

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

SPRING 2021

CRAFTING APPELLATE JURISDICTION WITHOUT ARTIFICE



Kent L. Richland

In *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 (*Kurwa I*), the California Supreme Court disapproved a popular practice created by civil litigators to achieve immediate appellate review of adverse rulings on key claims in a multi-count complaint where other, minor claims had not been disposed of in the trial court. The Court held that this practice—which involved voluntary

dismissal without prejudice of the minor claims, stipulated waiver of the statutes of limitations on those claims, and agreement that the minor claims would not be tried unless the appellate court reversed on the other claims—violated the one final judgment rule. This article explains the genesis and reasoning of the little-known

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FROM THE TRENCHES: USING EVIDENCE OF A FELONY CONVICTION



Robert Glassman

As we masked up and filled our briefcases with Purell and other disinfectants for a recent jury trial in Bakersfield in the midst of the ongoing pandemic, we had a lot on our minds. We were mostly preoccupied with the logistics of how we were going to try our case in a safe and socially distanced courtroom. But, just as before COVID-19, we also were

consumed with thoughts of what we had to do to win the case for our client, who suffered serious injuries when the defendant rear-ended the car she was riding in.

There were irreconcilable versions of how the accident occurred. The defendant claimed that our client’s car cut in front of him from another lane and he had no time to stop. Our client said the car she was in was stopped at an intersection. There were no independent witnesses. It was a classic “he said, she said” credibility battle.

But we had something to tip the balance: the defendant’s background. It was enough to force him to admit full liability on the eve of trial.

Here is how it unfolded:

During discovery, we learned that in 2008 the defendant had been found guilty of the felony of aggravated sexual assault with a 5-year-old child. He spent 3 years in state prison and had to register as a lifetime sex offender. He was released from prison in 2011, four years before the collision.

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PRESIDENT'S MESSAGE



Susan Leader

As we close the chapter on 2020, I am honored to step into the very big shoes left by Valerie Goo, the longest serving President in ABTL history, and serve as your new President. While there is still uncertainty as we navigate how and when to return to in-person programming safely, I'm confident that with the leadership and support of my fellow Executive Board members—Manuel Cachán (Vice President), Kevin Boyle (Treasurer), and Michael Mallow (Secretary)—and Executive Director Linda Sampson, we will continue to steer the ABTL to new heights.

While we await the return of in-person programming, Robert Wallan kicked off our virtual programming efforts on March 23 with an insightful discussion with our board members Judge Gutierrez, Justice Segal, Judge Taylor, and Judge Wardlaw on the state and future of the courts in COVID. Next month, Andre Cronthall and board member Judge Brazile will host our first ever state-wide webinar featuring a discussion with our newest Supreme Court Justice Jenkins. And not to be outdone, our Young Lawyers Division will be hosting an online discussion this month between board member Suzelle Smith and Senator Doug Jones regarding lessons learned in his illustrious career that is sure to be a draw for our young lawyer members.

Notwithstanding COVID, I'm happy to report that our membership continues to grow and diversify. We now have a record number of members from westside firms on both the plaintiff and defense sides of the bar. Our work as an organization reflects our ongoing commitment to promoting thoughtful discourse between the bar and the bench. Our civility committee, led by Amy Lucas and Dan Warshaw and comprised of almost two dozen board member judges and attorneys, continues to meet regularly and explore how to transform civility in our practice from an aspirational objective to a requirement. A special thank you to our former board member Justice Brian Currey for his commitment and work on this important committee.

As much as we've been able to accomplish virtually, I miss seeing and connecting in-person with each of you at our ABTL cocktail receptions and dinners. As I've been navigating a year of virtual work and school with my children, I rely even more on my Zoom time with my colleagues and friends in the ABTL community to stay connected. I'm happy to report that planning for the annual seminar in-person and in Hawaii is well under way, as well as initial planning for in-person programming in the second half of this year. I look forward to seeing everyone soon and celebrating what we've been able to accomplish both personally and professionally in the face of these unimaginable challenges.

In the meantime, stay well and see you soon.

Susan Leader

ABTL President, 2021

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Kurwa opinion and suggests a potential basis for other creative approaches to the issue so that litigators can avoid a frustrating and time-consuming detour to the appellate court.

The Problem

There are disjuncts between the economies of civil litigation practice and judicial economy. For example: the typical civil lawsuit consists of multiple claims, some more valuable than others. Sometimes the most valuable claims are eliminated in pretrial proceedings, leaving only “minor” claims to be litigated at trial. If the minor claims are truly insignificant, they can be jettisoned. But frequently their value is more than marginal and they are not expendable. In this situation, all the parties may conclude that rather than incurring the considerable expense of a trial on the minor claims alone, it makes economic sense to first test on appeal the validity of the dismissal of the more valuable claims; that way, should those claims be reinstated, all the claims could be tried together on remand.

There is one problem though. The rules of appellate review stand in the way of an appeal of only *some* of the claims between the parties. Rather, under the “one final judgment rule,” a judgment is ripe for appeal only when *all* causes of action have been disposed of. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) The reason for the rule is judicial economy; if piecemeal appeals of less than all claims were permitted, appellate courts would be forced to visit and revisit cases over and over again. In the face of the one final judgment rule, a plaintiff desiring an immediate appeal of the major claims would have no choice but to dismiss the minor claims, thereby creating a final judgment—but at the expense of abandoning a significant part of the plaintiff’s case.

Of course, the plaintiff could seek immediate review of the dismissed claims by way of extraordinary writ. But writ review is entirely discretionary with the appellate court, and appellate courts don’t ordinarily grant writ review simply because it is more economical for the parties. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273.) Indeed, since the percentage of writ petitions summarily denied approaches 95%, writ review is not a dependable alternative to an appeal. (See *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1241, fn. 3; see also Jud. Council of Cal., Rep. on Court Statistics (2019) Fiscal Years 2008-09 Through 2017-18 Statewide Caseload Trends, table 6: Disposition of Original Proceedings, p. 55 <<https://www.courts.ca.gov/documents/2019-Court-Statistics-Report.pdf>> [as of Apr. 5, 2021].)

The Putative Solution

In the face of this dilemma, civil litigators did not simply capitulate. Rather, they came up with an approach that seemed to create a final judgment and remain consistent with the goal of judicial economy while at the same time preserving for potential trial the minor causes of action. Their putative solution required an agreement among the parties that had three essential components.

First, the plaintiff agreed to voluntarily dismiss the minor causes of action *without prejudice* (i.e., reserving the right to try them at a later date). Since caselaw made it clear that “claims that have been dismissed, whether with or without prejudice, are not ‘pending’ for purposes of the one final judgment rule” (*Abatti v. Imperial Irrigation District* (2013) 205 Cal.App.4th 650, 666, citation omitted), the voluntary dismissal of the remaining claims created a final judgment subject to appeal.

Second, the parties agreed to waive the statutes of limitations on all voluntarily dismissed claims. This provision would ensure that the minor, dismissed claims would not be time-barred should the duration of the appellate process exceed the statutory time limit on those claims.

Third, the parties agreed that after the appeal the voluntarily dismissed claims would be dismissed with prejudice unless the appellate court reversed the judgment and remanded the case to the trial court (i.e., found some error in dismissing one or more of the major claims). This provision was crucial. It arguably preserved the one final judgment rule’s judicial economy rationale by tying the fate of the dismissed claims to the resolution of the major causes of action on appeal, thus preventing piecemeal appeals of the separate claims.

The Response of the Courts of Appeal—*Don Jose’s et al.*

No one knows how long this approach may have been employed without being subjected to judicial scrutiny. Since the parties’ side agreements would not necessarily have been on the record, the appellate courts could have seen nothing more than a judgment with all causes of action dismissed either by the trial court or by the plaintiff—in other words, a judgment that seemed perfectly ordinary and final.

