

Eight overlooked appellate decisions every PI trial lawyer should know

You're familiar with *Howell* and *Sanchez*, and you've made a *Kennemur* objection. Explore these lesser-known decisions to enhance your trial skills

By Matt Whibley

1. *Smith v. Covell*: Prohibiting defense speculation on absent witnesses equally available to both parties

In *Smith v. Covell* (1980) 100 Cal.App.3d 947, the court held that defense counsel cannot comment on or speculate about testimony from witnesses who were equally accessible to both parties but were not called to testify.

Brief facts: Allene Smith suffered injuries from a rear-end collision. During trial, the defense suggested that the absence of certain witnesses, like her treating physicians, implied unfavorable testimony for the plaintiff.

Holding: It is improper for defense counsel to draw negative inferences from the plaintiff's failure to call witnesses who are equally available to both sides.

Court's reasoning: Such comments invite the jury to speculate about unpresented evidence, shifting focus from the actual evidence to conjecture. This undermines the integrity of the trial. Additionally, the court recognized that plaintiffs can be ordered to produce witnesses, and witnesses can be subpoenaed, making them equally available to both parties.

Practice tip: Object promptly when opposing counsel hints at missing testimony from uncalled witnesses, such as treating physicians or family members. Emphasize that both parties have equal access to these witnesses through court orders or subpoenas. Negative inferences should not be drawn from their absence, as it unfairly prejudices the jury by introducing speculation. This is a good case to bring up right before closing arguments if it has not come up during trial.

2. *Victaulic Co. v. American Home Assurance Co.*: Denials of RFAs are inadmissible at trial

In *Victaulic Co. v. American Home Assurance Co.* (2018) 20 Cal.App.5th 948, the court held that a party's denials in responses to Requests for Admissions (RFAs) cannot be used against them at trial, even for impeachment purposes.

Brief facts: Victaulic sued its insurers for breach of contract and bad faith related to coverage disputes. At trial, Victaulic sought to impeach a witness using the insurers' RFA denials. The trial court allowed it, and the jury favored Victaulic.

Holding: The appellate court reversed this decision, stating that RFA denials are not admissible evidence because they represent legal positions, not factual admissions.

Court's reasoning: Allowing RFA denials to be used at trial would undermine the discovery process and discourage parties from truthfully disputing issues, leading to unfair prejudice.

Practice tip: When responding to RFAs, confidently deny disputed statements without fear they will be used against your client at trial. However, avoid denying clearly true facts to prevent potential sanctions under Code of Civil Procedure section 2033.420 for the costs of proving those facts.

3. *Mitchell v. Superior Court*: Admissibility of undisclosed lay witnesses on damages

In *Mitchell v. Superior Court* (2015) 243 Cal.App.4th 269, the court held that lay witnesses testifying about a plaintiff's damages may be allowed at trial even if not disclosed during discovery, provided their omission was not willful or in violation of a court order.

Brief facts: Karla Mitchell was injured in a car accident. In response to an interrogatory about incident witnesses, she disclosed only one passenger. Later, she identified three additional lay witnesses to testify on her damages. The defense moved to exclude these witnesses due to nondisclosure.

Holding: Excluding the witnesses was an abuse of discretion. The interrogatory did not specifically request the identities of witnesses related to injuries and damages, and there was no willful failure to disclose or court order violation.

Court's reasoning: Form Interrogatory 12.1 focuses on incident witnesses, not those testifying about subsequent damages. Evidence sanctions are appropriate only for willful discovery violations or disobedience of court orders.

Practice tip: If facing a motion to exclude lay witnesses due to nondisclosure, examine whether the discovery requests actually required their identification.

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Argue against exclusion if there was no willful omission or court order violation.

4. *People v. Garton*: Photographs and medical imaging are not hearsay and not subject to *Sanchez*

In *People v. Garton* (2018) 4 Cal.5th 485, the court clarified that photographs and medical imaging are not out-of-court statements, do not constitute hearsay, and are not subject to the limitations imposed on expert testimony by *People v. Sanchez*.

Brief facts: In a murder case, the expert witness testified about injuries based on autopsy photos and X-rays. The defense argued this was inadmissible hearsay since the autopsy was performed by another doctor.

Holding: Photographs and medical imaging are not hearsay because they are not statements by a person. Experts may rely on such images without violating hearsay rules or *Sanchez* limitations. Only people can make hearsay statements; machines cannot.

Court's reasoning: Hearsay involves out-of-court statements by a person. Machine-generated images are not statements and thus not hearsay. An expert's independent analysis of these images is admissible.

Practice tip: Use photographs and medical imaging confidently as evidence. Remember that while *Sanchez* restricts experts from relating case-specific hearsay to the jury, it does not apply to machine-generated images. However, you still need to establish a proper foundation for the evidence, which is different from addressing *Sanchez* concerns. Ensure that the images are authenticated and do not confuse the foundational requirements with *Sanchez* limitations.

5. *Paige v. Safeway Inc.*: Cross-examining adverse experts using authoritative publications

In *Paige v. Safeway Inc.* (2022) 74 Cal.App.5th 1108, the court held that under Evidence Code section 721, subdivision (b)(3), a party may cross-examine an adverse expert about the content of a publication established as a reliable authority, even if the expert did not rely on it.

