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Four underutilized rules of evidence at trial

DEALING WITH EXPERTS' WILD SCENARIOS OF CAUSATION, THE DISAPPEARING PLAINTIFF, IMPEACHMENT DOCUMENTS AND PUBLICATIONS REFERRED TO AT TRIAL

1. Evidence Code section 801.1: The death of the "throw it against the wall to see if it sticks" defense

In theory, both the plaintiffs and the defense should be held to the same standard. In practice, we all know that's not always the case. One way the double-standard frequently played out was with respect to expert opinions. On the one hand, the plaintiff's experts were required to offer their opinions to a degree of medical probability, i.e., more likely than not. On the other hand, the defense experts could opine as to the infinite alternative possibilities for what could have caused our client's injuries.

This contradiction was memorialized in *Kline v. Zimmer* (2022) 70 Cal.App.5th 123, which held that defense experts were not required to offer opinions to the same reasonable degree of medical probability standard as a plaintiff's expert. When this opinion came out, the defense bar rejoiced at the unfair advantage this gave them in litigating personal-injury cases.

Piggybacking on this low standard, defense experts could easily throw out wild assertions ranging from the plaintiff *might have* had preexisting, undiagnosed, and untreated arthritis in the affected joint, to a brain-injured plaintiff had a preexisting learning disability that no one ever diagnosed or even assessed.

Thankfully, the celebration was short-lived because less than two years later, the Legislature abrogated *Kline* by enacting Evidence Code section 801.1, which states that "the party not bearing the burden of proof may offer a contrary expert only if its expert is able to opine that the proffered alternative cause or causes each exists to a reasonable medical probability. . ."

Now, defense experts can still arguably make these claims, but they can no longer argue that it's just a *possibility* to explain the plaintiff's symptoms. This is a meaningful win for the plaintiffs' bar; defense experts now have to express their alternative-causation opinions to a reasonable degree of certainty within their field. In other words, the defense experts have to testify that to a degree of medical probability, more likely than not, the plaintiff's symptoms are caused by the defense alternative-cause theory, which is usually a wildly speculative, undiagnosed, untreated, and completely unassessed preexisting condition.

To use section 801.1 effectively, you need to recognize that your trial judge does not know your case as well as you do (and may not have read 801.1 yet). This means that you need to start the process of educating the judge early by clearly and succinctly establishing in expert depositions which opinions the opposing experts are offering to a reasonable degree of medical probability on causation.

A simple catchall *Kennemur* question to the effect of "What are all of the opinions that you intend to offer at the time of trial on what you believe, to a reasonable degree of medical probability, is causing the symptoms my client experienced as a result of the incident?" will do the trick. (See *Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780 ["The overarching principle in *Kennemur, Jones*, and *Bonds* is clear: a party's expert may not offer testimony at trial that exceeds the scope of his deposition testimony . . . ."].) The question is a mouthful, but it pins the expert down as to which of his opinions meet the 801.1 standard.

Now that you have your testimony, you need to draft motions in limine identifying the speculative prior events or conditions that should be excluded at the time of trial. The basis for the exclusion is section 801.1, i.e., that no defense expert established a causal link to the plaintiff's post-collision injuries. (See *Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal.App.4th 1563, 1569 ["Where the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation."]; see also *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1385 [holding that in those cases in which the issue of causation is beyond common lay experience, "causation must be founded upon expert testimony and cannot be inferred from the trier of fact's consideration of the totality of the circumstances unless those circumstances include the requisite expert testimony on causation"].)

Section 801.1's value does not stop with an in limine ruling in your favor. Often, new evidence is discovered about potential causal links and new theories on causation are developed in the middle of trial. You will learn a lot of these new theories during the defense's opening statement and their cross-examination of your experts. You need to identify these new arguments and exclude them before the defense experts take the stand. To do this, for each defense expert, you need to prepare a one-to-two-page trial brief that outlines your concerns regarding any new opinions the expert may offer as well as quick citations to the deposition that the judge can quickly reference.

By providing a brief before the cross-examination of the expert, your judge can quickly resolve your *Kennemur* objections without having to waste the jurors' time at sidebar. This substantially increases the likelihood that your objection will get sustained and the opinion will be precluded.

A word of caution on using these short, *Kennemur* trial briefs. Many judges believe that a simple solution to an expert's attempt to offer new opinions during trial is to simply order another deposition of the expert to take place outside of court hours, during trial. This, however, should not be required of the parties because it creates an unfair burden on the party filing the *Kennemur* brief. The Supreme Court squarely addressed this unfair burden of deposing an expert during trial in *Bonds v. Roy* (1999) 20 Cal.4th 140, 147: "The opportunity to depose an expert during trial, particularly if the testimony relates to a central issue, often provides a wholly inadequate opportunity to understand the expert's opinion and to prepare to meet it."