Eventually, however, the issue found its way into an appellate court and a published opinion. In *Don Jose’s Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115 (*Don Jose’s*), the Court of Appeal made it clear that it did not approve of the practice. The first words of the opinion are: “In this case we condemn the

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artifice of trying to create an appealable order from an otherwise nonappealable grant of summary adjudication by dismissing the remaining causes of action without prejudice but with a waiver of applicable time bars.” (*Id.* at p. 116.) And echoing the tone of disapproval with which the opinion begins, the court notes that the “stipulation here virtually exudes an intention to retain the remaining causes of action for trial” and “the one final judgment rule does not allow contingent causes of action to exist in a kind of appellate netherworld.” (*Id.* at p. 118.) Thus, the central holding of *Don Jose’s* appears to be that so long as any cause of action remains open to possible trial, there can be no final judgment from which a valid appeal may be taken—a conclusion in direct tension with the principle that a judgment is final for purposes of appeal even if some of the causes of action had been voluntarily dismissed without prejudice.

Moreover, the entire tone of the opinion indicates that the court is *offended* by the parties’ effort to craft a final, appealable judgment that, even if somewhat unorthodox, simply attempts to achieve economy for litigants while at the same time preserving the goals of the one final judgment rule. That reaction seems misplaced. Attempting to create an appealable judgment, even if unsuccessful, is not malum in se conduct.

The Supreme Court Weighs In—*Kurwa I*

Despite *Don Jose’s* unvarnished disapproval, litigants continued to test judicial tolerance of the voluntary-dismissal-with-stipulated-time-waiver approach. The result: over the next several years, four additional appellate courts issued published opinions agreeing with *Don Jose’s* holding that the practice violated the one final judgment rule. (See *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1469; *Hill v. City of Clovis* (1998) 63 Cal. App.4th 434, 445; *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79, 83; *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 242.) Significantly, these opinions were published even though none purported to break new ground; instead, all expressed solidarity with *Don Jose’s* animosity by quoting liberally and enthusiastically from *Don Jose’s*.

Thus, as the 1990’s transitioned to the 2000’s, appellate courts were unanimously embracing *Don Jose’s* antipathy to the voluntary-dismissal-with-time-waiver practice. But the litigators persisted. And in 2012, that persistence paid off when, in *Kurwa v. Kislinger*, a Court of Appeal finally published an opinion holding that a judgment was final for purposes of appeal so long as all claims were either tried or dismissed, even if the dismissals were voluntary and accompanied by a statute of limitations waiver. (See

Kurwa v. Kislinger (2012) 204 Cal.App.4th 21, 30, revd. *Kurwa I, supra*, 57 Cal.4th 1097.)

The litigators’ victory was short-lived. The California Supreme Court reversed the judgment of the Court of Appeal in a unanimous opinion. In doing so, the Court made it clear that violation of the one final judgment rule was *not* based on the fact that claims were dismissed without prejudice. The Court explained that a plaintiff has a statutory right to voluntarily dismiss a cause of action without prejudice before trial, and that “such a dismissal, unaccompanied by any agreement for future litigation, does create sufficient finality as to that cause of action so as to allow appeal from a judgment disposing of the other counts.” (*Kurwa I, supra*, 57 Cal.4th at p. 1105.)

Rather, the Court located the one final judgment problem in the statute of limitations waivers. The Court noted that without such a waiver, a dismissal of claims without prejudice “includes the very real risk that an applicable statute of limitations will run before the party is in a position to renew the dismissed cause of action.” (*Kurwa I, supra*, 57 Cal.4th at p. 1105.) By contrast, the Court asserted, “when the parties agree to waive or toll the statute on a dismissed cause of action pending an appeal, they establish an assurance the claim *can* be revived for litigation at the appeal’s conclusion. It is that assurance—the agreement keeping the dismissed count legally alive—that prevents the judgment disposing of the other causes of action from achieving finality.” (*Id.* at p. 1106.)

The Court overstates the effect of the limitations waiver when it says it creates an “assurance” that the dismissed counts can be revived after appeal. At most, the waiver removes one potential defense that *might*, depending on the length of the statutes of limitations, preclude the dismissed claims from being brought postappeal. Since the statutes of limitations on many California civil claims are three years, four years, or more (see, e.g., 3 years for liability based on statute (Code Civ. Proc., § 338, subd. (a)); 3 years for trespass (*id.*, § 338, subd. (b)); 4 years for breach of written contract (*id.*, § 337, subd. (a)); 4 years for breach of written lease (*id.*, § 337.2); 10 years for action on a judgment (*id.*, § 337.5 subd. (b))), and since the median time for processing a civil appeal in California is 589 days (Jud. Council of Cal., Rep. on Court Statistics (2020) Fiscal Years 2009-12 Through 2018-2019 Statewide Caseload Trends, figure 33: Civil Appeals: Time From Notice of Appeal to Filing Opinion (90th Percentile and Median), p. 36 <https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf> [as of Apr. 5, 2021]), a dismissed claim could survive an intervening appeal even without a limitations waiver, especially

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when the action was filed early in the limitations period and the primary claim was dismissed early in the litigation.

Moreover, the opinion fails to acknowledge that an agreement between the parties to tie the fate of the dismissed claims to the outcome of the appeal means that the most significant barrier to any postappeal trial is the need to persuade the appellate court that there was reversible error in the trial court. Under the opinion, any party is authorized to dismiss without prejudice unadjudicated causes of action and appeal others, and nothing can stop that party from timely refileing the dismissed claims later—even if the appeal is unsuccessful. Such a scenario would clearly permit a multiplicity of trial proceedings and appeals, in direct contravention of the policies behind the one final judgment rule. By contrast, under an agreement of the parties tying the continuing viability of the dismissed claims to the outcome on appeal, the situation is functionally identical to a case where all claims had been adjudicated before the appeal—claims could not be split off and tried and appealed separately.

Indeed, the opinion all but concedes that such a deal between the parties achieves the goal of judicial economy embodied in the one final judgment rule, noting that in the presence of such an agreement, “it might be debated whether the *Don Jose’s* rule is needed to prevent multiple appeals.” (*Kurwa I, supra*, 57 Cal.4th at p. 1106.) But rather than explaining how multiple appeals could still be pursued under such an agreement, the opinion points instead to the one final judgment rule’s “salutary effects beyond simply reducing the number of appeals.” (*Ibid.*)

The “salutary effects” the opinion points to seem mere makeweights, particularly in the context of the issue before the Court. The opinion first offers that the one final judgment rule avoids “uncertainty and delay in the trial court.” (*Kurwa I, supra*, 57 Cal.4th at p. 1106.) But however true that might be where a party sought to appeal some claims while others remained pending in the trial court, it obviously has no application where, as here, *nothing* remains pending in the trial court. The opinion also claims that several benefits may flow from requiring all claims to be adjudicated in the trial court prior to the appeal—the trial court might change its mind on the issues being appealed or additional trial court rulings will make a more complete record on appeal. (*Ibid.*) But these “salutary effects” are at best highly speculative, particularly where the claims that would remain to be adjudicated are so peripheral to the central claims that they are not worth adjudicating separately. It is hard to see how these vague potential benefits could independently justify the result—in the absence of any substantive impact on judicial economy—as the opinion claims.

After *Kurwa I*, California law regarding the one final judgment rule is marred by a central inconsistency: a judgment deciding some fully adjudicated claims may be made final and appealable by the voluntary dismissal of unadjudicated claims, even where the limitations periods for the latter claims are long enough that revival of those claims is virtually guaranteed and may result in a multiplicity of appeals. Yet under *Kurwa I*, the one final judgment rule precludes the parties from appealing after stipulating to a waiver of the limitations periods of the adjudicated claims—even if the parties have also agreed to a structure that insures no multiplicity of appeals.

Despite its weaknesses, *Kurwa I* is a unanimous California Supreme Court decision that relies on five intermediate appellate court decisions expressing passionate hostility to a perceived “artifice.” There’s not much chance its precise holding will be revisited any time soon.

