

Q&A with Supervising Civil Judge Honorable Layne H. Melzer By Manoah S. Marton



[Editorial Note: Judge Melzer was appointed to the Superior Court of Orange County by Governor Jerry Brown on June 28, 2016. Before his appointment, Judge Melzer worked as a partner at Rutan & Tucker—the same firm he joined as an associate in 1987. He graduated from California State University, Northridge in 1984 with a B.A. in philosophy, and he earned his J.D. from the University of California, Davis School of Law in 1987. Judge Melzer is currently the

Supervising Civil Judge for the Orange County Superior Court.]

Q: What is the role of the Supervising Civil Judge of the Orange County Superior Court?

A: My job is to supervise around 30 judges who preside over cases ranging from small claims to complex civil. I use the term “supervise” loosely because each judge is an independent constitutional officer. I also have expert assistance from a wonderful civil operations staff. So, in broad strokes, I work within our court hierarchy to help ensure our judges have

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Are Employee Non-Solicitation Agreements Still Viable in California? By Tamara Devitt

Most California lawyers know that California law (unlike the law of the majority of other states) generally prohibits employee non-compete agreements under California Business and Professions Code section 16600 (“Section 16600”). There are limited exceptions set forth in Business and Professions Code section 16601, which apply primarily in the context of the sale of a business or partnership. The longstanding public policy underlying Section 16600 is to foster open competition and employee mobility. More specifically, California’s public policy is to support the freedom and important legal right of citizens to “engage in businesses and occupations of their choosing.” Edwards v. Arthur Anderson LLP, 44 Cal. 4th 937, 946 (2008).



Recently under scrutiny by California courts is a related (but very different) type of restrictive covenant – those prohibiting the solicitation of employees. Historically far less controversial than non-compete agreements that prohibit employees from working for a competitor of their former employer, non-solicitation of employee provisions prohibit former employees from soliciting for hire or recruiting employees, consultants or contractors of their former employer.

A typical employee non-solicit provision looks something like this:

I agree that during the period of my employment with the Company, and for the period of one (1) year after the date my employment with the Company ends for any reason, I will not, as an officer, director, employee, consultant, owner, partner of another person or entity, or in any other

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President's Message By Matthew M. Sonne

I am honored to serve as the 2022 President of ABTL's Orange County chapter. Reflecting on the two-year pandemic and its accompanying difficulties, I am reminded of the story of a couple who went on a honeymoon up in the mountains, where they rented a charming, secluded cabin. On the first morning after their wedding, they awoke to the jarring sound of a woodpecker outside their window. The continual rat-tat-tat blighted each waking moment and made sleep impossible. The next morning brought the same rude awakening, and the next. The honeymoon ended up being anything but idyllic. They tried in vain to shoo the bird off, but rocks and shouts were useless. Ultimately, the couple threw up their hands and went back to the city, ending their honeymoon early.

But as many have discovered after experiencing adversity, not all luck is good, nor all misfortune bad. By the time the couple had returned home, their pesky nemesis had inspired the creation of a cartoon character named "Woody Woodpecker." Walter Lantz became the illustrator, his wife Gracie the voice. Fifty years later, when interviewed on their golden wedding anniversary, Gracie said that their honeymoon pest was one of the best things that ever happened to them.

Similarly, the unrelenting disturbance of the pandemic disrupted our professional lives and associations, especially organizations like ABTL whose mission includes "encouraging and facilitating *communication* between members [of the Bar and Bench]." The adversity forced us to develop creative new ways to nurture professional relationships and deliver value. Now, our membership is at an impressive 663 and still growing! Thank you all for your support, and please continue to promote ABTL at your firms and to your colleagues. Our next event will be on July 20, 2022 -- the Robert Palmer Wine Tasting Event and Members-Only Outdoor Summer Judicial Mixer at the MET in Costa Mesa.

Under immediate past president Maria Stearns' leadership, we learned the value of shared content



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Evidence Code Section 721: The Sword and Shield (Mostly Sword) for Expert Witness Cross-Examination

By Dave Sugden

“I know lots of people who say you’re wrong!”

“Really? Like who?”

“Well, you know ... like ... lots of people.”

The proverbial “they” as in, “You know what *they* say...” is among the laziest rejoinders in an argument. Instead of identifying problems of fact or logic, the person invents an imaginary consensus to suggest his or her opponent’s position is nothing but a fringe outlier.



Certainly such a tactic has no place in the courtroom, right? After all, one of the main reasons to exclude hearsay is to

preclude the admission of factual assertions without the safeguards of cross-examination.