Despite the guidance offered in *Bonds,* some judges still persist in this practice. As a result, in those cases, you should file these *Kennemur* briefs once there is no longer a reasonable

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opportunity to depose the expert to obtain the new opinions. In doing so, you protect the record on appeal and you protect yourself from the burden of taking expert depositions during trial.

2. CACI 202 and 5002: It does not matter whether my client sat and watched the entire trial

One of the age-old questions in nearly every trial is whether or not the plaintiff should remain in the courtroom for the entirety of the trial. On the one hand, lawyers fear that if their client is present at trial, it gives the jury the opportunity to scrutinize the client's every move and reaction as testimony is presented. On the other hand, lawyers often fear that if their client is not present, the opposing party may comment to the jury something to the effect of "We've all been working hard but the plaintiff does not even care enough to show up."

There is a solution. File a motion in limine to prevent this defense commentary on the presence or absence of parties at trial. Support for this prohibition is found in your CACI jury instructions. For example, CACI 202 defines the forms in which the jury can consider evidence: "It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion." None of these include evidence of whether or not a person is present at trial.

Similarly, CACI 5002 instructs the jurors that they "must decide what the facts are in this case only from the evidence you have seen or heard during the trial" and specifically prohibits jurors from considering things they may have seen or heard outside of the trial. These instructions squarely prohibit jurors from considering whether the plaintiff was present or absent during the trial because the plaintiff 's attendance is not evidence in the case. And even if it was, it is pure speculation to suggest that the plaintiff did not attend because they "do not care" about the proceedings.

While no published decision has addressed this issue, the Second Appellate District addressed it in the unpublished decision of *Cornavaca v. Horwedel*, 2017 WL 4784930. There, the defense attorney made the dreaded comment in closing argument regarding the absence of the plaintiffs during trial. On appeal, the court found this comment constituted attorney misconduct because it "appear[ed] to have served no other purpose than to suggest that the jury decide the case based on facts not in evidence." The court explained that "[e]vidence in a case consists of admitted testimony and exhibits," whether a party attends the proceeding is not evidence. The *Cornavaca* court even recommended that trial courts admonish jurors in the face of these kinds of the comments that "they are not to consider the presence or absence of the parties in the courtroom."

If a trial court should admonish jurors that "they cannot consider the presence or absence of parties in the courtroom," a motion in limine precluding the parties from commenting on the presence or absence of parties should be routinely granted. By bringing this motion in limine, what is often the biggest fear of whether to keep your client in the courtroom during trial, is resolved.

Even with a ruling prohibiting any party from mentioning the absence of the plaintiff to the jury, many lawyers will still raise the concern that even without comments from the opposing attorneys, some jurors may still be thinking, "Why is the plaintiff not present for the trial?" As a result, lawyers may forgo the motion in limine and instead attempt to voir dire the jurors on the subject of their client's absence. While this may work for some lawyers, Judge Rupert Byrdsong once gave me, as a young lawyer, some of the greatest advice that I still rely on to this day: "Quit putting in the jurors' minds issues that they were never thinking about in the first place." While an order in limine does not guarantee that a juror will not consider the absence of your client at trial, talking to the jurors about the issue will force them to consider it.

3. Evidence Code section 768: No, you cannot see what I am about to impeach you with

There has been a concerning trend with witnesses, particularly expert witnesses, who attempt to avoid answering questions on cross-examination whenever the lawyer conducting cross appears to be reading from a document. The witness at deposition will refuse to answer the question until they are provided the opportunity to see the document, and at trial, witnesses lately have been demanding to see the document before they answer. This is improper.

Evidence Code section 768 states that "[i]n examining a witness concerning a writing, it is not necessary to show, read, or disclose to him any part of the writing." This is a powerful tool for cross-examining an unscrupulous witness. Because after you impeach the witness one time with a writing, the simple act of picking up a document and looking at it while asking a question instills a fear that the witness is about to be impeached again. This usually forces the witness to take a more honest approach in answering the questions posed.

It should be noted that this power is not unlimited. Hearsay and the best-evidence rule apply depending upon how you phrase your questions. For example, if your first question concerning a document that the witness wrote begins with "this document that you wrote says," you are likely going to draw a hearsay objection that gets sustained. However, if you first establish the prior inconsistent statement exception (Evidence Code section 1235) with a question that begins with "do you agree with the following statement," you can utilize section 768's objective while avoiding other evidentiary pitfalls. You also need to be aware that once you show the witness the document, you are required to provide it to the court and counsel and give them an opportunity to review the document before you can ask the witness further questions regarding the substance of the

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document. (Evid. Code, § 768, subd. (b).)