But meanwhile, the economic realities of civil litigation practice remain, and the circumstances that gave rise to *Kurwa I* and its predecessors will continue to recur. No doubt litigators will continue to seek new approaches to the problem, informed by the doctrinal weaknesses of *Kurwa I* and forged by the demands of litigation economics, perhaps leading someday to a viable solution. In the meantime, a few potential (but less than perfect) solutions are suggested below.

Potential Solutions

There are a few possible approaches to the *Kurwa* conundrum that would appear still to be available under current caselaw.

First, the plaintiff can always unilaterally dismiss the unadjudicated claims without prejudice and accept the risk that those claims will be unavailable for trial after the appeal. *Kurwa I* makes it clear that claims disposed of in that fashion are sufficiently final to create an appealable judgment. And, as noted above, the statutes of limitations on a number of California claims exceed three years, which may provide sufficient time to complete the appeal and file a new action within the applicable limitations periods.

A riskier variation on that approach would be for the plaintiff to voluntarily dismiss without prejudice the unadjudicated claims, coupling that dismissal with an agreement with the defendant that the parties will make every effort to expedite the appeal. The danger in this approach is that the appellate court may view the side agreement to expedite the appeal as equivalent to the side agreement to waive the statute of limitations. But the counter

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argument is that the agreement to expedite cedes the timing to the appellate court and does not result in an “assurance” of retrial comparable to the stipulation condemned in *Kurwa I*.

Another, seemingly less risky approach would be for the plaintiff to voluntarily dismiss the adjudicated claims *with* prejudice (thus clearly creating an appealable judgment) while at the same time the parties agree on some monetary value for the adjudicated claims that would be paid only if the plaintiff were successful both in getting the judgment reversed *and* at trial of the remanded claims. This approach would seem entirely consistent with the one final judgment rule and would provide the plaintiff with potential recovery on the adjudicated claims, but only if the plaintiff is able to overcome several significant hurdles to recovery.

Postscript: *Kurwa v. Kislinger Redux (Kurwa II)*

Several years after *Kurwa I* was decided, there was a new development that could further encourage litigators to experiment with finding a solution to the one final judgment problem presented there. This new development came from a surprising source—another California Supreme Court decision in the *Kurwa* case itself.

After the *Kurwa* case was remanded to the trial court, the plaintiff sought to secure a final judgment by dismissing his adjudicated claims with prejudice. But there was another open claim—the defendant’s cross-complaint against the plaintiff. And the defendant had “no incentive” to dismiss that claim, as to which the parties had stipulated to waiver of the statute of limitations. (*Kurwa v. Kislinger* (2017) 4 Cal.5th 109, 115 (*Kurwa II*)). The trial court refused to vacate that stipulation or its earlier judgment, holding it had no jurisdiction to do so. (*Id.* at p. 116.)

The Supreme Court held the trial court’s ruling was error. It explained that because the core holding of *Kurwa I* was that the previous judgment was not final and appealable, “[i]t stands to reason that . . . the trial court . . . retains the power to render one.” (*Kurwa II, supra*, 4 Cal.5th at p. 116.) Thus, the high court concluded that “when the parties, by agreement, make a failed attempt to secure appellate review of a trial court’s nonfinal judgment, the trial court retains the power to vacate both the defective judgment and the underlying stipulation—that is, to restore the parties to the positions they would have been in absent the failed attempt.” (*Id.* at p. 118.)

Kurwa II stands for the proposition that a failed attempt to create an appealable judgment by dismissal and/or stipulation is

not necessarily fatal. A trial court’s entry of a nonfinal judgment cannot divest it of jurisdiction to act further in the case because, by definition, the trial court’s jurisdiction is not exhausted until a final judgment has been entered. And if the parties stipulated to provisions under the misapprehension that they were creating a final, appealable judgment, the trial court could provide relief and rectify the situation on remand.

Kurwa II provides litigators whose efforts to create a final judgment have been unsuccessful with a road map to the status quo ante. It effectively constitutes insurance that all is not lost if an experiment in creating an appealable judgment does not work. As such, the decision represents an important fail-safe mechanism that presumably will encourage such experimentation.

The one final judgment rule exists principally to protect appellate courts from having to entertain multiple, piecemeal appeals. Generally, if that goal places a burden on the litigants, it’s tough luck for the litigants—judicial economy is simply a more important societal goal. But if litigators can create an approach that satisfies the demands of both judicial economy and litigation economy, that’s a boon for everyone. After *Kurwa II*, the legal landscape presents a favorable environment for finding a solution to the *Kurwa* conundrum.

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Although the Evidence Code permits evidence of a felony conviction “[f]or the purpose of attacking the credibility of a witness” (Evid. Code, § 788), “upon proper objection to the admission of a prior felony conviction for purposes of impeachment in a civil case, a trial court is bound to perform the weighing function prescribed by [Evidence Code] section 352” (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274). Courts often consider whether the prior conviction involved “moral turpitude,” which the Supreme Court has defined “as a “general readiness to do evil”” which may, but does not necessarily, involve dishonesty.” (*People v. Gray* (2007) 158 Cal.App.4th 635, 640; see *People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24 “[T]he law provides that any criminal act or other misconduct involving moral turpitude suggests a willingness to lie and is not necessarily irrelevant or inadmissible for impeachment purposes. [Citations.] However, to the extent such misconduct amounts to a misdemeanor or is not criminal in nature, it carries less weight in proving lax moral character and dishonesty than does either an act or conviction involving a felony”].)

Did our defendant’s conviction qualify? It did. Committing a lewd act with a child, such as what the defendant did in our case, is a crime of moral turpitude and moral depravity that has some tendency in reason to undermine witness credibility. So, the trial court had discretion to permit evidence of the conviction. (See *People v. Gray, supra*, 158 Cal.App.4th at p. 640 [“whether the conviction proposed as impeachment involves moral turpitude is for the trial court to decide, not the jury”].)

Next, we anticipated the pushback we would get from the other side that the defendant’s conviction should not be admitted since it occurred more than 10 years ago. When determining whether to admit a prior conviction, a judge should consider how recently it occurred, but courts have often approved admission of evidence of convictions that were relatively remote in time. (E.g., *People v. Carter* (2014) 227 Cal.App.4th 322, 329-330 [trial court properly admitted evidence of witness’s 11-year-old conviction for theft and burglary; weight of this evidence was for jury to decide in light of witness’s explanations]; *People v. Aguilar* (2016) 245 Cal.App.4th 1010, 1020 [trial court properly admitted evidence of eight-year-old prior conviction]; *Robbins v. Wong, supra*, 27 Cal.App.4th at pp. 268, 274 [trial court properly admitted evidence of the plaintiff’s 15-year-old prior conviction of a drug-related felony to attack the plaintiff’s credibility in a personal injury action]; *Holley v. J & S Sweeping*

Co. (1983) 143 Cal.App.3d 588, 594-595 [trial court properly admitted evidence of the plaintiff’s 13-year-old prior felony conviction for the crime of receiving stolen property to attack the plaintiff’s credibility in a negligence action; “[a]lthough the factor of remoteness is an important part of the balancing process in assessing the probative value of a prior felony conviction [citations], nonetheless it is only one factor to be considered in the exercise of the court’s discretion”].)

Accordingly, we argued that under prevailing California law, the defendant’s felony conviction in 2008—7 years before the collision—was not too remote. And because his felony conviction was a crime of moral turpitude that was not remote in time, evidence of it should be admissible. This was especially true, we argued, in this “he said vs. she said” case where witness credibility was of utmost importance.

There was an additional helpful fact. In deposition, the defendant testified that he disclosed his felony conviction to his boss—for whom he was driving at the time of the accident—before being hired. But the boss testified in his deposition that the defendant did not, in fact, disclose the conviction.

