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Establishing Reliability Under California Evidence Code Section 721(B)(3): Why California's Evidentiary Law Could Use More Consistency

Leah Beth Payne

COMMENT

ESTABLISHING RELIABILITY UNDER CALIFORNIA EVIDENCE CODE SECTION 721(B)(3): WHY CALIFORNIA'S EVIDENTIARY LAW COULD USE MORE CONSISTENCY

Consider the following hypothetical, based on a real case[1]: Officer Smith was on duty in a marked highway patrol vehicle driving westbound on Interstate 8 at 2:15 a.m. He observed a black two-door Honda swerving within its lane. After watching the vehicle for a few minutes, Officer Smith witnessed it swerve onto the shoulder and back into the lane three times. Officer Smith initiated an enforcement stop.

When Officer Smith contacted Joe, the driver, he noticed a strong odor of alcohol. Officer Smith also observed that Joe had red watery eyes. With Joe's cooperation, Officer Smith administered five field sobriety tests, all of which indicated intoxication. One of the tests administered was a Preliminary Alcohol Screening (PAS) test. This test measured Joe's blood alcohol content at .084%.

After the PAS test, and based on the totality of the circumstances, Officer Smith placed Joe under arrest for driving while under the influence of alcohol. Upon arrival at the San Diego County Jail, Joe was required to blow two breath samples into an Intoxilyzer Electrochemical/Infrared (Intox EC/IR) instrument, a machine more accurate and sophisticated than the PAS test. Both Intox EC/IR tests measured a .07% blood alcohol content. The San Diego City Attorney charged Joe with driving a vehicle while under the influence of alcohol and driving a vehicle while having 0.08% or more alcohol in his blood. Joe pled not guilty to both counts.

At the preliminary hearing, Joe's attorney stated it is common for prosecuting attorneys to present an expert to testify about the theory of retrograde extrapolation, which he argued was the concept of taking a blood alcohol result at some point in time and going backward to determine the blood alcohol level at an earlier point based on the

1. The names in the hypothetical are not the same as the individuals involved in the real case.

passage of time. Moving to exclude this theoretical evidence and the numerical PAS test results, Joe's attorney further asserted that the prosecution would have to follow the *Kelly* test to bring the expert testimony before the court.[2]

The prosecution replied that its expert should be allowed to testify as to his opinion regarding the average rate at which alcohol is burned off based on his training, experience, and research. The prosecution also contended that the expert, using the result of a blood alcohol test, could calculate what that person's blood alcohol level was at an earlier time because there would be a burn off rate. The prosecutor stated that the concept of retrograde extrapolation was fairly well accepted and researched in the DUI community, and that it would be improper to limit the expert's testimony on the concept. He added that Joe's attorney could attack any issues regarding the theory during cross-examination. Joe's motion to exclude the evidence was denied.

Joe's counsel then stated that they would bring their own expert, Jack, who would testify contrary to the prosecution's theories of retrograde extrapolation. Jack was a young scientist who had only recently qualified as an expert.[3] Jack would testify that there was an article written approximately one year earlier which contended that alcohol burn off rates were likely much slower than the DUI community believed. The article was published in a little-known magazine and did not gain much credibility within the scientific community. However, the only requirement for getting the article before the jury was that one expert testify that it was reliable, regardless of what any other expert or community of experts believed.

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2. The *Kelly* test refers to the standard by which a party must prove the reliability of a new scientific technique before evidence obtained through the technique can be admitted into evidence. If a party can show that the new technique has gained general acceptance in the relevant scientific community, then evidence obtained with the technique may be admitted. People v. Williams, 54 Cal. Rptr. 2d 521, 527 (Cal. Ct. App. 1996) (citing People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976)). Thus, Joe's defense counsel argued that the prosecution must first establish that the theory of retrograde extrapolation had been generally accepted in the DUI community before their expert could give an opinion based on the theory.

3. A witness may qualify as an expert if "he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. . . . [This expertise] may be shown by any otherwise admissible evidence, including his own testimony." CAL. EVID. CODE § 720 (West 2007).

Since 1967, the California Evidence Code (CEC) has allowed texts to be used on cross-examination to impeach expert testimony.[4] This form of impeachment is extremely valuable because it allows counsel to highlight an expert's weaknesses when the expert testifies contrary to established authority.[5] Originally, the rule allowed counsel to read excerpts from "learned treatises" as long as the expert on the stand had referred to, considered, or relied on the publication when forming his or her opinion, or if the publication had been admitted in evidence.[6]

However, in 1997, subdivision (b)(3) was adopted to amend California Evidence Code section 721.[7] This new subdivision allows an expert to be cross-examined with several types of publications, not just learned treatises.[8] The use of a publication is permitted on cross-examination, even when the expert on the stand does not recognize the publication, so long as any other expert testifies that it is authoritative.[9] This ten-year old amendment has raised several issues for trial attorneys, many of which have yet to be resolved in any published California opinion.[10]

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4. CAL. EVID. CODE § 721 (West 2007); S. RULES COMM., 1997-1998 REG. SESS., S. FLOOR ANALYSES ON S.B. 73, http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0051-0100/sb_73_cfa_19970902_093201_sen_floor.html [hereinafter S. Rules Comm. Bill Analysis].

5. S. Rules Comm. Bill Analysis, *supra* note 4.

6. *Id.*

7. § 721.

8. *Id.*; *see also, e.g.,* Salgo v. Leland Stanford Jr. Univ. Bd. of Trs., 317 P.2d 170, 182 (Cal. Ct. App. 1957) (suggesting that several types of publications may be admissible, including "text books, pamphlets, and periodicals").

9. *Salgo*, 317 P.2d 170, 182.

10. *See generally* Rosen v. Regents of Univ. of Cal., No. A113267, 2007 WL 3361312, at *14 (Cal. Ct. App. Nov. 14, 2007) (each party and the trial judge had separate and conflicting interpretations of section 721, and of how a publication may be deemed reliable); Lopez v. Rashidi, No. E030977, 2004 WL 161795, at *12 (Cal. Ct. App. Jan. 28, 2004) ("[i]t is not clear whether the requirement that [a] treatise be established as reliable authority is governed by Evidence Code section 403" or 405); Stoll v. Bush, No. B159275, 2003 WL 22792314, at *4 (Cal. Ct. App. Nov. 25, 2003) (acknowledging that neither the parties' nor the court's own research had disclosed any California case on point regarding whether California Evidence Code section 721 required reliability to be established by a "designated expert").