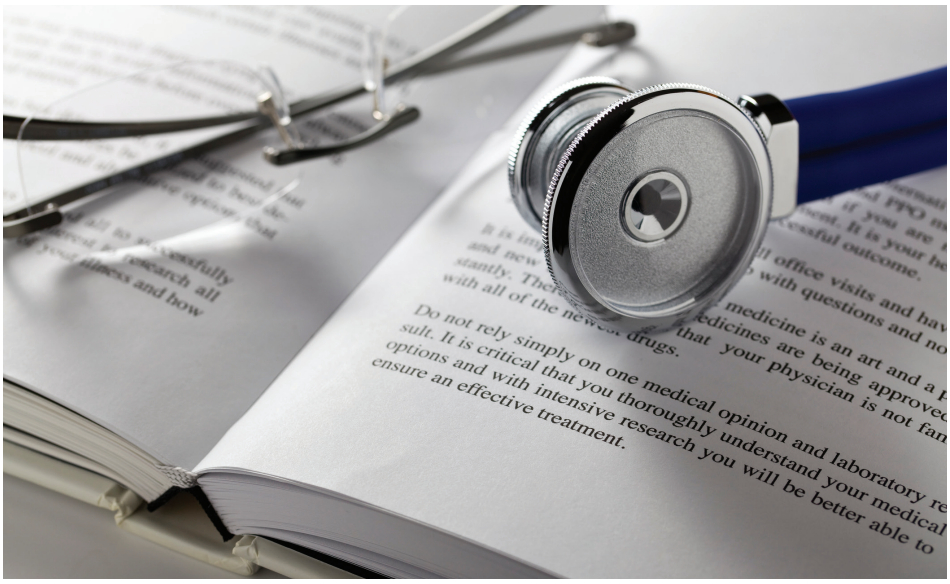
4. Evidence Code section 721: The literature does not support what you are saying

Evidence Code section 721 is one of the most underutilized weapons in a trial attorney's arsenal. Of the more than a dozen times that I have cited it at trial, only the queen of evidence herself, Judge MaryAnne Murphy, did not go clamoring for an Evidence Code book to verify my assertions of its validity.

Evidence Code section 721 allows a party to cross-examine an expert on "the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication" when (1) the witness referred, considered, or relied upon the text; (2) the publication is admitted into evidence; or (3) the publication has been established as a reliable authority by the witness or other expert testimony or judicial notice.

The first two subsections are somewhat intuitive and few balk at the suggestion that an article can be used in this manner. The third, however, that if a *different expert* or judicial notice establishes the reliability of the publication, is less obvious. This subsection enables a party to cross-examine opposing experts with research articles or publications that disprove the opposing expert's opinion so long as a different expert – e.g., *your* expert – establishes the reliability of the articles or publication or the court takes judicial notice of them.

There are countless uses of this section that can defeat many arguments routinely presented in personal injury cases. For example, in pediatric brain-injury cases, the Center for Disease Control's 2018 Report to Congress on The Management of Traumatic Brain Injury in Children is an invaluable resource that disproves many defense arguments regarding the long-term care required for children that suffer brain injuries. (Center for Disease Control, Report to Congress: The Management of Traumatic Brain Injury in Children Opportunities for Action (2018).)



Similarly, in any case that involves the use of a DTI MRI to diagnose a brain injury, the defense will invariably rely on Max Wintermark's 2015 white papers to argue that a DTI should not be used for diagnosis in a clinical setting. (See e.g., Douglas, Iv, Douglas, Anderson, Vos, Bammer, Zeineh, & Wintermark, Diffusion tensor imaging of TBI: Potentials and challenges (2015) Topics in Magnetic Resonance Imaging, 24(5), pp. 241-251.) This can be easily rebutted through section 721, if the plaintiff's expert cites as a reliable authority Wintermark's 2020 paper titled "White Matter Asymmetry: A Reflection of Pathology in Traumatic Brain Injury," which states: "we demonstrated the [DTI's] utility in detecting mTBI-specific effects and their associated interactions with age." (Vakhtin, Zhang, Wintermark, Massaband, Robinson, Ashford, and Furst, White Matter Asymmetry: A Reflection of Pathology in Traumatic Brain Injury (2020) Journal of Neurotrauma 37:2, p. 381.)

Setting up for section 721

But if you plan to use section 721, you must know how to set up the trial testimony so that you can use it. First, for the expert to give the opinion at trial that an article or publication is a reliable authority, they must give that expert opinion at deposition. (*Easterby v. Clark*, *supra*, 171 Cal.App.4th at p. 780)

Second, your expert must first establish the reliability of the article or publication before you can use it to cross-examine other experts. This often happens days and sometimes weeks before you actually use the article or publication on cross. Do not count on your overworked trial judge to remember that you laid the foundation for 721 with a different witness. Before you begin the cross, preferably on a break, have the trial testimony ready to show the judge, along with section 721.

If you spring it on the judge during your cross-examination, you will likely get shut down because the judge is either not aware of section 721(b)(3) or does not remember that you laid the foundation.

Finally, under section 721, the publication cannot be admitted into evidence as an exhibit to go back to the jury during deliberations. You can only read from the publication and some judges will allow you to publish the relevant portions during your cross-examination and in closing argument.

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