

“PERPETUAL” CONTRACTS UNDER CALIFORNIA LAW



Olivia Powar

At common law, contracts with no express duration are terminable at the will of either party. From a practitioner’s standpoint, determining when parties are no longer bound by a contract without an express end date is thus a crucial task, since if a court cannot construe a contract to contain a definite duration, the common law

default rule kicks in.

A contract with an indefinite duration—often termed a perpetual contract—generally has one of two characteristics. Either the contract may call for successive performances without specifying a final performance, or it may fail to specify a duration. Contracts of indefinite duration commonly include distributor and franchise arrangements,

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SOME THOUGHTS ABOUT ORAL ARGUMENT IN THE CALIFORNIA COURT OF APPEAL



David M. Axelrad

It used to be that appellate advocacy consisted entirely of oral argument, and the greatest appellate lawyers were the greatest orators, such as Daniel Webster. (See, e.g., Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief* (1999) 1 J. App.

Prac. & Process 1, 1-2; Waxman, *In the Shadow of Daniel Webster: Arguing Appeals in the Twenty-First Century* (2001) 3 J. App. Prac. & Process 521, 523.) There were no written briefs, and the argument itself would at times continue for days. For example, in the United States Bank case, *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316 [4 L.Ed. 579], six of the most prominent lawyers in the country at the time, including Webster, argued for nine days. (1 Warren, *THE SUPREME COURT IN UNITED STATES HISTORY* (1926) p. 507.)

After 1821, when the United States Supreme Court began to require printed briefs, dependence on written briefs grew, and oral argument was curtailed. (Former U.S. Supreme Ct. Rules, rule XXX, 19 U.S. (6 Wheat.) § v (1821) (repealed 1943); see Hall, *OXFORD GUIDE TO THE SUPREME COURT OF THE UNITED STATES* (2005) p.108; Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States* (1994) 38 Am. J. Legal Hist. 482, 482-483.) State appellate courts followed a similar trajectory. (Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future* (2009) 10 J. App.

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PRESIDENT'S MESSAGE



Sabrina H. Strong

After seven years on ABTL's Board, I am extremely honored to accept the "baton pass" from our outgoing President, Michael McNamara. Mike has been nothing short of extraordinary, and his contributions to ABTL—dating back to my first year on the Board—are countless and invaluable. I will endeavor to carry out my year as President with the same enthusiasm and energy as Mike and to carry on the many ABTL traditions set by those who

served before us.

I am confident that our ABTL Chapter will have another tremendously successful year. The lawyers, judges, and justices serving on our Board and Judicial Advisory Council are motivated, committed, and focused on working together to provide top-notch programming, to prioritize civility within our profession, and to reach and train newer lawyers and the students of our local law schools. Our Young Lawyers Division is thriving, establishing fresh traditions for the benefit of recently-admitted practitioners that we hope will be embraced for years to come. And our general membership continues to grow, reaching an all-time high of over 2,200 members.

In today's hectic and often impersonal environment, where many of us try to stay current by monitoring an endless stream of posts and feeds, ABTL's mission is more important than ever. I am extremely grateful to serve alongside my fellow Executive Board members, including Valerie Goo (Vice President), Susan Leader (Treasurer), and Manuel Cachán (Secretary); the many Committee Chairs and Vice-Chairs who devote countless hours to delivering valuable resources for our members; and all members of the full Board, Judicial Advisory Council, and Young Lawyers Division. We remain committed to encouraging a thoughtful exchange between the bench and the bar and to fostering meaningful connections throughout our legal community—plaintiff and defense lawyers, "big law" and boutique firms, practitioners from Downtown and the Westside.

Ultimately, our ability to promote camaraderie and respect within our profession requires participation. We look forward to seeing you at our annual seminar in Hawaii and at our lunch and dinner programs throughout the year. Please introduce yourselves; make connections; and enjoy spending time with old and new friends.

I look forward to continuing on this journey with you.

Sincerely,
Sabrina H. Strong
ABTL President, 2018-2019

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Oral Argument in the California Court of Appeal...continued from Page 1
 Prac. & Process 247, 253-254 (Kravitz); see Ehrenberg, *Embracing the Writing-Centered Legal Process* (2004) 89 Iowa L.Rev. 1159, 1183.) Today, by the author's calculation, only 14 states give parties to an appeal a right to oral argument. In all other states and in the federal system, the appellate courts have authority to dispense with oral argument in cases where the court concludes that argument would not assist the decision-making process.