With this amendment, there is a concern that unreliable publications will be used to cross-examine reliable expert witnesses.[11] The CEC allows witnesses like Jack, the questionable young expert, to simply testify that a publication is reliable.[12] Once Jack testifies as such, any well-experienced expert may be cross-examined with a little-known article that expresses an opinion contrary to that of the expert's on the stand. Attorneys may attempt to highlight the article's weaknesses by asking questions of their expert on redirect. However, this will only be possible if the attorney had notice that the article would be presented on cross-examination, and therefore had an opportunity to research it and find its weaknesses prior to trial.[13] Because the rule does not require attorneys to provide notice of which publications will be used on cross-examination,[14] it may often be the case that attorneys are not prepared to reveal a publication's weaknesses on redirect. Ultimately, the jury is left weighing the opinion of the expert on the stand with that of the "reliable" article, whose author never testifies before them and is never subject to cross-examination. The amendment is not without value, but changes should be made so that California Evidence Code section 721(b)(3) can be used in the manner the legislature envisioned: to safeguard the integrity of the trial while saving time and money.[15]

There must be clear guidelines for establishing a publication as a reliable authority. Because the authors of these texts never appear before the jury, the standards for ensuring that a text is reliable enough to come before a jury should be just as stringent as the standards for ensuring that new scientific techniques are sufficiently reliable to come before a jury.

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11. S. Rules Comm. Bill Analysis, *supra* note 4.

12. § 721.

13. *See, e.g.*, Mark B. Canepa, *Reevaluating Expert Testimony Following the Recent Amendment to Evidence Code Section 721*, 20 CEB CIV. LITIG. RPTR. 49, 54 (1998) (acknowledging that attorneys will have to do "their own review of available literature" in the relevant field, so that they are prepared to rebut propositions in a given text).

14. *See* § 721.

15. S. Rules Comm. Bill Analysis, *supra* note 4. Sponsoring the adoption of California Evidence Code section 721(b)(3), the State Bar argued that the amendment would protect against the use of "outdated or otherwise unreliable treatises" and would also reduce time and expense. *Id.*

Judicial notice is one way publications are permitted on cross-examination.[16] However, the judge cannot be required to hold a mini-trial for every publication to determine authoritative status; therefore, the burden of establishing reliability must be left on the attorneys. To help assess reliability, there must be a requirement that counsel provide the opposing party with notice of any publication and its contents before using it to cross-examine the opposing party's expert witness. There should also be a standard of peer review, or overall acceptance of the text. Thus, the propounding party should be required to prove that the publication is generally accepted and consistent with established thought in the profession. This standard is consistent with the requirements of California's *Kelly* test.[17]

This comment explains, in three parts, the present state of the law regarding California's allowance of learned treatises on cross-examination and the ways this law can become more valuable to trial attorneys. Part I provides a background of the evolution of California Evidence Code section 721 to its present state. Part II provides examples of how other jurisdictions have resolved ambiguities in their rules analogous to California Evidence Code section 721(b)(3). Part III contends that using the *Kelly* standard when admitting publications on cross-examination would be a beneficial and consistent approach for California to follow.

I. HOW THE LIBERAL APPROACH TO CALIFORNIA EVIDENCE CODE SECTION 721 EVOLVED

The California Evidence Code has allowed learned treatises to be used on cross-examination to impeach expert testimony since 1967.[18]

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16. CAL. EVID. CODE § 721(b)(3) (West 2007).

17. *See* People v. Williams, 54 Cal. Rptr. 2d 521, 527 (Cal. Ct. App. 1996) (citing People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976)) (requiring proof that a new scientific technique has gained general acceptance in the relevant scientific community, before such evidence may be admitted). The *Kelly* test only applies to new scientific techniques, but to foster consistency and ensure greater reliability, it seems appropriate to also apply the *Kelly* test to the admission of scientific publications.

18. § 721. While the CEC has allowed learned treatises on cross-examination since 1967, the practice has been permitted under the state's common law beginning as early as 1891:

Language in several [early] cases indicated that the cross-examiner could

When first enacted, the rule allowed counsel to read excerpts from learned treatises if the expert on the stand had "referred to, considered, or relied upon the publication in forming his or her opinion, or [when] the publication [had] already been admitted in evidence."[19] This traditional rule was intended to protect the jury from hearing excerpts of publications that were based on "inadequate research, unexpressed qualifications, or other factors of unreliability that might be revealed if the author were subject to cross-examination."[20]

Most jurisdictions allow experts to be cross-examined with the use of learned treatises; however, each jurisdiction varies on how liberally they allow such cross-examination.[21] Four main categories of decisions have emerged in jurisdictions across the nation allowing learned treatises on cross-examination, ranging from most stringent to most liberal allowance.[22] The first category of cases allows treatises to be used on cross-examination only if the expert witness on the stand has cited the treatise in support of his opinion.[23] The next group of decisions allows the cross-examination of experts using authorities which the expert did not use, but which are in the same category of texts that he did rely on.[24] A third category allows an expert to be cross-examined with texts that he has personally recognized as

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> use books to test the competency of an expert witness, whether or not the expert relied on books in forming his opinion. Fisher v. Southern Pac. R.R., 89 Cal. 399, 26 Pac. 894 (1891); People v. Hooper, 10 Cal. App. 2d 332, 51 P.2d 1131 (1935). [Later] decisions [indicated], however, that the opinion of an expert witness [had to] be based either generally or specifically on books before the expert [could] be cross-examined concerning them. Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); Salgo v. Leland Stanford etc. Bd. Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957); Gluckstein v. Lipsett, 93 Cal. App. 2d 391, 209 P.2d 98 (1949).

§ 721 cmt.

19. S. Rules Comm. Bill Analysis, *supra* note 4.

20. Canepa, *supra* note 13, at 49 (citing CAL. EVID. CODE § 721 cmt. 3 WITKIN, CALIFORNIA EVIDENCE § 1903 (3d ed. 1986)).

21. *See generally* W.E. Shipley, Annotation, *Use of Medical or Other Scientific Treatises in Cross-Examination of Expert Witnesses*, 60 A.L.R.2d 77 (1958) (summarizing all of the ways learned treatises are permitted in cross-examination throughout multiple jurisdictions).

22. *Id.*

23. *Id.*

24. *Id.*

reliable, even if he did not use those texts when forming his opinion.[25] The final category of cases allows any text to be used on cross-examination as long as the text has been established as reliable authority, regardless of whether the expert on the stand is familiar with the particular text.[26]

Early California decisions addressing this issue ranged widely, leaving little guidance for attorneys planning to use texts on cross-examination.[27] In 1997, however, an amendment was adopted which allows an expert to be cross-examined with any text, even when the expert on the stand does not recognize the publication as authoritative, so long as some expert testifies that the publication is authoritative.[28] The CEC now permits an expert to be cross-examined with the use of any publication, not just learned treatises, if: (1) he relied on the publication in forming his opinion; (2) the publication was admitted in evidence; (3) an expert testified that the publication was reliable; or (4) the judge made a determination that the publication was reliable.[29]

This rule is modeled after Federal Rule of Evidence (FRE) 803(18), an exception to the hearsay rule.[30] The federal courts have adopted a liberal interpretation of FRE 803(18) that favors

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25. *Id.*

26. *Id.*

27. CAL. EVID. CODE § 721 cmt. (West 2007). *Compare* Fisher v. Southern Pac. R.R. Co., 26 P. 894, 896 (Cal. 1891) (suggesting that attorneys may cross-examine opposing experts with texts that the expert did not rely on, if the expert had testified that he did rely on other texts), *and* Salgo v. Leland Stanford Jr. Univ. Bd. of Trs., 317 P.2d 170, 182 (Cal. Ct. App. 1957) (holding that other medical works are admissible on cross-examination if the expert on the stand had based his opinion "either generally or specifically on a medical work or medical works"), *with* Bailey v. Kreutzmann, 75 P. 104, 105 (Cal. 1904) (holding medical works admissible on cross-examination if the specific work was relied on by the expert on the stand).