In sum, we argued that evidence of the defendant’s felony conviction, and of the fact that he falsely claimed under oath that he had disclosed it to his boss, was extremely relevant to help the jury decide whether they should believe him as a witness. Indeed, we argued, CACI Jury Instruction No. 211 regarding “Prior Conviction of a Felony” was designed for just this kind of scenario. It states: “You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction to help you decide whether you should believe the witness”

In our case, the defendant’s felony conviction involving moral turpitude certainly suggested that he had a willingness to lie, lacked moral character and was dishonest. Accordingly, we argued, the jury should be allowed to consider this fact when assessing his credibility as a witness.

We raised the issue by way of an in limine motion. When the judge indicated in his tentative ruling that he was going to admit the evidence of the prior conviction, the defense admitted liability and stipulated that the defendant would not testify. This would not have happened had we not conducted discovery on the defendant’s background and learned of his prior felony conviction involving moral turpitude. Once we

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had that information and convinced the court and the defense that it was coming in at trial under California law, we were able to turn a “he said, she said” disputed-liability case into one in which the jury only had to decide causation and damages. After two exhausting weeks in a courtroom retrofitted with plexiglass COVID dividers separating the jurors from the lawyers and the lawyers from the witnesses, the jury found for our client.

So, make sure you know your adversary’s background before you try your next case. It just may make all the difference between winning and losing.

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YOUNG LAWYERS DIVISION UPDATE



Jonathan Slowik



Christina Maria Assi



Robert Glassman

The ABTL’s Young Lawyers Division kicked off its activities this year with a community-impact project with Los Angeles Family Housing. The YLD raised funds to purchase and assemble hygiene kits for unhoused families in Los Angeles and, thanks to the generosity of the ABTL membership, was able to raise more than double its funding goal! YLD members then joined together (virtually) to assemble 200 hygiene kits and donate over \$2,500 to Los Angeles Family Housing.

Looking ahead through 2021, the YLD will continue its focus on presenting exciting and informative programming, as well as providing opportunities for younger lawyers to interact with the judiciary, network with fellow young lawyers, and deepen connections with the broader legal community. In April, the YLD has planned its first of six brown bag lunches, this one featuring a pair of Los Angeles Superior Court jurists: Presiding Judge Eric C. Taylor and Judge Lawrence P. Riff.

Be sure to keep an eye on the ABTL Report and your email inboxes for updates about upcoming YLD events. And if you are interested in helping plan YLD events, please reach out to YLD co-chairs Jonathan Slowik and Christina Assi or YLD vice-chair Robert Glassman about getting involved.

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**THE THREE TYPES
OF DEPOSITION ERRATA:
“THAT’S NOT WHAT I SAID,”
“THAT’S NOT WHAT I MEANT,”
AND “LET ME JUST CHANGE
MY ANSWER”**



Alexander Vitruk

The deposition you took was a success. The stage is set for summary judgment. In flies an errata sheet with material changes to the witness’s testimony. The pivotal “yes” has become “no” or a meandering web of words. The sole reason given for the lawsuit just expanded into two or three. Perhaps “early 1990s” was rewritten to say “2019.” What next?

On the flip side, you represent someone seeking to change prior deposition testimony. What can you do under governing law? What *should* you do in light of your ethical obligations?

Correcting deposition testimony may seem routine or even ministerial at first blush. But lawyers must be on their toes. Your tactics and preparation may be the difference between obtaining summary judgment for your client and marching onward to trial. Between meeting your ethical duties and flouting them. Between prevailing at trial and losing.

This article explores the law and practice of deposition errata under Ninth Circuit and California authorities.

What Types of Deposition Errata are Permitted?

In practice, we tend to see three types of deposition errata in Ninth Circuit and California and state court matters—those that:

Correct inaccurately recorded testimony (“that’s not what I said”);

Correct accurately recorded testimony of an inadvertently wrong answer (“that’s not what I meant”); or

Correct accurately recorded testimony of an answer given correctly that is now inconvenient (“let me just change my answer”).

While the first two categories are hardly controversial, the third category can be downright frustrating. But what is the legal standard?

Ninth Circuit. The relevant language of Fed. R. Civ. P. 30(e)(1) provides that a deponent may, within 30 days, “review the transcript . . . [and] if there are changes in form or substance . . . sign a statement listing the changes and the reasons for making them.” Corrections cannot be “purposeful rewrites,” “contradictory[] changes,” or “changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment.” *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1225–26 (9th Cir. 2005). Simply put, “a deposition is not a take home exam[]” or an interrogatory. *Id.* (citation omitted).

To determine whether transcript errata may be disregarded as a sham, courts may consider “the number of corrections, whether the corrections fundamentally change the prior testimony, the impact of the corrections on the case (including the extent to which they pertain to dispositive issues), the timing of the submission of corrections, and the witness’s qualifications to testify.” *Lewis v. CCPOA Benefit Tr. Fund*, No. C-08-03228, 2010 WL 3398521, at *2 (N.D. Cal. Aug. 27, 2010). Also relevant is the question of whether deponent’s counsel attended the deposition and had the opportunity to question his client or seek clarity about the questions asked by opposing counsel. *See, e.g., Viasat, Inc. v. Acacia Commc’ns, Inc.*, No. 16cv463 BEN (JMA), 2018 WL 899250, at *5 (S.D. Cal. Feb. 15, 2018).

Even where “changes are not the ‘paradigmatic examples’ of contradiction, such as changing ‘yes’ to ‘no’[,] . . . [they can be] contradictory nonetheless.” *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 902 (N.D. Cal. 2016). Context is important in determining whether a change is contradictory. *See, e.g., Exp. Dev. Can. v. ESE Elecs. Inc.*, No. CV 16-02967-BRO (RAOx), 2017 WL 2713537, at *6 (C.D. Cal. June 20, 2017). Further, the errata must provide the reasons for the changes; one- or two-word statements will not suffice. *See, e.g., Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2009 WL 4842801, at *7 n.2 (S.D. Cal. Dec. 14, 2009), *vacated on other grounds*, 466 F. App’x 613 (9th Cir. 2012). Finally, the court may award sanctions for violations of Fed. R. Civ. P. 30(e). *See Combs v. Rockwell Int’l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991).

California. Section 2025.520(b) of the California Code of Civil Procedure (“C.C.P.”) similarly allows a deponent to make “change[s] to] the form or the substance of the answer to a question” within 30 days, but does *not* require a signed statement listing the changes and the reasons for making them. Nonetheless, “sham” modifications are generally improper. *See Gray v. Reeves*, 76 Cal. App. 3d 567, 574 (1977). A court *may*

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reject an errata that “chang[es] the content of an answer given by a party directly in the deposition, especially where there is no assertion the original answer was incorrectly transcribed or the question was misleading or ambiguous.” *Id.* Among published California decisions, however, it appears courts have rejected sham deposition errata only when they were submitted *after* the expiration of the 30-day period allowed by C.C.P. § 2025.520(b). *See id.*; *see also Shapero v. Fliegel*, 191 Cal. App. 3d 842, 849–50 (1987). Older published California decisions have allowed substantive changes to deposition testimony as long as they were timely, explaining that the proper remedy is the opposing party’s ability to read aloud the original answer at trial. *See, e.g., Lewis v. W. Truck Line*, 44 Cal. App. 2d 455, 461 (1941). The Rutter Guide and unpublished California decisions are generally in accord.

Practitioners contesting deposition errata may take some solace in the fact that in California state court federal decisions are persuasive on discovery issues absent contrary California decisions. *Liberty Mutual Ins. Co. v. Superior Ct.*, 10 Cal. App. 4th 1282, 1288 (1992). At least one federal court applied both federal and California state law. *Fredianelli v. Jenkins*, 931 F. Supp. 2d 1001, 1007–08 (N.D. Cal. 2013). California courts also have inherent discretion to strike irrelevant and inadmissible evidence, but it appears that no California court has struck a deposition errata on that basis.

