations depicting similar injuries.[4] Finally, communicate with medical experts about what physical models would most enhance their testimony. Effective models include, but are not limited to, anatomy diagrams, models of a healthy spine, or a spine with hardware similar to that which is in the plaintiff's body. If you or your expert do not have models available, there are cost-effective options available for purchase online through vendors such as Amazon. Bring the models to deposition, and have the expert use them. Even better, ask the expert to teach *you* how to use them. For example, for a rear-end collision, ask the expert to demonstrate how the impact forces the head forward as the torso remains still, then whips backwards placing damaging stress on the plaintiff's cervical discs. Then, after using a model or illustration to explain this concept for the jury in opening statement, the expert's use of that same model during trial testimony will only reinforce the concept of the mechanism of injury for the jury.

Importantly, if the expert has not already met with and examined the plaintiff in person, they should do so at least once prior to deposition. Following this exam, it is important to determine whether the expert believes there are any immediate care needs that the plaintiff must undergo in order to fully form their opinions. Not only will this aid in allowing the expert to form complete opinions, it can help identify any holes in the injury workup.

For example, additional imaging, pain management assessment, or therapies, thus building the value of the case with additional treatment. And in many cases, more than one exam with the expert is warranted in order to track the healing process.

Similarly, *before* deposition is the time to talk to the expert about recommendations for future medical treatment, and the cost of such care. Does the plaintiff require one or more surgeries? Is there a risk of adjacent level disc disease that more likely than not will require medical attention in the future? How often will the plaintiff require physical therapy and/or orthopedic follow-up? Will they require medication or injections to help manage their symptoms? Almost as important as *what* they'll need, is *when* they'll need it. What is the likelihood of needing surgery and how soon will they need it. In the case of a 40-year-old plaintiff with a spinal fusion, is it more likely than not that they will require at least one adjacent level fusion procedure in their lifetime? Likewise, it is essential to discuss what the future care will cost *prior to* deposition. This includes determining whether the expert is qualified to opine on the global cost of all recommended future care, and if not, what experts are necessary to fill in any holes. Is the expert familiar with the industry standard in a particular community for the usual, customary, and reasonable charges for medical care of that nature? What experience qualifies the expert to testify in that regard?

If the defense expert deposition notice includes a demand for disclosure of the file prior to deposition pursuant to CCP § 2034.415, use this as an opportunity. Turn over the visual aids your expert intends to use at trial, if available. This will allow the defense attorney the opportunity to question the expert on these visuals in deposition, and avoid risking exclusion by a defense motion *in limine* at trial.

Though the main focus of work with an expert will be on their opinions and building the plaintiff's case, they are a valuable resource when preparing for defense expert depositions and cross-examination. Helpful topics of discussion include where the expert sees holes in the defense expert's opinions, from what angle are defense expert opinions vulnerable to attack, and what document, record, photograph, or fact will help facilitate the attack.

Trial

Assuming the hard work went in on the front end, the weeks leading up to trial should be spent fine-tuning experts' opinions, rebutting defense expert opinions, and simplifying the presentation's medical language so that non-experts can understand the injury. This includes providing the expert with the defense experts' deposition transcripts, files, and any visuals the defense experts intend to use at trial. This is also the time to determine whether, based on defense expert testimony, additional visual aids are required. Finally, discuss *how* visual aids will be used to best assist with the expert's testimony in trial. Ask: Do they prefer to use a projector and screen, or are they comfortable using physical models? Depending on the injury, can the expert draw on a board in real-time when explaining a medical concept to the jury? Is the expert prepared to leave the stand to use a pointer, model, or other visual techniques in order to engage the jury in a dynamic fashion? Keep this in mind: the jury will be thinking "show me, don't just tell me." The expert should be ready to teach the jury about spine anatomy as well as the plaintiff's injury. When doing so, the expert should always compare a visual of the plaintiff's injured spine with a visual of what a normal, healthy spine looks like. While not every technique will work for every expert, asking these questions early on will lend to a cohesive presentation in the courtroom.

Conclusion

Maximizing use of spinal injury experts requires a significant investment of time and energy, which will pay off in spades. Though each case is unique in the nature and extent of the injury, type and number of experts needed, the same principle holds true: experts have much to offer, but the real value lies in how you use them. ■

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[1] Evid. Code § 723

[2] *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 267

[3] Code Civ. Proc. § 2032.610

[4] Visit http://Techsmith.com/screen-capture.html