Nonetheless, oral argument continues to play an important role. It allows the public to see justice in action, helping to ensure confidence in the judiciary and the judicial process. (Kravitz, *supra*, at pp. 263-264, 267.) It is the one opportunity for a face-to-face dialogue, a chance to respond to the judges' concerns, clarify facts or issues, answer questions that may be troubling the court, and explore the legal and policy implications of a particular holding. (Kravitz, *supra*, at pp. 264-266.)

California allows oral argument as a matter of right in all direct appeals. (Cal. Rules of Court, rule 8.256; *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 871-872; *People v. Brigham* (1979) 25 Cal.3d 283, 285-289.) But the state Constitution does not confer the right, although the Supreme Court has said that it is "implicit" for appeals. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1256 [holding there is no right to oral argument before issuance of a peremptory writ in the first instance; "Nothing in the history of (article VI, sections 2 and 3 of the California Constitution) indicates that their drafters intended or believed that there should be or is a constitutional right to oral argument in all causes decided by an appellate court on the merits"].) "Where, as in the present case [review of a State Bar disciplinary decision], governing decisions, statutes, and rules do not contemplate oral argument, the constitutional provision does not confer such a right independently." (*In re Rose* (2000) 22 Cal.4th 430, 455.)

The current rule allows "[e]ach side . . . 30 minutes

for argument," "[u]nless the court provides otherwise by local rule or order." (Cal. Rules of Court, rule 8.256(c), (c)(2).) While many Courts of Appeal give the parties discretion to argue for the full 30 minutes, some Courts of Appeal have taken advantage of the flexibility available under the rules to impose limitations.

For example, the Third Appellate District, in its local rule 3, provides: "Each side is allowed 15 minutes for oral argument, . . . [¶] Any request for additional time for oral argument must be made by written application submitted to the court within 10 calendar days of the date of the order setting oral argument. The application must be served contemporaneously on all other parties and must specify the amount of time requested and the issues to which additional oral argument will be addressed. When an application is granted, the time allotted to the other side or sides will be similarly enlarged." (Ct. App., Third Dist., Local Rules, rule 3, Time for Oral Argument.) The Fourth Appellate District, Division One has a similar rule. (See Ct. App., Fourth Dist., Div. One, Misc. Order No. 061218.)

I believe the effectiveness and value of oral argument in California's Courts of Appeal can be improved if the courts take advantage of the opportunity provided by the existing Rules of Court to limit or expand oral argument in certain cases. The rules are sufficiently flexible to allow the Court of Appeal to account for the fact that some cases deserve more discussion at oral argument than others. There are many cases in which a short argument, no more than a few minutes, gives the parties a full opportunity to present their case and respond to the court's questions. Conversely, there are cases that should be allotted more than 30 minutes per side because of the complexity of the issues or the number of parties. Adjusting oral argument to meet the needs of the case is an important case management tool.

I also believe the effectiveness of oral argument

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Oral Argument in the California Court of Appeal...continued from Page 3

increases when the court gives the parties a preview of its thinking, by issuing a “focus letter” identifying the issues of concern, or a tentative opinion, before oral argument. The Court of Appeal in Riverside, California (Fourth District, Division Two) issues tentative opinions in every case 30 days before oral argument. These are full opinions that lack the names of the participating justices but include record citations that are usually removed in final opinions. Recently other Courts of Appeal have begun to experiment by sending “focus letters” prior to argument directing the parties’ attention to issues of concern, or by providing very short summaries of the court’s tentative decision before argument begins. Those experiments should also continue and, hopefully, expand.

Finally, I disagree with those who claim that oral argument never affects the outcome of an appeal. While the justices may have already written a draft opinion before they take the bench, justices and their staff are human. Mistakes or misunderstandings can surface at oral argument. Even if only infrequently, an oral argument can and does change minds about the proper outcome of an appeal.

We will never return to the days of oral argument when appellate advocates would command the court’s attention for days at a time. But oral argument still serves a valuable function in the appellate process, and both bench and bar should strive to improve it.