28. § 721.

29. *Id.*

30. S. Rules Comm. Bill Analysis, *supra* note 4. FRE 803(18) permits the jury to hear statements from "published treatises, periodicals, or pamphlets" if those publications were established as reliable authority by expert testimony, even though those statements are technically hearsay. FED. R. EVID. 803(18). California's rule slightly differs from the Federal Rule, because the Federal Rule allows excerpts from publications to be read on both direct examination and cross-examination, while California's rule allows statements from the publication to be read on cross-examination only. Canepa, *supra* note 13, at 54.

admissibility,[31] and it appears that California has done the same in applying California Evidence Code section 721(b)(3).[32] While California's rule is modeled after the federal rule, it is not identical to it.[33] California's rule is "specifically a rule of cross-examination" and does not allow for the use of such publications on direct examination.[34] FRE 803(18), alternatively, is an exception to the hearsay rule, and therefore permits publications on both direct and cross-examination.[35]

Because California Evidence Code section 721(b)(3) merely models FRE 803(18), California's rules and procedures for admitting publications on cross-examination differ from federal standards. Unfortunately, without any published California cases interpreting the California rule, attorneys and judges alike have little guidance as to what procedures are required for establishing the reliability of a text. This has raised several unanswered questions.[36]

II. LACK OF CASE LAW INTERPRETING CALIFORNIA'S RULE HAS LEFT MANY QUESTIONS UNANSWERED

When evaluating California Evidence Code section 721, it is important to remember that the traditional rule was adopted because it was considered proper cross-examination to test the competency of the witnesses as experts and to test the overall value of their testimony.[37] The code Section was not adopted to allow cross-examining attorneys to present evidence to the jury that sustained their

31. Allen v. Safeco Ins. Co., 782 F.2d 1517, 1520 (11th Cir. 1986) (citing FED. R. EVID. 803(18) advisory committee's note).

32. *See, e.g.*, People v. Ledesma, 140 P.3d 657, 699 (Cal. 2006) ("scope of cross-examination permitted is broad and includes examination aimed at determining whether the expert sufficiently took into account matters arguably inconsistent with expert's conclusion.").

33. Canepa, *supra* note 13, at 50 (citing CAL. EVID. CODE § 721 cmt.; 3 WITKIN, CALIFORNIA EVIDENCE § 1903 (3d ed. 1986)).

34. *Id.*

35. *Id.*

36. *See generally supra* note 10.

37. Fisher v. Southern Pac. R.R. Co., 26 P. 894, 896 (Cal. 1891); *accord* People v. Hooper, 51 P.2d 1131, 1133 (Cal. Ct. App. 1935).

theory of the case.[38] In fact, California law prohibited learned treatises from being used as substantive evidence.[39]

The addition of subsection (b)(3) to California Evidence Code section 721 significantly changed the traditional rule. Subsection (b)(3) states that an expert testifying in the form of an opinion may be cross-examined "in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication" *if* the publication has been established as a reliable authority by the expert on the stand, or by the testimony of any other expert, or by judicial notice.[40] Because there are no published California cases to resolve how this new amendment should be applied, we must look to legislative intent. The California legislature intended that the amendment would be used to test an expert's opinion when that expert testified "contrary to well-accepted treatises."[41]

The legislative intent 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 . . . thereby, reducing the time and expense of having to call another expert."[42] Therefore, 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.

One major problem with this change is that the legislative intent indicates that "learned treatises" can be used to counter an expert's opinion, while the actual language of the rule allows *any publication* to counter an expert's opinion.[43] With such a significant change in California's evidentiary law, major questions have arisen: what are the procedures for establishing authoritative status; is California Evidence Code section 721(b)(3) governed by California Evidence Code

38. *Fisher*, 26 P. at 896.

39. *See, e.g., id.*

40. CAL. EVID. CODE § 721(b)(3) (West 2007).

41. S. Rules Comm. Bill Analysis, *supra* note 4.

42. *Id.*

43. *Compare* S. Rules Comm. Bill Analysis, *supra* note 4 (stating that "learned treatises" should be allowed to cross-examine an expert testifying contrary to such "well-accepted treatises") *with* CAL. EVID. CODE § 721(b)(3) (West 2007) (demonstrating that the actual rule allows *any publication* to be used to cross-examine an expert, provided it has been deemed reliable by the judge or any expert).

sections 403 or 405;[44] how is one opinion in an article deemed reliable or authoritative when there are several competing theories in various other articles; is notice required before using a text to cross-examine an expert witness? California practitioners have had little guidance to all of these unanswered questions.

A. What is the Proper Procedure for Determining Reliability When there Has Been No Judicial Notice of Reliability?

It is unclear whether the requirement that a treatise be established as reliable authority is governed by California Evidence Code sections 403 or 405.[45] This question is significant because the answer determines the burden of proving authoritative status and determines who decides if the burden is met.[46] If the preliminary fact is within the scope of Section 403, then it is up to the jury to decide whether it exists, and the trial court merely determines whether there is evidence sufficient to sustain a finding that it is reliable authority.[47] If Section 405 governs, however, then the trial court determines whether the text is "authoritative" by a preponderance of the evidence.[48]

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44. Lopez v. Rashidi, No. E030977, 2004 WL 161795, at *12 (Cal. Ct. App. Jan. 28, 2004). California "Evidence Code section 400 et. seq. set[s] forth the procedures to be utilized when the admissibility of certain evidence turns on the determination of some 'preliminary fact.'" People v. Simon, 228 Cal. Rptr. 855, 859 (Cal. Ct. App. 1986).

45. *Lopez*, 2004 WL 161795, at *12. There is ambiguity in all types of evidentiary issues regarding whether California Evidence Code section 403 or 405 governs the preliminary determinations of admissibility:

> Some writers have attempted to distinguish the kinds of questions to be decided under . . . Section 403 from the kinds of questions to be decided under . . . Section 405 on the ground that the former questions involve the *relevancy* of the proffered evidence while the latter questions involve the *competency* of evidence that is relevant.