Evidence Code section 721 provides the parameters of allowable cross-examination for expert witnesses. Its provisions leave enough wiggle room that unwary litigators can leave their expert vulnerable to cross-examination with untested hearsay. Understanding Section 721 and its scope is imperative for proper expert witness discovery and trial examinations.

Breadth of Cross-Examination of Expert Witnesses

When it comes to cross-examining expert witnesses, the permitted scope is much broader than percipient witnesses. “Once an expert offers his opinion ... he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness.” *Hope v. Arrowhead & Puritas Waters, Inc.*, 174 Cal. App. 2d 222, 230 (1959). As explained in *Monroy v. City of Los Angeles*, 164 Cal. App. 4th 248, 267 (2008), “[w]hile there can be no hard and fast rule regarding the limits of cross-examination, a trial court’s rulings should not be so overly restrictive as to deprive trial counsel of the *tools necessary* to probe, test, and even discredit the adverse expert witness.” (Emphasis added).

But what are the “tools necessary” to cross-examine an expert witness? In California, Evidence

The YLD Update

By Lauren Blaes, Casey McCracken, and Wesley Horton

This year’s Young Lawyers Division committee is made up of Lauren Blaes from Sheppard, Mullin, Richter & Hampton, Casey McCracken from Gibson Dunn, and Wesley Horton from Latham & Watkins.



In December 2021, we ended the year with a community-impact project in partnership with Serving People in Need Orange County (SPIN OC). The YLD raised funds to purchase everyday essential items for our homeless community in Orange County. YLD members then joined together to reconnect, mingle, and assemble approximately 50 hygiene kits.



Looking ahead through 2022, the YLD is excited to present informative programming and opportunities for young attorneys to connect with the judiciary, network, and deepen their connections in the legal community. On April 27, 2022, the YLD will be hosting its first brown bag lunch with the Honorable Nathan Scott at the West Justice Center. Brown bag lunches are a unique opportunity to learn from members of the Orange County bench in a small setting and receive insight and advice that will help you grow as an attorney.

The YLD Committee is looking forward to an exciting and educational year. We hope to see you at our events!



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the resources they need to do their jobs. During COVID, my role was very similar to what used to be called a Master Calendar Judge. We had more cases that needed courtrooms for trial than we could accommodate due to COVID protocols. So, for months I functioned like an air traffic controller evaluating which cases needed to move forward versus which cases might need to trail or be continued. Fortunately, all our civil courtrooms are now up and running for trials. And while our modified COVID master calendar system is no more, I am still charged with trying to find a home for cases that make their way to our trailing trial list because the assigned judge is otherwise engaged. In my role as the supervising judge, I also respond to any complaints received about judges on my panel. As you might imagine, I have a lot of committee responsibilities as the supervising judge, on everything from finance to technology related matters. I also have my own inventory and calendar, but those cases are a little different than before when I was an inventory judge. My cases now tend to have certain unique procedural qualities and typically much shorter decisional deadlines. By way of example, I hear a lot of post-judgment matters, arbitration-related petitions, lien expungement requests, petitions involving post-foreclosure excess proceeds, civil forfeiture claims, gang injunctions, and public agency receiverships, to name a few.

Q: You mentioned several times in your remarks at the ABTL post-COVID litigation panel on March 23rd that the Orange County Superior Court needs more judges. How bad is it?

A: Until just recently we had 12 formal vacancies. That was just reduced to nine, but we also have an additional nine judges who have decided not to run for reelection and who have retired (or will over the next few months). This effectively puts us down by roughly 18 judges. That's close to 15% of our allocated judgeships. Those 18 judgeships are spread throughout the court, but the civil panel has been hit particularly hard by retirements. That unmet need for judges impacts what we can do as a civil panel, particularly given COVID backlogs. And despite a decrease in the number of judges, filing rates have stayed constant. So we have growing case inventories, but fewer judges to handle them. But to be clear, these are problems that will be solved, and this remains a wonderful job!

Q: What measures are in place right now to help alleviate the shortage?

A: Our "assigned judge" program has been a real asset. It's available to judges who have retired but want to come back and serve on a part-time basis. Retired civil judges currently serving on assignment include Judge Bauer, Judge Horn, and Judge Glass. Hopefully some of our other retiring judges will participate as well. We also use temporary judges who can assist in a limited capacity. These are typically lawyers who have undergone specific training and been sworn as temporary judges under the law. We are indebted to these true volunteers who serve as mandatory settlement conference judges and call a variety of other calendars, such as small claims, by stipulation of the parties. However, the real solution to working through the backlog of cases left over from the pandemic years is, in my opinion, more appointments and increasing the panel size.