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FROM COURTROOM TO CLASSROOM: AN ALTERNATIVE APPROACH TO TRIAL ADVOCACY



Michael D. Stein

In law school, students are expected to develop the ability to advocate both sides of any legal question. The legal profession views such a skill as a virtue. Most laypeople do not—to them, this “skill” epitomizes insincerity. Lawyers are often maligned as hired guns, willing to sell their power of persuasion to the highest bidder. As unjustified as the perception may be, its existence is undeniable. To paraphrase author Terry Goodkind, “Perception is easily accomplished, requires little effort, and never has to stand the test of reality.”

Since the client’s fate often depends on how the jury perceives the client’s messenger, trial lawyers must strive to overcome this unspoken perception. The task is all the more challenging because of two equally unassailable truths—(i) most people put jury service on a par with a trip to the dentist; and (ii) T.V. shows and movies frequently portray lawyers as little more than educated used car salesmen, committed not to a just result but to winning no matter the cost.

My antidote for toxic perceptions of the legal system in general and lawyers in particular is simple. During the three trial phases in which you can directly address the jurors—voir dire, opening statement and closing argument—defy and redefine their expectations and preconceived notions by focusing on two principal goals: (1) motivating them to be engaged participants rather than passive listeners; and (2) changing their perception of you from biased advocate to passionate teacher.

A. Voir Dire: Welcoming Prospective Students

Far more than merely the phase where you select the jury, voir dire affords the opportunity to begin transforming your jurors’ perceptions by identifying parallels between the courtroom and the classroom. Explain how each trial phase bears a striking resemblance to attending school—voir dire is the admissions process,

opening statement is a preview of the course syllabus, direct and cross-examination are akin to listening to guest speakers, and closing argument is like a final exam review before the jury takes its “test” (i.e., deliberates and answers the questions on the verdict form). Re-casting the proceedings in this manner creates a framework in which jurors can begin looking at you in a less suspicious light—as someone trying to teach rather than sell them something.

Enhance this new perspective with the following suggestions:

1. Lawyers tend to focus during voir dire on eliciting negative information upon which to exercise a peremptory challenge. Flip it. Be an admissions officer interviewing a prospective student and allow the applicant to accentuate the positive. “Tell us the single, strongest skill/character trait you possess and why you think it would make you a good member of this class.”
2. Ask each juror to identify someone famous, living or dead, whom he/she most admires. Their answers will provide invaluable insight into them as people—and, as discussed later, they set up a powerful technique for closing argument.
3. Don’t immediately exercise peremptory challenges unless absolutely necessary. The attorney using the fewest challenges sends this implicit but powerful message: “My case is so strong, unlike my opponent, I don’t need to handpick the jury—any jury will do.”

B. Opening Statement: Course Overview

On the first day of class, professors typically provide a course overview. Since jurors generally rely on one of three prisms—emotion, curiosity, or suspicion—to process the information presented during trial, craft an opening statement that simultaneously previews in an organized manner what the jury will hear and that appeals most directly to the appropriate case prism.

Build on the concept of yourself as a teacher rather than a biased advocate with the following ideas:

1. Prepare a cast of characters chart with headshots, if available, of the major players in the case along

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From Courtroom to Classroom...continued from Page 5

with their title(s) and company affiliations. Prepare a similar chart describing the top five exhibits with their corresponding exhibit numbers. The sooner your students become acquainted with the guest speakers and course materials, the better.

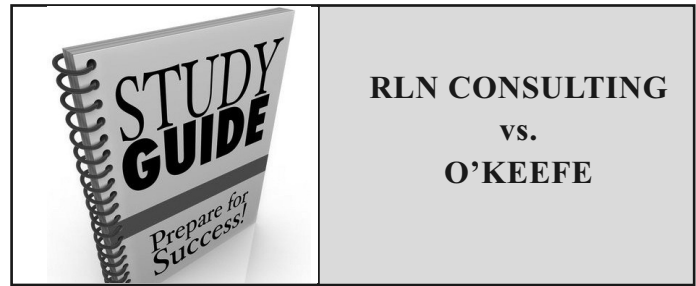
2. Channel a favorite history teacher who brought the subject to life by putting you in the moment.
3. Teachers often use the first class session to outline what they expect from their students and what their students can expect from them. Tell the jurors you're confident they will take their responsibility seriously by giving both sides their attention and considered judgment. Assure them that in return, they can and should expect from you a fair and efficient presentation of the information necessary to render that judgment.