CAL. EVID. CODE § 403 cmt. a (West 2007) (citing Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927)); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929)). However, "eminent legal authorities sometimes differ over whether a particular preliminary fact question is one of relevancy or competency." *Id.*

46. Morgan, *supra* note 45.

47. *Id.*

48. *Id.*

The resolution of this question will also determine whether opposing counsel is permitted to provide evidence rebutting the claim that a text is reliable. However, courts will rarely conduct mini-trials to determine whether a text is sufficiently authoritative. Alternatively, the Senate Judiciary Committee acknowledged that experts should not be permitted to claim that an "obscure authority" is reliable.[49] So how does a court balance judicial efficiency with the danger of allowing unreliable statements to be read to the jury as if they were substantive scientific evidence?

For some time, other jurisdictions have allowed experts to be cross-examined by reference to other reputable works in their field, even if the experts have not relied on those works in forming their opinion.[50] However, it has taken much case law to determine the proper procedures for this form of cross-examination. In evaluating the Supreme Court decision *Reilly v. Pinkus,* the U.S. Court of Appeals, D.C. Circuit, noted:

> *The* [Reilly] *Court does not say how the authority of those works is to be determined.* It seems clear from the facts given in the opinion that it is unnecessary for the witness himself to recognize the authority of the work . . . or even to have read it . . . . *We think the authority of the work is for the presiding officer to decide. And we think he should have a broad discretion in determining what—and how much evidence may be presented on that question.*[51]

This quotation confirms that no set procedure exists for determining the reliability of a publication in the federal courts. The burden is essentially left on the judges to decide on an ad hoc basis what publications are sufficiently authoritative. Of course, courts should always have discretion to decide what and how much evidence may be presented, but this D.C. Circuit decision did almost nothing to guide

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49. S. JUDICIARY COMM., 1997-1998 REG. SESS., S. COMM. ANALYSIS ON S.B. 73, http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0051100/sb_73_cfa_19970514_104316_sen_comm.html [hereinafter S. JUDICIARY COMM. BILL ANALYSIS].

50. Reilly v. Pinkus, 338 U.S. 269, 275 (1949).

51. Dolcin Corp. v. F.T.C., 219 F.2d 742, 746 n.4 (D.C. Cir. 1955) (emphasis added); *see also* Laird v. T.W. Mather, Inc., 331 P.2d 617, 622-23 (Cal. 1958) (holding that the trial court "is given a wide discretion in controlling cross-examination affecting the knowledge and credibility of an expert witness.").

judges in how authoritative status may be determined more quickly and efficiently.

Some courts have commended trial judges for working with counsel to structure a procedure for determining authoritative status out of the presence of the jury, before cross-examination begins.[52] In *Martin v. Zucker*, the trial judge held a sidebar conference with counsel, in which they all came to an agreement as to how plaintiff's counsel could properly conduct the cross-examination of the defense's expert witness with a learned treatise.[53]

Decisions such as *Martin* reveal that rules similar to California Evidence Code section 721(b)(3) and FRE 803(18) are not necessarily governed by any specific preliminary rule. Instead, the "presiding officer" has discretion to determine how cross-examination may be conducted.[54] However, with no uniform procedure in the federal system or in California, it is difficult to know at what point in the trial a publication's authoritative status must be established.

The California State Bar sponsored the adoption of California Evidence Code section 721(b)(3), and maintained that requiring treatises to be established as reliable authority "ensures that outdated or otherwise unreliable treatises [would] not be used inappropriately to discredit an expert's opinion."[55] This quote suggests that a publication must be established as reliable authority *before* there is an opportunity to use the publication on cross-examination. This assertion is also consistent with the language of the rule, which states that an expert may not be cross-examined with a publication unless the publication "*has been established* as reliable authority."[56] This language reveals that reliability must already be established when publications are used to cross-examine expert witnesses.

Similarly, the Washington Supreme Court held in *Dabroe v. Rhodes Co.* that when a party fails to meet the burden to lay the necessary foundation of showing that a publication is authoritative, the jury should be instructed to disregard so much of the cross-

52. Martin v. Zucker, 479 N.E.2d 1000, 1003-04 (Ill. App. Ct. 1st Dist. 1985).
53. *Id.*
54. *Dolcin Corp.*, 219 F.2d at 746 n.4.
55. S. RULES COMM. BILL ANALYSIS, *supra* note 4.
56. CAL. EVID. CODE § 721(b)(3) (West 2007) (emphasis added).

examination as relates to the publication in question.[57] The decision in *Dabroe* suggests that establishing authoritativeness should occur prior to the use of the publication on cross-examination. This position is consistent with that of several other jurisdictions.[58]

At least one federal circuit suggests that it would be beneficial, if not necessary, to hold a preliminary determination as to whether a text can be considered reliable authority.[59] In *United States v. Downing*, the court analogized the examination of the reliability of a novel scientific technique to the threshold determination required when hearsay evidence is offered as an exception to the hearsay rule.[60] The *Downing* court stated that the "conditions on the admission of hearsay seem to ensure a level of trustworthiness such that the testimony is likely to enhance the truth-seeking function of litigation. A preliminary determination that a scientific technique is reliable serves a similar purpose."[61]

B. How is Reliability Proved?

Reading the plain language of the California statute, very little is required to prove that a publication is "reliable authority."[62] The only requirement for establishing a publication as reliable authority under the CEC is for an expert to simply testify that the publication is

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57. Dabroe v. Rhodes Co., 392 P.2d 317, 322 (Wash. 1964). However, the California Legislature has acknowledged that, even if a judge cautions the jury that "the statements read are not to be considered evidence of truth of the propositions stated, there is [still] a danger that at least some jurors might rely on the author's statements for this purpose." § 721 cmt.

58. Federico v. Ford Motor Co., 854 N.E.2d 448, 453 (Mass. App. Ct. 2006) (holding learned treatises admissible on cross-examination only after the judge decides that it is a reliable authority); Foster v. Barnes-Jewish Hosp., 44 S.W.3d 432, 438 (Mo. Ct. App. 2001) (holding that in order to use scientific evidence to examine an expert witness, counsel must first adduce evidence that the text is reliable authority); Myron *by and through* Brock v. Doctors Gen. Hosp., 704 So. 2d 1083, 1092 (Fla. Dist. Ct. App. 1997) (holding it was error to permit cross-examination using treatises when they had not, at the time of cross-examination, been proven as reliable authority).

59. United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985).

60. *Id.*

61. *Id.*

62. *See* CAL. EVID. CODE § 721(b)(3) (West 2007).

authoritative.[63] The federal courts also seem to require very little.[64] The Advisory Committee's Note to FRE 803(18) adopts a liberal interpretation of the rule favoring admissibility.[65]

Nearly all jurisdictions following similar rules have concluded that when an expert witness does not concede that a text is reliable authority, the burden of proving authoritative status is on the cross-examiner.[66] Most jurisdictions agree that the overall determination of authoritative status rests almost entirely within the trial court's discretion, because it is in the best position to determine what is sufficiently worthy of trust to be considered reliable authority.[67] Accordingly, how a text is deemed sufficiently reliable varies among jurisdictions.