Notwithstanding the similarities between Fed. R. Civ. P. 30(e) and C.C.P. § 2025.520(b), the key differences between the statutes and the dearth of published California decisions on sham deposition errata suggest that a deponent in California state court can simply change his or her substantive testimony for any reason whatsoever—and need not provide the reason, unlike in federal court—as long as the change is timely under C.C.P. § 2025.520.

How to Deal with “Let Me Just Change My Answer.”

How do you avoid having your case harmed either by your opponent’s sham errata or by submitting errata that will damage your credibility or be disregarded by the court?

First, create a clear record in the deposition. The attorney taking the deposition should frame questions narrowly, avoid objections if possible, and ensure that the witness’s answer is unequivocal. *See James D. Abrams & Devin M. Spencer, Pretrial Discovery Strategies: Defending Against a Deponent’s Errata Sheet Before, During, and After a Deposition*, Am. Bar Ass’n (Feb. 7, 2020), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2020/deposition-errata-sheet/>. If your questions are vague or unclear,

the witness is more likely to provide vague or unclear answers and then use an errata sheet to create a much different record, after spending time thinking about the case or consulting with counsel. *Id.* An unclear record is also more likely to blur the line between “that’s not what I meant” and “let me just change my answer,” giving opposing counsel a chance to argue later on that your questions were improper or misleading. If the attorney taking the deposition establishes a clear record, however, he or she may want to consider concluding the deposition with questions such as, “Have you answered each of my questions to the fullest extent of your ability?” or “Is there any additional information that you have that is responsive to any of my questions that you have not provided?” (subject to the risks of objection and the possibility that the deponent may try to change prior testimony or equivocate). Meanwhile, the defending attorney should timely and appropriately object throughout the deposition. The deposition should also be video-recorded.

Second, as an attorney counseling the deponent regarding any changes in testimony, you should be mindful of your ethical obligations to the court, the legal profession, and opposing counsel. The ABA’s Model Rules of Professional Conduct rules 3.3 and 3.4 and California’s Rules of Professional Conduct rules 3.3 and 3.4 prohibit a lawyer from knowingly offering false evidence or knowingly counseling or assisting a witness to testify falsely. “The crucial issue is that the lawyer does not falsify, distort, improperly influence, or suppress the substance of the testimony to be given by the witness.” *See Erin C. Asborno, Ethical Preparation of Witnesses for Deposition and Trial*, Am. Bar Ass’n Litig. Section, Trial Prac. Comm. (Dec. 13, 2011), <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2011/121311-ethics-preparation-witnesses-deposition-trial/>.

Third, attorneys on both sides must know and comply with the governing law, including the court’s local rules and any standing order. For instance, some courts do not allow new evidence to be submitted after a reply brief has been filed, without court approval. *See, e.g., Fredianelli*, 931 F. Supp. 2d at 1007.

Fourth, as the attorney who took the deposition, you should be vigilant and proactive when reviewing the errata and considering next steps. If the errata truly amounts to “let me just change my answer,” a carefully crafted and persuasive demand letter can sway the opposing side to change course. A meet-and-confer phone call or informal discovery conference may also be helpful. Here is a nonexhaustive checklist of questions you may want to consider:

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- Was the errata submitted within 30 days?
See Hambleton, 397 F.3d at 1224–25; *Gray*, 76 Cal. App. 3d at 574.
- Was it signed by the deponent? *See* Fed. R. Civ. P. 30(e)(1)(B).
- Are there other procedural deficiencies (such as failure to specify the page and line number of the testimony being corrected)? *See id.*
- What is the impact of the changes on the case (including the extent to which they pertain to dispositive issues)? *See Lewis*, 2010 WL 3398521, at *2.
- What is the timing of the changes (in relation to summary judgment or class certification briefing, for instance)? *See Laster*, 2009 WL 4842801, at *7 n.2.
- Does the errata sheet actually explain the purported reason for the changes? *See id.*
- How many changes were made? *See Lewis*, 2010 WL 3398521, at *2.
- Do the changes fundamentally alter the prior testimony (in context)? *Id.*
- What are the witness’s qualifications to testify (and is the witness a trained expert)? *Id.* at *4.
- Did deponent’s counsel attend the deposition and have the opportunity to question his client or seek clarity about the questions asked by opposing counsel? *See Viasat*, 2018 WL 899250, at *5.
- Do any of the changes concern the statute of limitations? *See Herriott v. Sanofi-Aventis U.S. LLC*, No. LA CV16-09181 JAK (GJSx), 2017 WL 8794204, at *5 (C.D. Cal. May 18, 2017).
- Does the conduct appear to be sanctionable?
See Combs, 927 F.2d at 488.

If the other side refuses to retract the errata, you should weigh next steps in light of the various considerations, the most critical being your client’s needs. While the most common procedural mechanism for redress is a motion to strike the errata, *see, e.g., Hambleton*, 397 F.3d 1217, practitioners may also consider moving to reopen the deposition. And if the errata arrived after you filed a motion for summary judgment, you may need to address it in reply and/or file evidentiary objections. You

may also consider moving *ex parte* if necessary (imagine, for instance, a sham errata submitted after your client filed its opposition to a motion for class certification).

Fifth, if you find yourself marching onward to trial, the attorney who defended the deposition should be prepared to explain the errata. And the attorney who took the deposition should craft a winning strategy for using errata to impeach the witness. Perhaps the most embarrassing scenario would be to forget the errata and ask the witness during cross-examination, “You said ‘yes’ to this question at your deposition, did you not?”—to which the witness replies, “Yeah, but then I corrected it,” followed by an awkward silence. And do not waste the court’s time by dwelling on nonsubstantive changes or apparent misquotes; try instead to clearly and concisely establish a nexus between the errata and the witness’s credibility. For instance, in a 2018 bench trial before the Southern District of New York, the cross-examining attorney kept dwelling on defendant’s expert witness’s nonsubstantive corrections from “in fact” to “may,” which appeared to irritate the court. April 24, 2018 Transcript at 1384–85, *Sacerdote v. N.Y. Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018) (No. 16-cv-6284 (KBF)). “Let me just sort of cut this off,” the judge said. “The issue is whether or not there’s a reason that goes to [the witness’s] overall credibility with that. So if she wants to tone down something that she said from ‘in fact’ to ‘may,’ unless you tell me that it’s really changing the substance of her testimony in a way that’s going to be important to me, I don’t really care. So this, in the ether, isn’t doing much.” *Id.*

Takeaways

Create a clear record in the deposition (frame questions narrowly if taking the deposition; object appropriately and timely if defending). Know the governing law. Be mindful of your ethical obligations. Be vigilant and proactive in your approach. Always practice civility with respect to opposing counsel, but keep your eyes peeled for any misconduct. Be prepared at trial.

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U.S. SUPREME COURT UPDATE: CASES OF INTEREST IN OCTOBER TERM 2020

The United States Supreme Court has decided and is still considering a number of cases on its October Term 2020 docket that should be of particular interest to the ABTL membership. This two-part article summarizes cases that involve the most prominent issues of interest to civil litigators before the Court this Term. This first part discusses cases that have been decided or argued so far.



John F. Querio

CIVIL PROCEDURE

A state can exercise specific jurisdiction over an out-of-state defendant even where the plaintiff's claims do not arise out of the defendant's forum contacts as a strict causal matter, as long as the defendant's forum contacts have a close enough relation to the claims to make the exercise of jurisdiction reasonable.

Ford Motor Co. v. Montana Eighth Judicial District Court, ___ U.S. ___, 141 S. Ct. 1017 (2021)

These consolidated cases address whether state courts in Montana and Minnesota have specific personal jurisdiction over two lawsuits against Ford. In both cases, resident plaintiffs suffered in-state injuries in car accidents involving Ford vehicles. Though Ford sells vehicles in both states, the vehicles at issue were manufactured and sold in other states. These cases thus raise the question of how closely related a defendant's forum state contacts must be to a plaintiff's claim to allow the state's courts to exercise personal jurisdiction over the defendant, a question previously left open by the Court and over which state and federal courts across the country have divided.