Q: In your view, what is the root cause of the shortage? Is it a lack of qualified applicants, red tape in the appointment process, or maybe a little bit of both?

A: To be blunt, I don't have enough visibility to give a good answer that question. I doubt it is a lack of qualified applicants. I suspect that the pandemic has left the governor's office with a lot of other priorities, and we've also had an unusual number of retirements. Did the pandemic have an impact on retirements? Probably. COVID changed the job of being a judge, and it changed everyone's experience in terms of coming to court. Jobs during the pandemic were different and challenging for everyone, including courts, lawyers and judges. Whenever change like that happens, there are ripple effects. So, let's just blame COVID—how's that for a politically neutral response?

Q: Is there anything litigants can do to help?

A: Filings are relatively consistent, and we are here to resolve those disputes. What the litigants can do is be judicious about which aspects of their case they choose to bring to the court's attention. A large part of what happens in a case happens outside of the court—discovery, depositions, interrogatories, document review—and not all those issues need to come to us. Litigants should try to work out their differences before they bring those disputes to the court's attention. That's true today and it was true 20 years ago. But because of our current challenges, I would be particularly careful and discerning about bringing a motion over a discovery issue that you might well be able to work out if both sides compromised a little more.

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Q: The topic of judicial qualifications is in the news right now, with the pending nomination of Judge Ketanji Brown Jackson—a former trial court and appellate judge—to the United States Supreme Court. In your experience, what character traits or skills are the most important for judges at the trial court level?

A: Humility is very important. You have to put aside your initial reactions or preconceived notions so that you can truly listen to all sides of a dispute. You need to be open-minded and non-dogmatic so you can find the truth, even if doing so requires admitting your initial conclusions were wrong. That requires a degree of humility and self-awareness. It likewise requires that you be professionally skeptical, that is, willing to question assumptions and suppositions. Also, your job as a judge is to dispense justice, make decisions, and be fair and equitable while doing so. It is vitally important that the litigants leave your courtroom with the sense that they were heard, even if you ultimately disagreed with their argument. Your job is not to make them feel small—it's not about you—and that is the essence of humility. As a judge, you can never allow yourself to become bigger than the case in front of you or the parties in the courtroom. Apart from humility, a judge must strive for unimpeachable integrity and should have a high degree of intellectual curiosity. Sometimes, you have to look at issues the parties haven't necessarily raised in order to make the correct decision. I could go on, but these are a few of the more important traits or skills that a judge should possess.

Q: Same question, but at the appellate level. Do you think the requisite character traits or skills change?

A: In my opinion, it is the same basic group of skills, but at the appellate level you have to be perhaps more driven by the academic and intellectual pursuit of the law. Not that you don't enjoy those things as a trial judge, but at the trial court level a lot of what you do is very interpersonal with the lawyers and the parties. At the appellate level, your job is to look at the law in a more academic, intellectual way. You are authoring opinions that examine the contours of the law and shape the way the law is applied in the trial courts. As a result, being an appellate justice puts a premium on clear, cogent legal writing and legal thought and so it

attracts those with an academic bent who enjoy analyzing and writing about the law.

Q: Can you speak to the mindset shift you had to make, transitioning from a partner at Rutan & Tucker to Judge on the OC Superior Court?

A: The biggest shift is that I am no longer an advocate. I did enjoy that part of private practice. I enjoyed making arguments, cross-examining witnesses and all that goes along with legal advocacy—but my role now is not advocacy at all. It's rising above the advocacy and trying to make a legally correct and just decision. But that is what I love about the job and why I wanted to be a judge. As a judge I no longer have to concern myself with winning and losing. Advocacy is still essential to the process—that's where good lawyering comes into play—and we as judges enjoy the guidance provided by strong advocacy. Yet my job is to distill the truth that derives from that adversarial process rather than being burdened with the task of being an advocate.

Q: What would you say to qualified attorneys who may be hesitant to consider judgeship as a possible career move?

A: In my view, becoming a judge is a lawyer's highest calling. From the moment I started practicing, I knew I wanted to be a judge. That's where I thought I could ultimately do the most good. For a lawyer, it may be the pinnacle of public service. The judiciary is a vital part of our constitutional system, being a judge is important and fulfilling work, and we need good judges.

Thank you, Judge Melzer, for your time.

♦ *Interviewer Manoa S. Marton is a litigation associate in the Orange County office of Orrick, Herrington & Sutcliffe LLP*

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capacity, either directly or through others solicit, induce, encourage, or participate, directly or indirectly, in soliciting, inducing, or encouraging any employee or contractor to terminate his or her employment or contractual relationship with the Company.

