

Attorney-referral lien treatment in the wake of *Qaadir*

The attorney-client privilege vs. defense's argument on attorney-referral treatment

By Sarin Goncuian & Jonathan Bakhsheshian

The problem

Question: "Did your attorney refer you to Dr. Batman?"
Attorney #1: Objection. Calls for attorney-client privilege.
Attorney #2: Counsel, pursuant to *Qaadir v. Figueroa*, attorney-referred treatment is relevant and goes to the bias of the treatment since it was attorney driven.
Answer: ???????
Do you let your client answer?

Since *Qaadir v. Figueroa* (2021) 67 Cal.App.5th 790, was decided, I have yet to sit for a deposition where the defense team did not argue that evidence of attorney-referral treatment is not protected by the attorney-client privilege. I remember the first deposition that this was claimed. I begged the defense attorney to provide me with a pin cite showing where *Qaadir* makes that conclusion – and he simply could not. After meeting and conferring after the deposition, I have concluded that (with every single defense attorney who has brought it up) the defense team picks and chooses certain lines from the *Qaadir* opinion to make this argument, but that the *Qaadir* court made no such finding. The defense argument ignores what actually happened in *Qaadir* and fails to properly argue the facts to support their "conclusion," which is at odds with what the opinion actually said and did.

The ultimate conclusion of *Qaadir* concerning attorney-referral questions

The *Qaadir* court explicitly held that evidence of attorney referrals to treating medical providers is relevant to the issue of bias. Specifically, the court stated:

> We agree the referral evidence was relevant to the question of the reasonable value of the lien-physicians' medical care because it may show bias or financial incentives on the part of the lien-physicians. If a lien-physician wants future referrals from a lawyer and understands that the lawyer benefits from inflating a client's medical bills, that incentive might encourage the lien-physician to inflate its current bill to please the lawyer and win future referrals.

(*Id.*, 67 Cal.App.5th at pp. 804-805.)

This is the quote used in every single meet-and-confer letter from the defense team to support its position. But this does not encompass *how* or *why* the Court made this conclusion, nor does it deal with the issue of *privilege*. Specifically, *Qaadir* does not allow for any questions specifically *to the plaintiff* during deposition or cross-examination concerning attorney-referral questions. Instead, it confirms that questions regarding attorney referral are permissible to *other parties*; specifically, to plaintiffs' treaters, and other witnesses who would not fall under the attorney-client privilege. The decision does not, in any way, hold or even suggest that attorney-referral questions *are not* covered under attorney-client privilege.

Qaadir's underlying facts

In *Qaadir*, the Court of Appeal affirmed the judgment for the plaintiff, who was injured in an automobile accident and suffered a back injury. But in one portion of the decision, the court held that the trial court had erred when it excluded evidence that the plaintiff had been referred by his counsel to his treating doctors, who treated him on a lien basis.

During his opening statement, defense counsel advised the jury, *without objection*, that the plaintiff (Qaadir) was "directed to go see Dr. Badday [plaintiff's pain management doctor in that case] by his lawyer." (*Id.* at pp. 808, 815-16.) Later in the trial, defense counsel asked Qaadir's billing expert and Qaadir himself whether his attorney referred him to the lien-physicians. Plaintiff's counsel objected *on relevance grounds*, and the objection was sustained both times. (*Id.* at p. 808.) Because relevance was the only objection, defense counsel requested to establish relevancy at sidebar and the trial court denied counsel the opportunity.

It is vital to understand that it was this technical error of not allowing counsel to approach and establish relevancy that was the *only* aspect of the trial court's ruling that the *Qaadir* court held was erroneous. It is equally important to note that the *Qaadir* court ultimately held that the error was not prejudicial and, as a result, it affirmed the judgment against the defendant, notwithstanding the erroneous ruling.

Section 2017.010 of the Code of Civil Procedure states that, "any party may obtain discovery regarding any matter, *not privileged*…" That does not mean that privileged information is irrelevant. In *Qaadir*, plaintiff's counsel objected to a question

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regarding attorney-referred treatment *solely based on relevancy* – and that's it. (*Id.* at p. 808.) There was *no* attorney-client-privilege objection asserted, and before that question, the plaintiff had already disclosed that his attorney referred him to a pain-management specialist, effectively waiving any attorney-client privilege with respect to that referral. (*Id.* at 795 [stating that the plaintiff had already disclosed that his attorney referred him to the pain management doctor].)