A state court's exercise of personal jurisdiction is limited by the Fourteenth Amendment Due Process Clause to circumstances where the defendant has "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington* 326 U.S. 310, 316 (1945). General personal jurisdiction exists where a defendant is "at home" (i.e., incorporated or headquartered) in the forum state and permits the state's courts to hear any claim against the defendant. Specific personal jurisdiction permits a state's courts to hear only those claims that have some connection to the defendant's contacts with the forum state—in particular, where the claims "arise out of or relate to" the defendant's forum-state contacts, and it is

not unreasonable for the defendant to litigate in the forum state. These cases delve into the "arise out of or relate to" test.

At the Supreme Court, Ford urged that the connection required between the defendant's forum state contacts and the plaintiff's claims should be causal—both factually and proximately. Plaintiffs countered that the test should be less stringent: if a defendant cultivates a market for a product in the forum state, the defendant may be sued there for injuries caused by the product, whether or not the precise item that caused the plaintiff's injury was manufactured or sold in the forum state.

The Supreme Court unanimously agreed with plaintiffs' position and held that the exercise of specific personal jurisdiction was appropriate on the facts of these cases. The Court's opinion emphasized that Ford's in-state activities of advertising the model of car involved in the accidents, supporting a network of dealerships to sell and service those models, distributing replacement parts for those models, and cultivating a market for those models all related to the plaintiffs' claims arising out of the in-state accidents involving that model of car, whether or not a strict causal connection existed. The Court did not provide further detail regarding how far this "related to" prong of the test extends, although it did indicate that the analysis has "real limits" (e.g., internet sales might yield a different result).

In opinions concurring in the judgment, Justice Alito expressed the view that this "related to" analysis should not be extended further than the fact pattern involved in these cases, while Justice Gorsuch (joined by Justice Thomas) decried the incoherence of the Court's modern personal jurisdiction jurisprudence and called for a wholesale rethinking of this area of law to take account of modern technology.

Does 28 U.S.C. § 1447(d) permit a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court when the removing

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defendant premises removal in part on the federal-officer removal statute, 28 U.S.C. § 1442, or the civil-rights removal statute, 28 U.S.C. § 1443?

BP P.L.C. v. Mayor and City Council of Baltimore, No. 19-1189 (cert. granted Oct. 2, 2020; argued Jan. 19, 2021)

Generally, appellate review of an order remanding a case removed from state court is not permitted. However, under 28 U.S.C. § 1447(d), orders remanding a case removed pursuant to the federal-officer removal statute (28 U.S.C. § 1442) or the civil-rights removal statute (28 U.S.C. § 1443) are reviewable. Three circuits have permitted review of any issue in a district court’s remand order where the removal was premised at least in part on the federal-officer removal statute or civil-rights removal statute, while six circuits have held that review is permitted only as to the federal-officer or civil-rights ground for removal.

In this case, a group of fossil fuel energy companies removed a state court action brought by municipalities seeking damages arising from climate change allegedly caused by the energy companies’ activities. The removal was based on multiple grounds, including federal question and federal common law grounds. Because the municipalities’ complaint included allegations related to the energy companies’ fossil fuel production at the direction of federal officers, the energy companies also premised removal on the federal-officer removal statute. The district court remanded the case, and the energy companies appealed. The Fourth Circuit held that appellate review was limited to the federal-officer ground for removal, and the Supreme Court granted certiorari to resolve the circuit split on this issue. Though the question presented is a matter of subject matter jurisdiction, the outcome of this case will determine whether the future of climate change litigation is in state or federal courts.

At oral argument, several of the justices expressed concern about appellate review of the entire remand order, noting the potential for inclusion of a barely colorable federal-officer removal ground in a defendant’s notice of removal in order to bootstrap other removal grounds into an appeal of any remand order. However, several of the justices also questioned the municipalities’ counsel vigorously about the fact that the text of section 1447(d) and Supreme Court precedent support the energy companies’ position.

The energy companies and their amici have noted their interest in the Court issuing a ruling as to whether climate change litigation is a question of federal common law, but it is unclear

whether the Court will rule on this issue, especially since only eight justices are participating in this case due to Justice Alito’s recusal.

CONSUMER PROTECTION

The definition of an “automatic telephone dialing system” in the Telephone Consumer Protection Act of 1991 does not encompass all devices that can “store” and “automatically dial” telephone numbers because the definition requires that the device “us[e] a random or sequential number generator.”

Facebook, Inc. v. Duguid, __ U.S. __, 141 S. Ct. 1163 (2021)

The Telephone Consumer Protection Act of 1991 (TCPA) prohibits the use of an automatic telephone dialing system (ATDS) to make calls to cellular phones without consent. The TCPA defines an ATDS as “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator . . . and . . . to dial such numbers.” 47 U.S.C. § 227(a)(1). The question in this case is whether an ATDS includes devices that can store and automatically dial telephone numbers even if such devices do not use a random or sequential number generator. This question is significant because if an ATDS does include such devices, nearly all modern telephones—including the 265.9 million smartphones in the United States—would fall into the definition, meaning their owners could potentially violate the TCPA inadvertently on a nearly constant basis.

Plaintiff sued Facebook in district court claiming Facebook violated the TCPA by sending security-related text messages to him without his consent. The district court granted Facebook’s motion to dismiss on the ground that plaintiff had failed to allege that Facebook’s text messages were sent using an ATDS. Based on its earlier decision in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018)—which held a device may be an ATDS if it has the capacity to dial stored numbers automatically, even if it does not use a random or sequential number generator—the Ninth Circuit reversed the trial court’s dismissal.

The Supreme Court unanimously reversed the Ninth Circuit, holding that a device must have the capacity to store or generate phone numbers using a random or sequential number generator to qualify as an ATDS under the TCPA. The Court relied on normal rules of statutory construction, including the series qualifier canon, the statutory context, and the purpose of the TCPA. To plaintiff’s claims that random or sequential number generators are “senescent technology,” the Court responded that

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this was a matter for Congress to address.

A wave of class action litigation under the TCPA has risen in the past few years, much of which is now threatened by the Court's holding in this case. It remains to be seen whether this case will spell the death knell for that litigation or if Congress will amend the TCPA to codify the construction advocated by plaintiff here.

Section 13(b) of the Federal Trade Commission Act does not authorize the Federal Trade Commission (FTC) to seek equitable monetary relief such as restitution and disgorgement.

AMG Capital Management, LLC v. Federal Trade Commission, __ U.S. __, 2021 WL 1566607 (Apr. 22, 2021)

Section 13(b) of the Federal Trade Commission Act authorizes the FTC to seek preliminary and permanent injunctions. A majority of the circuits have held that section 13(b) also authorizes the FTC to seek equitable monetary relief, such as restitution and disgorgement. Though the Seventh Circuit previously held the same view, it recently rejected the availability of monetary relief under section 13(b) in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), creating a circuit split.

In this case, Scott Tucker managed businesses that provided short-term “Delaware Model” loans to consumers online—loans that automatically renew with no affirmative action by the consumer. The FTC filed suit against Tucker and his companies, alleging violations of section 5 of the Federal Trade Commission Act (prohibiting unfair or deceptive acts or practices) and seeking preliminary and permanent injunctive relief, disgorgement, and restitution under section 13(b). The district court found that Tucker and his companies had violated section 5 and awarded \$1.27 billion in restitution to the FTC, which the FTC was not required to return to consumers if direct redress was impracticable. The Ninth Circuit affirmed this award, noting that it had repeatedly held that section 13(b)'s authorization of injunctive relief permits district courts to grant any additional equitable relief necessary to accomplish justice, including restitution.