Such provisions are routinely included in employment agreements, confidentiality agreements, non-disclosure agreements, severance agreements and stock/asset purchase agreements. Until recently, courts have generally found employee non-solicitation agreements (also known as anti-raiding agreements) **not** to constitute illegal non-compete agreements. *See, e.g., Loral Corp. v. Moyes*, 174 Cal. App. 3d 268 (1985) (court upheld employee anti-raiding agreement).

Recent cases, however, raise questions about whether non-solicitation agreements are still viable in California and if so, to what extent.

***AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, 28 Cal. App. 5th 923 (2018)**

AMN Healthcare — the first court of appeal decision of note where the court affirmed the trial court’s refusal to uphold an employee non-solicitation provision — involved corporate defendants staffing agencies (and fierce competitors) in the healthcare field that provided their customers with travel nurses. Several travel nurse recruiters employed by AMN and who had signed confidentiality and nondisclosure agreements (the “CDNA”) left employment with AMN to work for Aya.

The CDNA included a provision preventing the nurse recruiters from soliciting any employee of AMN to leave the service of AMN for at least a one-year period following termination of employment. Significantly, for purposes of the non-solicitation provision, a travel nurse was deemed to be an employee of AMN while on temporary assignment through AMN. The travel nurse assignments generally were temporary and for a short duration of 13 weeks, which meant that the recruiters were placing (and re-placing) travel nurses on a regular basis as part of their job duties.

AMN sued Aya and the departing travel nurse recruiters (the “Aya Defendants”) to enforce the CDNA. The Aya Defendants filed a cross-complaint including a declaratory relief action seeking to have the employee non-solicitation provision invalidated under California law. The Aya Defendants filed a summary judg-

ment motion arguing that (1) such provision was unenforceable and invalid under California law as an improper restraint on the departing nurse recruiters’ ability to engage in their profession in violation of Section 16600; and (2) that AMN’s contract-based causes of action failed as a matter of law. The trial court granted the Aya Defendants’ motion, finding the non-solicitation of employee provision was an unlawful restraint on trade in violation of Section 16600 because it prevented the departing recruiters from engaging in their lawful trade or profession — soliciting and recruiting travel nurses on temporary assignment with AMN — for at least one-year post-termination. AMN appealed.

The court of appeal affirmed summary judgment for the Aya Defendants, thus invalidating the employee non-solicitation provision. The court reasoned that the non-solicitation provision clearly restrained individual defendants from practicing (with Aya) their chosen profession — recruiting travel nurses on 13-week assignments with AMN.

Several commentators initially read the significance of the *AMN Healthcare* decision to be limited because of its unique facts. However, at least some courts have since found Section 16600 to prohibit employee non-solicitation agreements in other contexts.

Some courts have adopted AMN Healthcare, while others have even extended the decision to apply to cases without AMN Healthcare’s unique facts

The district court in *Barker v. Insight Global, LLC*, 2019 WL 176260 (N.D. Cal. Jan. 11, 2019) took a broad view of the *AMN Healthcare* decision. The plaintiff in *Barker* left his employment as head of the San Francisco/San Jose office for the defendant (a staffing agency), started work with a competitor and then sought to invalidate his employee non-solicitation agreement. Relying upon *Loral*, the defendant moved to dismiss the plaintiff’s claims based on the employee non-solicit agreement. The district court initially granted the defendant’s motion to dismiss the plaintiff’s declaratory relief claim as well as a claim that the agreement was invalid under California’s Unfair Competition Law. Following the *AMN Healthcare* decision, however, the court granted a motion for reconsideration, ruling in relevant part that “[h]aving considered the *AMN* decision and reviewed *Loral* and *Edwards*, the Court is convinced by the reasoning in *AMN* that California law is properly interpreted post-*Edwards* to **invalidate employee nonsolicitation provisions.**” *Id.* at *3 (emphasis added). The court, in its

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ruling on the motion for reconsideration, did not specifically analyze the underlying facts as to the plaintiff's role with defendant versus his new employer. However, no facts in the record appear to present the same facts at issue in the *AMN Healthcare* decision.

Other courts have taken a similarly broad view of the *AMN Healthcare* decision. For instance, the district court in *WeRide Corp. v. Kun Huang, et al.*, 379 F. Supp. 3d 834 (N.D. Cal. 2019), cited favorably to *AMN* and *Barker* when it denied a preliminary injunction as to the plaintiff's breach of contract claim concerning an employee non-solicit agreement. The provision at issue read "[u]ntil one year after the term of my employment, I will not encourage or solicit any employee or consultant of Company to leave Company for any reason (except for the bona fide firing of Company personnel within the scope of my employment)." The court found the provision at issue **void** under Section 16600.