In California, the Senate Judiciary Committee voiced its concern that, under the state's rule, counsel would "use a partisan expert on direct examination to establish the reliability of an obscure authority, which [could] then be used to attack the view of an opposing expert on cross-examination."[68] However, proponents of the bill contended that "the rule [had] been used in federal courts for years and [had] operated to save resources and shorten trials."[69]

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63. *Id.*

64. *See* FED. R. EVID. 803(18). FRE 803(18) allows a text to be deemed reliable by the testimony of any expert, which is a very low standard compared to requirements imposed by other jurisdictions. Allen v. Safeco Ins. Co., 782 F.2d 1517, 1520 (11th Cir. 1986) (citing FED. R. EVID. 803(18) advisory committee's note).

65. *Allen*, 782 F.2d at 1520 (citing FED. R. EVID. 803(18) advisory committee's note). "Rule 803(18) is hinged upon [the position that a publication's authoritative status] is established by any means." *Id.* This is the most liberal view "found in decisions allowing use of the treatise on cross-examination." *Id.*

66. Dabroe v. Rhodes Co., 392 P.2d 317, 321-22 (Wash. 1964); *see also* Miller v. Peterson, 714 P.2d 695, 700 (Wash. Ct. App. 1986) (stating that cross-examiner has burden to prove reliable authority); People v. Behnke, 353 N.E.2d 684, 689 (Ill. App. Ct. 1976) (stating that burden is on cross-examiner to prove authoritativeness).

67. Zimmer v. State, 477 P.2d 971, 977 (Kan. 1970) (citing 4 Wigmore on Evidence § 1692 (3d ed. 1967); KAN. CIV. PROC. CODE ANN. § 60-460 [cc], author's cmt. (West 1970).

68. S. JUDICIARY COMM. BILL ANALYSIS, *supra* note 49.

69. *Id. But see* Canepa, *supra* note 13, at 54 ("This significant new amendment will undoubtedly increase costs and expenses for all sides.").

Courts interpreting FRE 803(18) assure that "[l]earned treatises are considered trustworthy because 'they are written primarily for professionals and are subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake.'"[70] However, in the age of cutting-edge technology and new science, emerging theories change original assumptions. A person may write several articles in a lifetime, and the author's newer articles may be inconsistent with their former ones as he or she adopts new theories over time.[71] How is one article among several inconsistent theories deemed *reliable* or *authoritative* in fields where there are several conflicting ideas, and everyone is an expert? This question resonates in many different types of cases, such as those involving DUI, medical malpractice, toxic torts, and product liability.

When adopting California Evidence Code section 721(b)(3), the Senate Judiciary Committee used the following terms as synonyms for "reliable authority": "learned treatise," "well-accepted treatise," "recognized treatise," and a publication that establishes "a position that is consistent with established thought."[72] Attempting to use an article that is only one among several inconsistent articles does not seem to fit the definitions of "reliable authority" as the Senate Judiciary Committee envisioned. In light of the intent that texts used on cross-examination would be so reliable that they had achieved the status of a "learned treatise" or, at least, presented positions "consistent with established thought," it seems that using *any* publication, regardless of acceptance within its community, is contrary to the legislative intent that the text be "well-accepted."

Other jurisdictions have stated that "the party propounding the written material must show that it is *generally accepted and regarded as authoritative within the profession.*"[73] Missouri, for example, has recognized that learned treatises are written without bias and are far more trustworthy than other publications because they are "subjected

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70. Schneider v. Revici, 817 F.2d 987, 991 (2d Cir. 1987) (quoting FED. R. EVID. 803(18) advisory committee's note).

71. *See* Meschino v. N. Am. Drager, Inc. 841 F.2d 429, 434 (1st Cir. 1988) ("Physicians engaged in research may write dozens of papers during a lifetime. Mere publication cannot make them automatically reliable authority.").

72. S. RULES COMM. BILL ANALYSIS, *supra* note 4.

73. Herrera v. DiMayuga, 904 S.W.2d 490, 494 (Mo. Ct. App. 1995) (emphasis added).

to meticulous scrutiny by the author's peers."[74] This degree of trustworthiness is not attributed to other publications "because many are 'mere expressions of the authors' opinions on controversial subjects' or 'relate to experimentation and speculation based upon preliminary studies and are intended to invoke comment and criticism.'"[75]

The First Circuit requires that both the specific text to be used on cross-examination and its sponsors be deemed authoritative.[76] The court explained that there is incredible pressure for researchers to publish, and it is partly because of this pressure that many publications do "not reach the dignity of a 'reliable authority.'"[77] The court further noted that, even if an expert testified that a particular magazine was "highly regarded," such testimony would not render all of the contents within the magazine reliable authority.[78] Each article must be established as authoritative, regardless of how reputable the periodical or its editor.[79]

There are no bright line rules in California state courts or the federal courts for establishing the authoritative status of publications. As long as an expert witness has testified that a text is authoritative, then the foundation has been laid and excerpts from that publication may be read to the jury.[80] While a publication can be established as "reliable authority" by the testimony of any expert, it is still up to the trial court to ensure that the text has the requisite element of trustworthiness before allowing the text to be read to the jury.[81]

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74. *Id.* (quoting Grippe v. Momtazee, 705 S.W.2d 551, 556-57 (Mo. Ct. App. 1986)).

75. *Id.*

76. *See Meschino*, 841 F.2d at 434.

77. *Id.*

78. *Id.*

79. *Id.*

80. CAL. EVID. CODE § 721(b)(3) (West 2007). Of course, it may be very difficult to establish any one article as authoritative in the profession when there are multiple competing theories in that specific field. *See* Canepa, *supra* note 13, at 52 (acknowledging the difficulty in establishing the reliability of "'cutting edge' theories or techniques").

81. *See, e.g.*, Schneider v. Revici, 817 F.2d 987, 991 (2d Cir. 1987) (noting that even if a text qualified as a learned treatise under FED. R. EVID. 803(18), its admission would remain subject to a balancing of probative value against danger of prejudice under FED. R. EVID. 403).

C. Is Notice Required?

Another significant issue that California courts have yet to address is whether counsel is required to provide notice that a certain publication will be used on cross-examination.[82] Those opposing this requirement argue that requiring such notice will provide opposing counsel with a roadmap of the attorney's impeachment strategy.[83] Accordingly, disclosure "significantly diminishes impeachment value at trial."[84] On the other hand, supporters of pretrial disclosure note that a lack of notice may lead to unfair surprise because attorneys and their experts would be ambushed by publications that they have never read and know nothing about.[85]

When adopting FRE 803(18), the Advisory Committee acknowledged the potential problem of unfair surprise. "Although three members of the committee supported reasonable notice no later than the pretrial conference, the committee decided to address this problem in the advisory note. . . . The proposed language was never included."[86] Some states have also recognized that withholding notice of the content of learned treatises to be used on cross-examination may open the rule to abuse.[87] For example, Massachusetts requires counsel to provide notice at least thirty days before trial of any text they anticipate to use, and "[f]ailure to do so subjects the publication to exclusion."[88]

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82. *See, e.g.,* Rosen v. Regents of Univ. of Cal., No. A113267, 2007 WL 3361312, at *14 (Cal. Ct. App. Nov. 14, 2007).