Tucker and his companies urged the Supreme Court to follow the Seventh Circuit's interpretation and overturn the Ninth Circuit's affirmance of the restitution award. They pointed out that allowing the FTC to seek monetary relief under section 13(b) allows the FTC to avoid the procedural protections provided in section 19, which expressly authorizes the FTC

to seek monetary relief for consumers. To obtain relief under section 19, the FTC must either (1) prove that the defendant engaged in conduct that violated the FTC's rules related to unfair or deceptive acts or practices, or (2) issue a cease and desist order to the defendant and prove in district court that a reasonable person would have known under the circumstances that the conduct was dishonest or fraudulent. In contrast, under section 13(b), the FTC is required only to show that it has reason to believe there is a violation of any law enforced by the FTC.

The Supreme Court unanimously ruled against the FTC in an opinion by Justice Breyer. The Court reasoned that the operative term “injunction” in section 13(b) does not encompass retrospective monetary relief and that the structure of the Federal Trade Commission Act—in particular, Congress's subsequent enactment of section 19's more cabined monetary remedy—weighs heavily against the FTC's position.

The Court's ruling removes a key enforcement tool that the FTC has used for many years to police consumer fraud, and there is already growing pressure in Congress to fill this gap. Thus, the Court may not have the last word on this issue.

**CORPORATE LIABILITY UNDER
THE ALIEN TORT STATUTE**

(1) Is the presumption against extraterritorial application of the Alien Tort Statute displaced by allegations that an American company generally conducted oversight of its foreign operations at its headquarters and made operational and financial decisions there, even though the conduct alleged to violate international law occurred in—and the plaintiffs suffered their injuries in—a foreign country? (2) Is a domestic corporation subject to liability under the Alien Tort Statute?

Nestlé USA, Inc. v. Doe, No. 19-416 & *Cargill, Inc. v. Doe*, No. 19-453 (cert. granted July 2, 2020; argued Dec. 1, 2020)

These consolidated cases present the latest iteration in the Supreme Court's ongoing project of narrowing the scope of the Alien Tort Statute (ATS) in the context of litigation against domestic corporations involving allegations of aiding and abetting human rights violations in foreign countries.

Plaintiffs allege that they were trafficked from Mali into Côte d'Ivoire and enslaved on cocoa plantations as children. They brought suit in district court under the ATS against Nestlé and Cargill, alleging that those corporations aided and abetted child

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slavery. Nestlé and Cargill moved to dismiss plaintiffs' ATS claim, arguing that domestic corporations cannot be held liable under the ATS and that plaintiffs' allegations were insufficient to establish the mens rea and wrongful act elements of aiding and abetting. The district court dismissed the case on all of these grounds, but the Ninth Circuit vacated and remanded, holding that corporations can be held liable under the ATS and that plaintiffs' allegations supported the inference that Nestlé and Cargill had the requisite mens rea (i.e., a purpose to facilitate child slavery).

On remand, the district court again dismissed the case, applying the "focus" test set forth in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) to determine that the ATS claim was impermissibly extraterritorial. Plaintiffs' allegations against Nestlé and Cargill included U.S.-based decisionmaking, provision of funds originating in the United States, provision of supplies and training to Ivorian cocoa farmers, publication of statements of opposition to child slavery, and opposition to a bill that would have required Nestlé's and Cargill's cocoa to be "slave-free." The district court held that the "focus" of plaintiffs' claims was the alleged conduct of Nestlé and Cargill that aided and abetted child slavery in Côte d'Ivoire and that this alleged conduct did not "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality.

The Ninth Circuit again reversed, holding that the "focus" of an ATS claim is not the location where the injury or principal offense occurred but, instead, where any conduct that might constitute aiding and abetting occurred. On the basis of an allegation that Nestlé and Cargill provided money to farmers in exchange for their loyalty to Nestlé or Cargill as an exclusive supplier, the court held that the "focus" test was satisfied and the claims were not impermissibly extraterritorial.

At oral argument, most of the justices seemed reluctant to adopt Nestlé's and Cargill's argument that corporations are not subject to liability under the ATS. However, almost all of the justices also expressed serious doubts that plaintiffs' allegations satisfied the "focus" and "touch and concern" tests and seemed inclined to rule that plaintiff's ATS claim was barred by the

presumption against extraterritoriality. Whether this case is the final nail in the coffin for ATS human rights litigation remains to be seen.

INTELLECTUAL PROPERTY

The fair use doctrine protects a program developer's use of a software interface to create a new computer program where, as here, the use is transformative.

Google LLC v. Oracle America, Inc., __ U.S. __, 141 S. Ct. 1183 (2021)

This is the marquee intellectual property case on the Supreme Court's docket this Term. It asks whether software interfaces—lines of computer code that allow developers to utilize prewritten libraries of code to perform particular tasks in creating new computer programs—are protected by copyright law and, if so, whether the fair use doctrine provides a defense to copyright infringement claims arising from the use of such software interfaces to create new computer programs.

Google and Oracle have been locked in litigation for years over copyright infringement claims related to Sun Microsystems' Java platform (which Oracle purchased in 2010), and in particular Java's software interfaces. Google used Java software interfaces to develop its Android smartphone platform with Sun's blessing, but once Oracle acquired Sun, it sued Google for patent and copyright infringement. Google defended against the copyright claim on the ground that the Java software interfaces were not copyrightable and that, even if they were, Google's incorporation of them into Android was fair use. When the jury hung on the fair use defense after a first trial, the district court granted Google judgment as a matter of law on the ground that the software interfaces were not copyrightable. The Federal Circuit reversed, holding that they were copyrightable, and the Supreme Court declined to take the case up in that interlocutory posture. On remand, after a second trial, the jury found in Google's favor on its fair use defense, but the Federal Circuit again reversed and ruled that Google did not engage in fair use as a matter of law.

The Federal Circuit's copyrightability holding deepened an existing circuit split, and that factor, along with the importance of the questions presented to the future of the software industry, likely prompted the Supreme Court to grant certiorari. However, the Court ended up bypassing the copyrightability issue by assuming that software interfaces are copyrightable without

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deciding that question. Instead, the Court held that Google's use of the Java software interfaces was protected under the fair use doctrine as a matter of law.

The Court first determined that fair use presents a mixed question of law and fact under which the jury finds the underlying, real-world facts, but the court expounds the law and applies it to the facts found by the jury. The Court then applied the four-factor fair use test by examining the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use on the potential market for or value of the copyrighted work. Relying largely on the fact that Google's developers who used the Java software interface to create the Android platform engaged in transformative use, the Court concluded that these factors all pointed in favor of Google.

The Court's opinion will have significant implications for the future of the software industry, and it should ensure the continued existence of a healthy breathing space for the use of software interfaces to create new computer programs and operating systems.

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REMOTE BENCH TRIALS: KEY CONSIDERATIONS IN PREPARING AND CONDUCTING THEM



Daniel G. Murphy

Trial lawyers have been sorely tested in all respects during the last year.

Most courts closed in mid-March 2020 for almost all purposes, followed by halting re-openings for limited purposes as the year progressed. Civil jury trials all but disappeared.

After participating in one of the last civil jury trials in the Los Angeles

Superior Court on the eve of the statewide shutdown, I handled one of the first “all video” bench trials in that court beginning in late December 2020. The uncomfortableness of that early-pandemic jury trial was supplanted by the ease and efficiency of the bench trial.

Although the future of remote jury trials is uncertain, my positive experience with this video trial—seven days over several weeks—makes clear to me that many judges, lawyers and parties will want to continue having them in the post-pandemic environment. In my view, video trials should be embraced for their advantages, not feared for their uncertainties.

Here is what I learned about the critical aspects and best practices of successful video trials.