The district court in *Conversion Logic, Inc. v. Measured, Inc.*, 2019 WL 6828283 (C.D. Cal. Dec. 13, 2019) adopted the reasoning of *AMN Healthcare*. The plaintiff provided software and services analyzing which marketing efforts generate a return on investment. The plaintiff's employees left to start a competing company, defendant Measured, Inc., and the plaintiff sued defendants for breach of contract on various theories, including breach of the employee non-solicit agreement. The agreement at issue prohibited the subject employee for a period of one year following his termination from Conversion from "directly or indirectly" "employing, engaging or soliciting" any employee who was an employee of Conversion during the twelve-month period immediately prior to the termination of his employment. The defendant moved to dismiss the breach of contract claim based on the plaintiff's alleged breach of the employee non-solicit agreement, which the court granted without leave to amend. Notably, unlike in *AMN Healthcare*, there were no facts to suggest that the employee non-solicit provision restricted the individual defendant from working in his chosen field. The court did note the restrictions were more onerous than in *AMN Healthcare* because one of provisions plaintiff sought to enforce had a **no-hire** restriction. No-hire restrictions (as contrasted with those restrictions prohibiting former employees from directly or indirectly soliciting employees of their former employer) are unenforceable under California law. See *VL Sys., Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708 (2007)

(holding the subject "no-hire" provision was unenforceable as a matter of law because the provision went "far beyond what is necessary to protect VLS's legitimate interests and results in a situation where the opportunities of employees are restricted without their knowledge and consent" and violated Section 16600).

Other courts have taken a narrower view of AMN Healthcare's holding

In *Hamilton v. Juul Labs, Inc.*, 2020 WL 5500377 (N.D. Cal. Sep. 11, 2020), the former plaintiff-employee worked for defendant as the Director of Program Management. She was required to sign a non-disclosure agreement ("NDA") as a condition of employment, which included an employee non-solicit provision. The plaintiff sued alleging various provisions of the California Labor Code were violated based on the defendant requiring her to sign an allegedly unlawful NDA. The defendant filed a motion to dismiss. In opposition, the plaintiff argued that her claims were viable because, under the *AMN Healthcare* decision, the non-solicitation of employee provision was unlawful. The court rejected the plaintiff's argument that the employee non-solicitation provision rendered the NDA unlawful, finding that *AMN Healthcare* was distinguishable. Specifically, the court pointed out that the recruiters in *AMN Healthcare* were completely restrained from engaging in their chosen profession if the covenant were enforced because their entire profession was based on solicitation. On the other hand, the plaintiff here failed to allege that a "prohibition on solicitation had any effect on her chosen post-Juul career." 2020 WL 5500377, at *21-22.

Similarly, the court of appeal in *Quidel Corporation v. Superior Ct.*, 57 Cal. App. 5th 155 (2020), which addressed a provision in an exclusive dealing agreement between two biotechnology companies, rejected the plaintiff's argument that *AMN Healthcare's* scope was broad enough to prohibit the agreement at issue. In doing so, the court distinguished *AMN Healthcare*, finding it was limited to the context of impeding an individual person's ability to seek employment.

The plaintiffs in *Aramark Management, LLC v. Borgquist et al.*, 2021 WL 3932258 (C.D. Cal. July 8, 2021) alleged breach of contract as to various provisions of the individual defendants' employment agreements, including a non-solicitation of employee provision. The non-solicitation of employee provision at issue was negotiated in the context of the plaintiff's

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acquisition of the individual defendants' previous employer. The provision prohibited the individual defendants from soliciting, inducing, encouraging or participating (directly or indirectly), in soliciting, inducing, or encouraging any employee or service provider to terminate or reduce his relationship with the plaintiff. The individual defendants resigned from their employment and opened a competing business. The plaintiff brought a partial motion for summary judgment seeking an order that one of the individual defendants violated the employee non-solicit provision as a matter of law based on his conduct during his employment with the plaintiff. In granting the motion for summary judgment, the court rejected the defendants' arguments that the provision was void and unenforceable under Section 16600, finding that the defendants did not show under *AMN Healthcare* that the individual defendant could not engage in his chosen profession, trade or business. The court did highlight that the plaintiff was not seeking to enforce the agreement as to post-termination conduct, and that fact appears to have influenced the court's analysis when finding the provision enforceable.

What's Next?