83. Mike Trentalange, *Use of Learned Treatises on Cross-Examination: Practical Considerations*, 79 FLA. BAR J. 44, 45-46 (2005).

84. *Id.* at 46.

85. *See* Canepa, *supra* note 13, at 52.

86. Charles J. Walsh & Beth S. Rose, *Increasing the Useful Information Provided by Experts in the Courtroom: A Comparison of Federal Rules of Evidence 703 and 803(18) with the Evidence Rules in Illinois, Ohio, and New York,* 26 SETON HALL L. REV. 183, 254 n.220 (1995) (quoting *Hearings Before the Subcomm. on Criminal Justice*, 93rd Cong. 290 (1973)).

87. *See, e.g.,* Connecticut Mut. Life Ins. Co. v. Ellis, 89 Ill. 516, 519-20 (Ill. 1878) ("Great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination.").

88. Canepa, *supra* note 13, at 52 (citing MASS. GEN. LAWS ch 233, §79c

Another factor favoring the establishment of a notice requirement is efficiency, since lack of notice may result in undue consumption of time at the trial. If no notice is required, experts will be forced to take time while testifying to read excerpts of the text to determine whether they agree with it. The costs of litigation would also necessarily increase.[89] Further, without a pretrial disclosure requirement, it may be very difficult for opposing counsel to verify that what is being read for the first time on cross-examination is in fact being read in the correct context, and not just as a result of cherry-picking statements that are out of context.[90] There needs to be some rule of disclosure to avoid unfair surprise.[91]

Although many jurisdictions have required such disclosure,[92] and courts have discretion to so require if requested by counsel,[93] there is no overall requirement in either California or the federal courts that counsel provide notice of the publication and its contents before using it to cross-examine the opposing party's expert witness.[94] Moreover, Federal Rule of Civil Procedure 26(a)(3) "exempts parties from the obligation to disclose information to be used at trial solely for impeachment."[95] Because FRE 803(18) allows texts to be used on cross-examination as substantive evidence, rather than mere impeachment evidence, many trial attorneys argue that in federal

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(1997)).

89. "[C]ases that depend on the testimony of experts are among the costliest." Canepa, *supra* note 13, at 54. Because California Evidence Code section 721(b)(3) does not require notice of what publications will be used in trial, attorneys must be prepared for any publication: "[c]ounsel . . . can no longer rely primarily on his or her own expert to provide scientific or other information without doing their own review of available literature. The increased time will be reflected in higher attorney bills and expert fees." *Id.*

90. James M. Roux & Theodore F. Roberts, *Cross-Examining an Adversary's Expert with a Learned Treatise: Maine Trial Practice and Procedure*, 14 ME. B.J. 220, 222 (July 1999).

91. Canepa, *supra* note 13, at 52.

92. *Id.* (citing MASS. GEN. LAWS ch 233, §79c (1997)).

93. *Id.*

94. *See* CAL. EVID. CODE § 721(b)(3) (West 2007); FED. R. EVID. 803(18).

95. Trentalange, *supra* note 83, at 46 (citing Bearint *ex rel* Bearint v. Dorell Juvenile Group, Inc., 389 F.3d 1339 (11th Cir. 2004)).

courts "such publications clearly need to be disclosed to be used at trial."[96]

D. California Evidence Code Section 352: Prejudicial Effect Versus the Probative Value of Publications on Cross-Examination

Finally, there has been acknowledgement that using publications on cross-examination will "undoubtedly increase costs and expenses for all sides."[97] This runs contrary to the goals envisioned by the Senate Judiciary Committee in proposing the rule: to save time and money.[98] The Senate Judiciary Committee made clear that California Evidence Code section 721(b)(3) was intended to "reduce litigation costs by permitting recognized and learned treatises to be used to counter opposing expert opinions through cross-examination, thereby reducing the time and expense of having to call another expert to battle the opposing expert to establish a position which is consistent with established thought."[99]

Unfortunately, allowing any publication to be used to cross-examine expert witnesses has often confused juries and lengthened the time spent in trial.[100] Some courts have recognized a responsibility to balance the probative value with prejudicial effects of publications used on cross-examination.[101] The following cases reveal that a prejudicial effect argument based on California Evidence Code section 352 may be the best way for California attorneys to get publications barred from cross-examining an expert witness.[102]

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96. *Id.*

97. Canepa, *supra* note 13, at 54.

98. S. RULES COMM. BILL ANALYSIS, *supra* note 4.

99. *Id.*

100. *See, e.g.,* Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 86 (E.D.N.Y. 1975) (discussing the threat of juries being misled and confused when articles, and not treatises, are read into evidence); *see also* Hoffschlaeger Co. v. Fraga, 290 F. 146, 148 (9th Cir. 1923) (discussing how the trial was lengthened because of cross-examination and attempts to have excerpts from texts read allowed on cross-examination).

101. *See, e.g., Apicella*, 66 F.R.D. at 86; *see also* Schneider v. Revici, 817 F.2d 987, 991 (2d Cir. 1987) (noting that even if a text qualified as a learned treatise under FED. R. EVID. 803(18), its admission would remain subject to a balancing of probative value against danger of prejudice under FED. R. EVID. 403).

102. California Evidence Code section 352 gives the court discretion to

In *Apicella v. McNeil Laboratories, Inc.*, the court recognized the dangers of unfair prejudice that may arise when articles, rather than learned treatises, are used in evidence.[103] The court was concerned that the jury would focus on the accuracy of the proposed article rather than the liability issue before them.[104] The court also voiced concerns that the trial would be "considerably extended" if the validity of the article needed to be tried.[105] After weighing the need and probative value of the article against the dangers of unfair prejudice and consumption of time, the court excluded the relevant evidence under FRE 403, the federal rule analogous to California's prejudicial effect rule.[106]

Similarly, in *Hoffschlaeger Co. v. Fraga*, the Ninth Circuit concluded that the trial court did not abuse its discretion when it refused to require a witness to get a book from his home and look in the book for a passage that counsel believed was within the text.[107] The court said that "[i]f counsel desired to contradict the witness by some statement of the author, he should have called the attention of the witness to the statement, and not consume the time of the court by asking the witness to look for something that might or might not exist."[108] The *Hoffschlaeger* decision suggests that to avoid exclusion of evidence under FRE 403 (or the analogous California Evidence Code section 352), counsel must be well-prepared to call specific passages to the attention of expert witnesses and cannot waste time in doing so.