Buy-In

The first issue, of course, is getting buy-in from the court and the parties. In our case the judge was very interested in handling one of the first all-remote bench trials in the Los Angeles County Superior Court and then being able to report on his experience to his colleagues. Indeed, he initiated the idea of a fully remote trial, provided we could agree on a technology platform other than the system being used by the court for hearings, which did not provide for exhibit management. Recognizing the issues in the case could not be fully resolved short of appeal, both sides wanted to get the bench trial going so the case could be sent on its way to the appellate court. And we had no difficulty agreeing on the technology—we had been using the same court reporting service, which was marketing a proprietary video trial platform based upon its video deposition technology with which we had already become comfortable.

Obtaining buy-in will obviously be more difficult when the judge is not interested or technically proficient, or when one side does not really want prompt resolution of the case.

Dragging a reluctant party along will make everything more difficult, although far from impossible.

Technology *Vendor Engagement*

As already mentioned, both sides agreed to use the technology offered by the court reporting firm that had been successfully handling our remote depositions. We asked the vendor to make presentations to each side about how it would work, and we then all got together on a video call so that both sides could ask questions at the same time.

The basic video technology was familiar to most of us from our months in lockdown. The exhibit sharing was handled by a separate program that was somewhat less intuitive than the video technology, but allowed each side to have a private folder of exhibits that it could use or not use. Exhibits could be shown to witnesses and opposing counsel, and if admitted into evidence could be moved to an admitted exhibits folder.

The next step was to arrange for a demonstration of the technology for the judge and his clerk to get their sign-off. Our vendor went to the courtroom and spent several hours with the judge and clerk to make sure they were both comfortable with and trained on the technology. An important issue raised by the judge was how to provide for public access; it was quickly solved by his decision to broadcast the proceedings on a screen in the courtroom.

We then had a video conference among the judge, clerk, counsel and the vendor to discuss any final issues. We made two important decisions at that time. The first was to use the vendor’s “concierge service”; the second was to provide the court with binders of hard copy exhibits for easy reference during the trial.

Concierge Service

As most lawyers who handle complex trials know, it is important to have someone during a trial who has responsibility for managing the presentation technology. That person can be a paralegal, a junior lawyer or an independent courtroom presentation specialist. Sometimes the parties agree to share a presentation specialist.

In this case, we decided to use our own staff to organize and call up exhibits, but also to take advantage of a “concierge service” offered by the vendor. This was a person completely steeped in the vendor’s technology but with a client service demeanor, who could be available to us on either an hourly or a daily basis. After meeting her, both sides agreed to retain

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her on a daily basis for the entirety of the trial, a decision with which the judge was pleased.

That was a good decision: After the trial, all of the lawyers agreed she was critical to the smooth functioning of the trial. She had full access to, and control of, the video and exhibit programs, and she could make adjustments on the fly. Perhaps most importantly, before any witness was to be called, she would contact that witness to make sure the video connection was stable and the witness could access the exhibits. She participated in every minute of the trial. Her work included coordinating breakout rooms for the opposing teams.

Exhibits

The exhibit sharing program generally worked well, and we and our witnesses were all trained on it by the vendor. Nevertheless, the judge had requested notebooks containing hard copy exhibits, and we also provided both ourselves and our witnesses with them. This facilitated quickly flipping between documents, which was where the computer program struggled.

Technology / Home Office

After prompting by our vendor, the lawyers on our side took hard looks at our own home technology. This included our internet connections as well as our lighting, sound, background and display capability. For relatively minimal cost, I acquired a high-quality camera and microphone that I could position so that when I looked at my computer screens it appeared I was looking directly into the camera. I also bought a large second monitor and a source of diffuse lighting that removed most glare. Having a second monitor is essential to participating in the video session while simultaneously reviewing documents. I then reoriented my home office desk to remove all backlighting (a common problem) and improve the background. We went through the same exercise with our principal witnesses. After that was done, we all wondered why we had not paid more attention to video presentation during the hundreds of sessions we had participated in up to that time.

A final but very practical piece of advice as it relates to your home office set-up: Have a comfortable chair at the right height. Trial days tend to be long.

Witness Preparation

Witness preparation is really no different than normal except for the need to prepare the witnesses to speak to the camera effectively. Because of COVID, we did all of our witness preparation remotely, so were able to spend a good deal of time schooling the witnesses on the same issues as to which

we had previously schooled ourselves: Internet speed, camera and microphone quality, lighting, and looking at the camera.

It is also critical to make sure witnesses understand they should be by themselves and leave their phones and tablets in a different room.

Cheating

Much has been written about trying to make sure witnesses being deposed are not being improperly coached, and most of us have developed our standard speeches for the start of depositions. We did not have to face those issues in our trial because of the nature of the case and the relationship between opposing counsel. It was apparent that all witnesses and their counsel were in separate buildings, and we had no basis to believe there would be improper coaching.

But in many cases that will not be true. Especially when pandemic restrictions are gone, witnesses and their lawyers may insist on being together, and the witnesses may refuse to confirm they have no phones or tablets with them. On top of that, the prior relationship among counsel may not instill confidence about the absence of coaching.

In those situations, it would be appropriate to ask the judge to issue pre-trial orders regarding the circumstances under which testimony will be given, including witness sequestration if necessary.

I believe it would take a very practiced witness to hide the fact of being coached while under the microscope of a video camera focused closely on the witness's face. If there is reason to suspect a witness is being coached, however, it would be appropriate to ask the judge to order the witness to use his or her camera to show the room in which the testimony is being given and to show his or her phone.

The Trial

There are clear benefits to video trials outside of pandemic-related social distancing. Probably the most significant is time efficiency. For a trial in downtown Los Angeles, I would normally either have to spend two hours each day commuting in my car or move into a hotel for the duration of the trial. In addition, we would struggle to find a place to meet during breaks, and would suffer through bad lunches along with hundreds of others in a cramped cafeteria. If we were not in a hotel, we would have to drive back to our office at the end of the day to prepare for the next day.

This tedious routine was replaced with having breakfast at home; meeting the team in our video break-out room to

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discuss the upcoming morning; participating in the morning session; having lunch in my own home office while discussing the morning with the team in our break-out room; and then repeating the process in the afternoon. Having video break-out rooms into which we were automatically placed during breaks was a terrific time saver that also enhanced confidentiality. The entire trial experience seemed to be far less rushed than normal, all of which I believe is attributable to not having to travel anywhere. Yet I'm quite sure that this seven-day trial would have taken much longer if we had tried it in-person.

I have heard it said it is harder to connect with and evaluate witnesses by video than in person. I do not believe that is the case, and it certainly was not our experience in the bench trial. While I expect there will always be differences of opinion as to this issue, I believe the close-in view of witnesses on a video screen highlights every eye-dart and change in facial expression. This only enhances the viewer's ability to make credibility determinations. In one situation in our trial, the lack of credibility of one opposing witness became painfully apparent through changes in his demeanor—including the small beads of sweat that suddenly appeared but that probably would have gone unnoticed if he were on the witness stand in a courtroom.

One unanticipated benefit of the video trial was the ability to provide input to the examining lawyer—which in our case included not only the other three trial lawyers on the team but also several additional lawyers who were monitoring the trial. With an iPad right next to me open to a group chat among the lawyers, I was able to get immediate input on my questions and the witness's answers. This was far superior to the very distracting normal process of notes being handed up to the podium.

As a general matter, handling, showing and offering exhibits into evidence went smoothly, aided occasionally by the fact that the judge, lawyers and most witnesses had hard copies available. But, as noted above, the exhibit sharing software was not up to the task of moving quickly from one exhibit to another. That is an area where remote trial vendors need to improve, but I expect they will catch up quickly.

There were very few technical glitches during the trial. Credit for that goes to the technical support provided by the vendor and our concierge, who made sure witnesses and lawyers were ready to go at the right time. Probably the most severe technical problem during the trial was my own loss of an Internet connection near the end of the day during a heavy rainstorm. Fortunately I was able to reconnect relatively quickly by using my phone and the cellular service.

All in all, I felt the remote trial was a very good experience and would not hesitate to participate in another one or try a remote jury trial. The details and planning that went into it up front made all the difference.

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