As demonstrated above, the court decisions are a mixed bag, but it does appear there is a trend in the California courts to expand the scope of Section 16600's prohibition to apply to employee non-solicit agreements. Absent a California Supreme Court decision, we can likely expect similar conflicting decisions from courts considering the validity of employee non-solicit agreements. This trend is not necessarily limited to California, and it is aligned with certain policies of the current presidential administration. Notably, President Biden's Executive Order on Promoting Competition in the American Economy encourages the Federal Trade Commission to take action to prohibit non-competition agreements and other restrictions on employee mobility.

In the end, it appears non-solicitation of employee agreements are likely still viable and not outright prohibited — depending on the facts and circumstances, of course — but such provisions are now much more likely to be aggressively negotiated in transactions and contested in litigation.

♦ *Tamara Devitt is a partner in Haynes and Boone's Orange County and Palo Alto offices representing management in a wide range of labor and employment disputes.*

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from other ABTL chapters that could be enjoyed virtually. We learned to be flexible and pivot to outdoor – and then hybrid – event settings that delivered the quintessential ABTL brand of events while mitigating risk. Let's all thank Maria for her extraordinary leadership and her ability to turn disruption into value.

I am excited for our 48th Annual Seminar at the Rancho Bernardo Inn. Please mark your calendar for September 22-25. While this is an "off year" in terms of Hawaii, our local seminar will have no shortage of powerful legal content, networking opportunities, and outdoor beauty. We hope you will join us.

Finally, I want to welcome and thank our new ABTL Report Editor, Rich Krebs of Orrick, as well as my dedicated Executive Committee: William O'Neill, Vice President; Kenneth Parker, Treasurer; and Andrew Gray, Secretary. Welcome to our newest board members: Tamara Devitt of Haynes and Boone, Amy Laurendeau of O'Melveny, Michael Purpura of Hueston Hennigan, Dave Sugden of Call & Jensen, Orange County Superior Court Supervising Civil Judge Layne Melzer and Judge Rich Lee. And of course our Executive Director Linda Sampson, whose dedication to ABTL is unsurpassed.

Although the rat-tat-tat of the pandemic was disruptive and may still have lingering effects, rest assured that our chapter has emerged stronger, more nimble, and remains financially sound. We look forward to the "post-pandemic" ABTL delivering even more programming and value to its membership than ever before.

♦ *Matt Sonne is a partner in the Labor & Employment Department of Sheppard Mullin Richter & Hampton LLP and is the 2022 ABTL Orange County Chapter President.*

-Expert Cross-Examination: Continued from page 3-

Code section 721 is the Leatherman of the cross-examiner's various tools.

Monroy explained that “[t]he successful cross-examiner will attack not only the opinions and conclusions of the expert but also the factual underpinnings and rationale used by the expert in forming them.” *Id.* This requires “repetitive questions” and sometimes “asking the same question in different styles and ways.” *Id.* Likewise, testing the “foundational facts and the use of hypothetical questions” may be necessary to show that “the expert’s opinion is untenable, illogical, or inapt under the facts of the particular case being litigated.” *Id.* The statutory authority for this expanded scope of cross-examination is found in Section 721. Section 721(a) expressly identifies the *additional* grounds upon which an expert may be cross-examined:

[A] witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to

- (1) his or her qualifications,
- (2) the subject to which his or her expert testimony relates, and
- (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

Of course, like any Evidence Code section, Section 721 must be read in the context of other, potentially competing sections. Take hearsay, for example. The general rule of inadmissibility, when it comes to hearsay, is the desire to exclude testimony that cannot be tested through cross-examination. *See e.g., Target Natl. Bank v. Rocha*, 216 Cal. App. 4th Supp. 1, 7 (2013) (“The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination.”).

Section 721(b) is intended to provide a Goldilocks-type framework where (1) the cross-examination of an expert can remain robust, but (2) experts are not unfairly blindsided by the introduction of untested hearsay evidence that might challenge their opinions. Section 721(b) provides that “[i]f a witness testifying

as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless [:]”

- (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or opinion.
- (2) The publication has been admitted in evidence.
- (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits.

Cal. Evid. Code § 721(b).

The Comment to Section 721 explains that the desired purpose behind subdivision (b) is to hit the sweet spot between, on the one hand, adequately testing an expert witness and, on the other, introducing a competing opinion that cannot be safeguarded through cross-examination:

If an expert witness has relied on a particular publication in forming his opinion, it is necessary to permit cross-examination in regard to that publication in order to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is important to permit an expert witness to be cross-examined concerning those publications referred to or considered by him even though not specifically relied on by him in forming his opinion. An expert’s reasons for not relying on particular publications that were referred to or considered by him while forming his opinion may reveal important information bearing upon the credibility of his testimony. However, a rule permitting cross-examination on technical treatises not considered by the expert witness would permit the cross-examiner to utilize this opportunity not for its ostensible purpose--to test the expert’s opinion--but to bring before the trier of fact the opinions of absentee authors without the safeguard of cross-examination. Cal. Evid. Code § 721, Comment.