Qaadir is, accordingly, inapplicable when the plaintiff has *not* waived attorney-client privilege. As a result, the conversations plaintiff may or may not have had with counsel are privileged, *even if such conversations would be relevant*. If at a deposition the attorney-client privilege objection is made, then the issue of relevancy becomes functionally irrelevant, because if the material is privileged, its relevancy does not matter with respect to its admissibility.

The attorney-client privilege vs. defense's argument on attorney-referral treatment

Information protected by the attorney-client privilege is protected from compelled disclosure unless the privilege is waived. *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, 460-61, one of the primary cases defendants constantly rely on in their meet and confer letters, states that: "although exercise of the privilege may occasionally result in the suppression of relevant evidence, the Legislature of this state has determined that these concerns (relevancy) are outweighed by the importance of preserving confidentiality in the attorney-client relationship. The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence."

The privilege is absolute, and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.) As long as the attorney-client privilege was asserted in every response to the questions that as phrased would invade potential confidential communications between plaintiff and their counsel, attorney-client privilege is not waived – this includes making the objection at the deposition, along with any discovery requests.

Qaadir does not discuss the attorney-client privilege as an issue because there was no assertion of the privilege in that case. Accordingly, there is no basis for any court to rely on *Qaadir* to suggest that the privilege does not apply to attorney referrals made to the client. I have seen the defense argue that, because the *Qaadir* opinion is silent with respect to the privilege that the court was suggesting, the privilege did not apply. This is simply wishful thinking.

What if attorney-referral questions are asked to treating doctors; Does the objection still stand?

No. Evidence Code section 350 states that only relevant evidence is admissible. Relevant evidence is defined as "having any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Haston* (1968) 69 Cal.2d 233, 244.)

Plaintiffs used to argue that referral to a doctor by an attorney is irrelevant. We would argue that the issues in a typical personal injury case are negligence, which includes duty, breach, causation, and damages, and that (in discovery) defendants made no allegations that the treatment received by plaintiff was below the standard of care, somehow implicating an attorney or doctor in a scam. Accordingly, we would claim that attorney referrals do *not* have a "tendency to prove or disprove any disputed fact that is of consequence to the determination of the action."

But, *Qaadir* makes it clear that the information is relevant as it relates to bias of the treating physicians. The objection should still be made and the individual Court can decide the merits and importance.

Attorney-referral treatment may be defeated by Evidence Code § 352 on a case-by-case basis

Evidence Code section 352 says the Court may exclude evidence if its probative value is substantially outweighed by the probability its admission will necessitate undue consumption of time, create substantial danger of undue prejudice, confuse the issues, or mislead the jury. An argument that could be made in motions in limine is that attorney-referral treatment has very little probative value since the issue is plaintiff's injuries, not how she found her medical doctors. The bias or incentives of the doctors are also prejudicial since the typical personal-injury case does not include a claim for medical malpractice, or any allegations that the treating doctors' treatment was below the standard of medical care. "Opening the door" to this information would require the attorney-client privilege to be broken, discussion of liability and health-insurance, and would violate the collateral source rule. (See Evid. Code, §§ 950-962 et seq.; CACI 105 – since possible responses can include that plaintiff had no insurance so she needed a doctor on lien, etc.)

Know your adversary and retain civility

Despite the many tools provided in dealing with this issue, it is important to

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maintain civility throughout the process. Sometimes, it is not necessary to rush into emails and letters when a simple phone call can resolve the issue. Building rapport with the defense team can prove useful. Chances are you will likely deal with the defense team again. Do not hesitate to establish a professional relationship with your adversary. It is invaluable.



Goncuian

Sarin Goncuian is a senior associate at Ellis & Bakh, LLP, *in Calabasas, and focuses on wrongful death and catastrophic injury litigation. Ms. Goncuian graduated from Pepperdine Law School. Ms. Goncuian be reached at sarin@ellisbakh.com.*



Bakhsheshian

Jonathan Bakhsheshian is a partner at Ellis & Bakh, LLP, *in Calabasas, and focuses on wrongful death and catastrophic injury litigation. He is currently a board member of CAOC. He can be reached at jonathan@ellisbakh.com.*

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