Brief facts: Debra Paige slipped in a Safeway parking lot. Safeway's expert testified that the paint used was appropriate. During deposition, the expert acknowledged ASTM standards as accepted but did not rely on them. At trial, the court prohibited cross-examination about these standards.

Holding: The appellate court held it was error to prohibit such cross-examination. Under section 721, subdivision (b)(3), experts may be questioned about authoritative publications established as reliable, regardless of their reliance on them.

Court's reasoning: The statute allows cross-examination to challenge credibility when experts ignore established authorities contradicting their opinions. The expert's acknowledgment of the ASTM standards as reliable established the foundation for their use in cross-examination.

Practice tip: Use Evidence Code section 721, subdivision (b)(3) to cross-examine adverse experts about authoritative publications. Establish the publication as a reliable authority through the expert's admission, other expert testimony, or judicial notice. Subtly remind the expert that you share your expert depositions on platforms like TrialSmith and through organizations like CAALA. If they misrepresent the reliability of well-established secondary sources, it could significantly impact their future credibility and ability to rely on those sources in other cases. This can encourage experts to be more forthcoming and accurate in their testimony.

6. *Gonzales v. Pacific Greyhound Lines*: Limiting impeachment to material points

In *Gonzales v. Pacific Greyhound Lines* (1950) 34 Cal.2d 749, the Court held that impeachment must be confined to material points and not directed to collateral matters.

Brief facts: Kenneth Gonzales sued for the wrongful death of his alleged father. The defense attempted to challenge the child's legitimacy by introducing prior divorce proceedings testimony.

Holding: The defense could not impeach the witness on collateral matters unrelated to the material issues, such as the child's legitimacy in a negligence claim.

Court's reasoning: Certain presumptions – like the legitimacy of a child born during wedlock – are conclusive or challengeable only by specific parties. Introducing such collateral issues would unfairly prejudice the jury.

Practice tip: When the defense tries to attack credibility on immaterial issues, promptly object to prevent the introduction of collateral matters. Additionally, during expert depositions, bring up any "bad facts" the defense might attempt to use. Ask experts how these facts are relevant to their specific opinions, thereby creating material for a motion in limine. For example, inquire whether an accident reconstructionist or medical expert considers prior drug use relevant to their analysis. If they acknowledge it has no bearing on their opinion, you can argue to exclude such evidence as irrelevant. If the bad facts could influence their opinions – such as methamphetamine use affecting life expectancy – consider stipulating to certain aspects like the defense's proposed life expectancy. This can render the issue immaterial and prevent potentially prejudicial information from reaching the jury.

7. *People v. Caro*: Computer animations are admissible as demonstrative evidence

In *People v. Caro* (2019) 7 Cal.5th 463, the court held that computer animations can be shown to the jury as demonstrative evidence if they reasonably accurately depict the underlying testimony.

Brief facts: The prosecution used a computer animation to illustrate an expert's opinion on how shootings

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occurred. The defense objected, arguing the animation was prejudicial.

Holding: The court upheld the use of the animation, stating it was permissible when it accurately represents the expert's opinion, fairly represents the evidence, and is admissible under Evidence Code section 352.

Court's reasoning: Computer animations aid jurors in understanding complex testimony. The animation was not unduly prejudicial, and proper limiting instructions were given to the jury.

Practice tip: When using computer animations:

- Clarify purpose: Inform the court that the animation is demonstrative, not substantive evidence.
- Expert endorsement: Have your expert testify that it reasonably accurately depicts their opinion.
- Limiting instructions: Request the court to instruct the jury that the animation is an aid to understanding, not evidence of actual events.
- Avoid prejudice: Ensure the animation is not overly graphic or emotionally charged.

8. *Powell v. Superior Court*: You have a right to call the opposing party's expert witness at trial

In *Powell v. Superior Court* (1989) 211 Cal.App.3d 441, the court held that a party may call an expert witness designated by another party, even if they did not designate that expert themselves.

Brief facts: Pamela Powell sued for personal injuries sustained in an accident. The defendants designated Dr. Maurice P. Carlin as their expert witness and had him perform a defense medical examination of Powell. Although Powell did not designate Dr. Carlin as her expert, she deposed him under the expert-discovery procedures. The defendants moved for a protective order to prevent Powell from calling Dr. Carlin at trial, arguing she failed to properly disclose him as her expert. The trial court granted the protective order.

Holding: The appellate court reversed the trial court's decision, holding that Powell could call Dr. Carlin as an expert witness at trial, even though she had not designated him, because he was designated by the defendants and had been deposed.

Court's reasoning: The court interpreted Code of Civil Procedure section 2034, which allows a party to call as a witness at trial an expert not previously designated by that party if the expert has been designated by another party and has been deposed. The statute's language was clear and unambiguous, permitting any party to call such an expert regardless of whether the designating party intends to call them.

Practice tip: This issue arises when you conduct a strong deposition of a defense expert, and they attempt to withdraw the expert as a witness. Under Code of Civil Procedure sections 2034.310, subdivision (a) and 2025.620, subdivision (d), you have the right to call an expert witness designated by the opposing party, even if you did not designate them yourself. Additionally, you can use the videotaped deposition of that expert at trial, regardless of whether the expert is available or the opposing party attempts to withdraw them. Just ensure you comply with Code of Civil Procedure sections 2025.340, subdivision (m) and 2025.220.

When deposing a defense expert who provides favorable testimony, include foundational questions that highlight the expert's qualifications, experience, and role as an objective reviewer hired by the defense.


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