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But as explained below, Section 721(b) provides the potential to permit exactly what the Comment cautions against. Especially when it comes to subdivision (b)(3), an expert witness can be cross-examined with a third-party publication so long as some other expert testifies that the source is reliable.

**Section 721(b)(1):
Cross-Examining the Expert
on Materials “Considered”**

California’s Supreme Court has explained that “[t]he scope of cross-examination permitted under section 721 is broad, and [it] includes examination aimed at determining whether the expert sufficiently took into account matters arguably inconsistent with the expert’s conclusion.” *People v. Ledesma*, 39 Cal. 4th 641, 699 (2006). An easy application of Section 721(b)(1) occurs when an expert takes the stand and testifies “My opinion is that the rocket at issue was travelling 500 miles per hour at lift-off. My opinion is based on the treatise, *Rocket Science*.” The more difficult questions occur when the expert more vaguely acknowledges what was “referred to, considered, or relied upon” in forming his or her opinions.

Ledesma explained that the cross-examination is not limited to only those portions the expert “referred to, considered, or relied upon.” *Id.* at 696, citing *People v. Combs*, 34 Cal. 4th 821, 893 - 894 (“We rejected the defendant’s argument that the defense experts could be cross-examined only as to those portions of [the expert’s] report that they had adopted and relied upon.”).

In *People v. Clark*, 5 Cal. 4th 950 (1993), California’s Supreme Court explained that an expert who generalizes the bases for his or her opinion opens the door to a broad cross-examination. In *Clark*, the defendant was sentenced to death following a jury trial for rape and first-degree murder. In *Clark*’s defense, Dr. Stephen Raffle, a psychiatrist and professor of medicine at the University of California, San Francisco, opined that Clark suffered various psychiatric disorders at the time of the murder. Dr. Raffle testified that Clark suffered a “rage reaction and disassociative state (*i.e.*, a short break from reality) at the time of the crimes.” *Id.* at 1115.

On cross-examination, Dr. Raffle testified that he (1) “considered or relied upon all of his training in arriving at his conclusions[.]” and (2) was familiar

with the writings of another psychiatrist, Dr. Bernard Diamond. *Id.* at 1139. The prosecutor then used an article by Dr. Diamond, entitled “With Malice Afterthought” and a portion of the article was read to the jury during the cross-examination. *Id.*

The Court held that cross-examination using Dr. Diamond’s article was proper and consistent with Section 721(b) because Dr. Raffle acknowledged that he “considered or relied upon all of his training at arriving at his conclusions.” Included in his training was familiarity with Dr. Diamond’s article. It was thus fair game for cross-examination.

**The “Old” Section 721(b):
*McGarity v. Department of Transportation***

Section 721(b)(3) was added by amendment in 1997. Subdivision (b)(3) provides that cross-examination is permissible if “[t]he publication has been established as a reliable authority by the testimony or admission of the witness or *by other expert testimony* or by judicial notice.” This allows an expert to be cross-examined with any text, even if the expert on the stand does not recognize the publication as authoritative, so long as some expert testifies that it is. To understand the breadth of this amendment, it is worth looking at an opinion that pre-dated it.

McGarity v. Department of Transportation, 8 Cal. App. 4th 677 (1992), was a personal injury and wrongful death lawsuit arising from a car accident allegedly caused by a dangerous condition on a public road. The plaintiff Michael McGarity was driving a 1973 Chevrolet pickup along a winding road with Myles Park as his passenger. *Id.* at 680. At one point, the road curved to the left at a ninety-degree angle and the curve warning sign that was supposed to be posted was not present. *Id.* Also missing from the road were reflective curve delineators; there were four on the road whereas the relevant traffic manual called for twelve. *Id.*

Just before Mr. McGarity approached the curve, “the truck hit a bump in the road, momentarily distracting McGarity’s attention.” *Id.* Mr. McGarity drove off the road and the truck traveled 185 feet before hitting a concrete irrigation watergate. The watergate scraped the underside of the truck, “squashing the fuel tank ‘like a milk carton.’” *Id.* The fuel tank ignited and engulfed the truck in flames. Mr. McGarity and Myles Park both suffered severe burns and Mr. Park later died from his injuries. *Id.* Mr. McGarity and representatives of Mr. Park’s estate sued the State of California, De-

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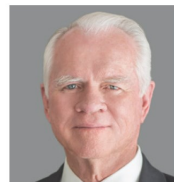
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partment of Transportation (“the State”).