Because one of the main purposes of California Evidence Code section 721 (b)(3) was to save time and expense, allowing a procedure that requires the expenditure of additional time and money to establish a publication as reliable authority seems to defeat the purpose of the code Section. Thus, counsel may argue under California Evidence

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exclude evidence if the probative value of the evidence is substantially outweighed by "the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 2007).

103. *Apicella*, 66 F.R.D. at 86.

104. *Id.*

105. *Id.*

106. *Id.* at 87.

107. Hoffschlaeger Co. v. Fraga, 290 F. 146, 148 (9th Cir. 1923).

108. *Id.*

Code section 352 that the probative value of impeaching an expert witness on cross-examination through the use of a publication is substantially outweighed by the probability of undue consumption of time and confusing the jury. California courts have "broad discretion to weigh the prejudicial impact of testimony against its probative value."[109] Therefore, a California Evidence Code section 352 motion can be a good solution if such a problem arises in trial.[110]

One last consideration is the general rule that "[a]n expert witness may not be cross-examined regarding matters that are not relevant to the expert's opinion or qualifications."[111] Thus, attorneys should be wary of the opposing party using publications that do not relate to the expert's testimony nor help test the expert's qualifications. In such a case, an objection to the use of the publication based on relevancy grounds would be appropriate.

III. A New Approach to Admitting Learned Treatises on Cross-Examination

Allowing any publication to be established as reliable by the testimony of any expert seems inconsistent with other California evidentiary rules. In determining the reliability of publications to be used on cross-examination, California courts should apply the same test used when determining the reliability of new scientific techniques: the *Kelly* test.[112]

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109. People v. Lancaster, 158 P.3d 157, 181 (Cal. 2007) (citing People v. Rodrigues, 885 P.2d 1, 33 (Cal. 1994)); *see also* People v. Ledesma, 140 P.3d 657, 699 (Cal. 2006) ("The scope of cross-examination permitted under section 721 is broad, and includes examination aimed at determining whether expert sufficiently took into account matters arguably inconsistent with expert's conclusion.").

110. *See supra* notes 100-09 and accompanying text. A California Evidence Code section 352 argument may be particularly beneficial when each party has separate expert witnesses prepared to testify, because attorneys can argue that the jury would be especially confused if they had to listen to two or more experts testify and were further subjected to hearing excerpts of publications challenging each expert's opinion. Not only would a jury be confused by so many differing opinions, but the trial would be considerably lengthened if several experts testified, and each expert was subject to cross-examination with the use of publications.

111. People v. Smithey, 978 P.2d 1171, 1184 (Cal. 1999).

112. *See generally* People v. Bolden, 58 P.3d 931, 949 (Cal. 2002) (outlining the requirements of the *Kelly* test) (citing People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976)).

A. Why the Kelly *Test Should Apply to the Admissibility of Publications on Cross-Examination*

The bill history of California Evidence Code section 721 shows that texts would be deemed reliable if they were learned treatises, or well-accepted treatises or texts that revealed opinions consistent with established thought.[113] However, subdivision (b)(3) allows *any publication* to be established as reliable as long as *any expert* has testified as such.[114] Allowing *any* publication is not the same as allowing texts which have reached notoriety so high as to be deemed learned and well-accepted treatises. Allowing the use of magazine articles, or even medical pamphlets, as long as they are published, seems too low a standard, and may not provide enough safeguards to protect trustworthiness. Because most publications have not reached the status of learned treatise, it is crucial that there be higher standards in determining their reliability rather than deeming them reliable simply because an expert testified as such.

Another compelling reason for requiring a more stringent standard when deeming a publication a reliable authority is that excerpts from publications are now admissible as substantive evidence. Traditionally, California did not allow publications on cross-examination because there was a concern they would be used for more than impeachment evidence.[115] Texts were not permitted if it was apparent the cross-examining party was using the publication to support his or her own theory rather than to impeach the opposing expert on the stand.[116] This is because California Evidence Code section 721 was not, and still is not, an exception to the hearsay rule.[117] Accordingly, the rule does not have the additional safeguards generally attached to hearsay exceptions. Since the addition of subdivision (b)(3), however, publications may be used as substantive evidence rather than for impeachment purposes only, even though the amendment failed to include any additional safeguards.[118]

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113. S. RULES COMM. BILL ANALYSIS, *supra* note 4.

114. CAL. EVID. CODE § 721(b)(3) (West 2007).

115. *See* Fisher v. S. Pac. R.R. Co., 26 P. 894, 896 (Cal. 1891).

116. *Id.*

117. Canepa, *supra* note 13, at 50.

118. The rule states that "relevant portions of [admissible publications] may be read into evidence," thus explicitly permitting publications to be used as substantive

Similarly, FRE 803(18) does not make a distinction between the use of publications for impeachment purposes and the use of publications for substantive evidence.[119] Federal Rule 803(18) provides that "statements made in published treatises, periodicals, or pamphlets" which are established as reliable authority by the testimony or admission of an expert are not excluded by the hearsay rule.[120] The rule further states that such statements "may be read into evidence but may not be received as exhibits." [121] Thus, the Federal Rule allows a publication to be read into the record as substantive evidence as long as the proponent established that the text was authoritative.[122] Allowing publications to be used as substantive evidence is supported by a great deal of case law.[123] Because texts are being used for more than mere impeachment, but also as substantive evidence, it is crucial that there be higher standards in determining their reliability before they are admitted, and the *Kelly* test provides those needed standards. [124]

B. How Kelly *Applies to Scientific Techniques, and How it Could Apply to Publications*

To establish the reliability of a new scientific technique, the *Kelly* test requires that the propounding party show that the technique has gained general acceptance in the community.[125] The *Kelly* test was generally known as the *Kelly-Frye* test, because *Kelly* was a California decision which relied heavily on the reasoning in the federal decision,

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evidence rather than mere impeachment. CAL. EVID. CODE § 721(b)(3) (West 2007).

119. FED. R. EVID. 803(18).

120. *Id.*

121. *Id.*

122. *Id.* The language in California's rule is nearly identical to the language in the Federal Rule. *See* CAL. EVID. CODE § 721(b)(3).

123. Tart v. McGann, 697 F.2d 75, 78 (2d Cir. 1982) (listing cases from the Second, Third, and Fifth Circuits, all of which support the proposition that learned treatises are permitted for impeachment purposes *and* as substantive evidence).

124. *See generally* People v. Leahy, 882 P.2d 321 (Cal. 1994) (detailing the safeguards inherent in the *Kelly* test, and the many reasons for keeping the test as it is).

125. People v. Williams, 54 Cal. Rptr. 2d 521, 527 (Cal. Ct. App. 1996) (citing People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976)).