Among the issues in dispute was the speed of the truck when it approached the curve. An eyewitness testified that he had been driving 80 miles per hour behind Mr. McGarity for about fifteen miles before the accident but had not closed the gap between their two vehicles. *Id.* The defendant’s expert opined at trial that Mr. McGarity was driving 80 miles per hour at the time the truck left the road. *Id.* at 681.

The plaintiff’s lawyer wished to cross-examine the State’s expert witness using a crash test report “prepared by General Motors in a test crash at 30 miles per hour with a test truck of the same year and design but heavier than the accident vehicle.” *Id.* The State objected, citing California Evidence Code section 721(b) (which at the time, did not include subdivision (b)(3)).

The trial court sustained the State’s objection and the plaintiffs appealed. For purposes of appeal, the Court explained that it is undisputed that the witness had not referred to, considered, or relied on the General Motors report in forming his opinion, nor had the report been admitted into evidence. Nevertheless, the plaintiffs argued that Section 721(b) did not apply because the General Motors crash test report was not a “text, treatise, journal, or similar publication.” While the parties agreed that the report was indeed not a text, treatise or journal, the issue was whether it was a “similar publication.” The plaintiffs argued that because the report was not published for “mass consumption ... section 721(b) [was] inapplicable.” *Id.* at 682. The Court disagreed. The court explained that “the purpose of section 721(b) supports a broad construction of the term.” *Id.*

The broad construction notwithstanding, the court explained that “to counterbalance the broad scope of cross-examination, the purpose of section 721(b) is ‘to prevent an adverse party from getting before the trier of fact the *inadmissible hearsay* views of an *absent* expert, which may be *contrary* to the expert witness’ opinion, through the device of cross-examining the expert witness regarding the absent expert’s publication or report even though the testifying expert had *not* used or considered that publication or report in *any* way in arriving at or forming his opinion testimony.” *Id.* at 683, citing 2 Jefferson, Evidence Benchbook (2d. ed. 1982) § 29.8, p. 1036, original emphasis.

The Court went on to explain the danger of allowing contrary opinions to make their way into evidence without the ability to test them through cross-examination:

[A] rule permitting cross-examination on technical treatises not considered by the expert witness would permit the cross-examiner to utilize this opportunity not for its ostensible purpose—to test the expert’s opinion—but to bring before the trier of fact the opinions of absentee authors without the safeguard of cross-examination. Although the court would be required upon request to caution the jury that the statements read are not to be considered evidence of the truth of the propositions stated, there is a danger that at least some jurors might rely on the author’s statements for this purpose. Yet, the statements in the text might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable to the case before the court, or might be unreliable for some other reason that could be revealed if the author were subject to cross-examination.

Id. at 683 - 684, citing Cal. Law Revision Com. com., 29B West’s Ann. Evid. Code (1966 ed.) § 721.

Section 721(b)(3): Allowing an Even Broader Scope of Cross-Examination

As explained in *Establishing Reliability Under California Evidence Code Section 721(b)(3): Why California’s Evidentiary Law Could Use More Consistency*, 45 Cal. W. L. Rev. 475, 483 (Spring 2009), the legislative intent behind section 721 “indicates that the purpose of California Evidence Code section 721 is no longer simply to impeach expert testimony but also to counter opposing expert opinions.” The article further states that “the purpose of the amendment is *to allow learned treatises to substitute for live expert testimony, thus changing the original purpose of the rule*, as well as the safeguards imposed by the hearsay rule.” *Id.* (Emphasis added).

To illustrate, if another expert in *McGarity* testified that the crash test report prepared by General Motors was reliable authority, subdivision (b)(3) suggests a different outcome would have resulted. The Court already held that the report was a “similar publication.”

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Accordingly, so long as another expert testified that the report was “established as a reliable authority” it would have been fair game for cross-examination (whether or not the State’s expert witness had considered or relied on the report).

Conclusion

The expert who boldly asserts that his or her opinion is based on all prior training and experience can open a wide door of cross-examination. The moment a witness acknowledges that a third-party publication (within the scope of Section 721(b)(1)) is among that prior training, it is fair game for cross-examination. In addition, having the opposing expert identify the reliable authorities at his or her deposition can help prevent a blindsiding cross-examination of your own expert. Section 721 is important, and its potency should not be overlooked.

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