Frye v. United States.[126] However, in 1993, the U.S. Supreme Court held in the *Daubert* decision that "the Federal Rules of Evidence had superseded *Frye*."[127] According to *Daubert*, general acceptance is not required to prove that a new scientific technique is reliable, and instead, the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony [is reliable and relevant]."[128]

However, the California Supreme Court has made clear that *Kelly* survived the *Daubert* decision.[129] Accordingly, to establish the reliability of new scientific techniques in California, attorneys are still required to show that the techniques are generally accepted in the relevant scientific community before they will be admitted in evidence.[130] Said another way, under *Kelly*, the court does not have to decide whether a new scientific technique is reliable because reliability is determined by the applicable scientific community.[131]

California courts can foster consistency by applying this same standard when allowing publications to be used on cross-examination. Thus, propositions written in a given publication should be deemed reliable only if those propositions have gained general acceptance in the pertinent field. If opposing counsel disagrees that a specific publication has gained general acceptance within its relevant community, then he or she should be permitted to attempt to rebut the presumption of reliability, as is permitted when determining the reliability of new scientific techniques under *Kelly*.[132] A court may decide that a given publication is unreliable if several reputable

126. People v. Bolden, 58 P.3d 931, 949 (Cal. 2002).

127. *Id.* (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587 (1993)).

128. *Daubert*, 509 U.S. at 597.

129. People v. Leahy, 882 P.2d 321, 331 (Cal. 1994). The California Supreme Court essentially held that *Kelly*, which was based on the Federal decision, *Frye*, ensured integrity in the trial. *Id.* The Court stated that *Daubert* ignored the merits of *Frye* and there was simply "no justification for reconsidering . . . [the] holding in *Kelly*." *Id.*

130. *Id.*

131. *Bolden*, 58 P.3d at 950.

132. *See id.* at 664 (allowing each side to present arguments as to whether the scientific technique was in fact generally accepted and therefore reliable).

experts in the relevant field have publicly opposed the propositions within the publication.[133]

One major drawback of the *Kelly* standard, however, is that in a field where there are multiple competing scientific theories, it may be the case that none of them will be generally accepted in the community. Accordingly, the *Kelly* standard may be very difficult, if not impossible, to meet in such a case. This is especially problematic when it comes to new and "cutting edge" theories, because general acceptance may not occur until long periods of time have passed and eventually one theory is deemed more reliable by the community than the others.[134] Notwithstanding, the reliability gained by applying *Kelly* safeguards to publications admitted on cross-examination[135] far outweighs the complications that could arise when multiple scientific publications propose competing theories, none of which have gained general acceptance in the community.[136]

IV. CONCLUSION

California Evidence Code section 721, which traditionally allowed the use of learned treatises on cross-examination for impeachment purposes only, has been widely expanded by the inclusion of subdivision (b)(3). This amendment allows parties to use publications to cross-examine an expert witness not just for impeachment purposes, but also as substantive evidence.[137] California has no published cases interpreting this ten-year-old amendment, therefore leaving plenty of room for interpretation of the rule and the procedures needed to implement the rule.[138]

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133. This is the practice when courts find that scientific techniques have been publicly opposed and deemed unreliable by several scientists in the applicable field. *Id.* at 665.

134. *See* Canepa, *supra* note 13, at 52 (acknowledging the difficulty in establishing the reliability of "'cutting edge' theories or techniques").

135. *See generally* People v. Leahy, 882 P.2d 321 (Cal. 1994) (detailing the safeguards inherent in the *Kelly* test, and the many reasons for keeping the test as it is).

136. *See id.* at 327-31.

137. *Id.*

138. The only cases the author has located regarding the interpretation of CAL. EVID. CODE § 721(b)(3) have been unpublished cases which reveal the significant need for more consistency and some sort of interpretation by a higher court. *See*

As a result, there is much inconsistency within California's evidentiary law. California Evidence Code section 721(b)(3) allows relevant portions of a publication to be read into evidence once the publication is established as reliable.[139] Reliability can be established when *any* expert testifies that the publication is reliable, even if other experts in the community believe otherwise.[140] In contrast, when dealing with the admission of scientific techniques, California courts must follow the *Kelly* test, which requires that the technique be generally accepted within the relevant scientific community before reliability is established.[141] *Kelly* has been analyzed numerous times in California case law, and the California Supreme Court continues to adhere to the standard because of the protections it offers in combating the "misleading aura of certainty" which often accompanies scientific evidence.[142]

Because California's evidentiary law offers little guidance in the application of California Evidence Code section 721(b)(3), attorneys and judges alike could benefit significantly from the application of the *Kelly* standard to the determination of whether publications are

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generally Rosen v. Regents of Univ. of Cal., No. A113267, 2007 WL 3361312, at *14 (Cal. Ct. App. Nov. 14, 2007) (each party and the trial judge had separate and conflicting interpretations of Section 721, and of how a publication may be deemed reliable); Lopez v. Rashidi, No. E030977, 2004 WL 161795, at *12 (Cal. Ct. App. Jan. 28, 2004) ("[i]t is not clear whether the requirement that [a] treatise be established as reliable authority is governed by Evidence Code section 403" or 405); Stoll v. Bush, No. B159275, 2003 WL 22792314, at *4 (Cal. Ct. App. Nov. 25, 2003) (acknowledging that neither party, nor the court's own research had disclosed any California case on point regarding whether California Evidence Code section 721 required reliability to be established by a "designated expert.").

139. CAL. EVID. CODE § 721(b)(3) (West 2007).

140. *Id.*

141. People v. Williams, 46 Cal. App. 4th (App. Ct. 1996) (citing People v. Kelly, 549 P2d 1240, 1244 (Cal. 1976)).

142. Roberti v. Andy's Termite & Pest Control, Inc., 113 Cal. App. 4th 893, 899-900 (App. Ct. 2003).

reliable enough to be used as substantive evidence on cross-examination. This would not only add consistency to California evidentiary law, but would also provide the procedures and guidelines that have been absent in admitting excerpts of publications on cross-examination.

Leah Beth Payne[*]

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* J.D. Candidate, California Western School of Law, April 2010. Thank you to the Deputy City Attorneys in the Criminal Division of the San Diego City Attorney's Office for guiding me to this topic. To Professor William Lynch of California Western School of Law and the diligent staff of the *California Western Law Review*, thank you for all of your valuable suggestions. To my incredible family who always remind me that we are more than conquerors through Jesus Christ, thank you for your never ending support and encouragement. You have each gone above and beyond for me and I am forever grateful. To my energetic and yet so patient Cody Micah, thank you for bringing more joy to my life than I ever knew possible. You never cease to amaze me and I still can't believe that I get to be the one that you call mommy. Finally, to my unbelievably dependable husband, your enduring patience and unconditional love have been behind every good thing I've accomplished. No one would ever believe how much you do for me on any given day, and I know that I don't deserve you. You will never fully know how much I adore you, but I'm determined to try and show you for the rest of my life.