C. Closing Argument: Preparing for the Final Exam

Professors typically offer, and students generally appreciate, a class session dedicated to reviewing material likely to be tested on the final exam. Once both sides rest their case and the jury has been instructed on the applicable law, the judge will advise the jurors they will now hear the closing "arguments" of counsel.

Whether I'm representing the plaintiff or the defendant, I typically begin by confessing discomfort with the word "argument." Arguments, by definition, have counter-arguments. I like to tell jurors my goal is not to "argue" my client's case but instead to hopefully show that after they review the evidence and consider the Court's instructions, they will conclude there's nothing to argue about.

The foundation of any effective summation is a thorough review of the verdict form. However, in keeping with our "lawyer as educator" mantra, consider the following slide that I used at the outset of my closing in a case where I represented the plaintiff in a trade secret misappropriation case:



REVIEW QUESTIONS

I reassured the jury that while they had to take a "test," the good news was that there were no wrong answers and, unlike in school, they would get to review their actual "test" questions in advance. That set up the next slide:


I let the jury know that for each question on their "exam," I would provide them a hopefully useful study guide compiling in one place the jury instruction(s), exhibit(s) and/or testimony that best answered the question. Notice the hyperlinks in the right column. This enabled me with the click of a button to show the critical excerpt from the relevant instruction, exhibit or testimony being referenced. You never saw more jurors feverishly scribbling notes in their steno pads!

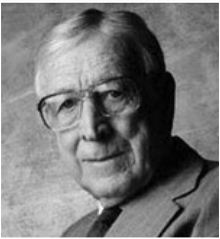
Next came the time to put to use the "most admired people" our jury had identified during voir dire. Like most cases, this one involved the issue of witness credibility; more specifically, the defendant's lack of credibility. Several of our jurors expressed admiration for Oprah Winfrey and famed UCLA basketball coach John Wooden. A simple Google search for images of Ms. Winfrey and Coach Wooden and quotes from each of them on the topics of integrity and character quickly provided the content of the next two slides:

<p><u>VERDICT QUESTION</u> <u>NO. 1</u> Did RLN own a proprietary trade secret?</p>	<p>INSTRUCTIONS 1. CACI 109 [LINK] 2. CACI 3341 [LINK]</p> <p>EXHIBITS 1. Exhibit 40 [LINK] 2. Exhibit 108 [LINK]</p> <p>TESTIMONY 1. Ms. O'Keefe [LINK] 2. Mr. Jorgenson [LINK]</p>
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	<p>“Real integrity is doing the right thing, knowing that nobody’s going to know whether you did it or not.” <i>—Oprah Winfrey</i></p>
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	<p>“Ability may get you to the top, but it takes character to keep you there.” <i>—John Wooden</i></p>
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The unbridled pride on the faces of the jurors who saw their most admired person integrated into my closing “argument” was unmistakable. Even more importantly, not only did this technique demonstrate that our side was paying attention to what the jurors said a week earlier during voir dire, we made the jurors’ champions our champions.

I next told the jury that while the final quote I wanted to share with them was from someone they had never met before the trial, it was nevertheless particularly instructive.

Then came the dagger.

<p>PHOTO OF DEFENDANT FROM DEPOSITION VIDEO</p>	<p>“If you decide that a witness did not tell the truth about something important, you may choose not to believe anything that witness said.” <i>—Judge Mary Jones</i></p>
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In case you don’t recognize the “quote” in this slide, its an excerpt from CACI Instruction No. 107. Juxtaposing that jury instruction side by side with the defendant’s photograph elicited laughter—and, more importantly, numerous affirmative head-nods from the jury box.

And yes, the jury found for my client.

Embrace rather than fear jurors’ less-than-favorable perceptions of attorneys as an opportunity to distinguish yourself in the eyes of your factfinders. Your odds of securing a favorable verdict will improve if you follow the tried and true method for catching a pesky house fly. Something about a preference for honey over vinegar?

Michael D. Stein is a partner at Tisdale and Nicholson, LLP.

SANCHEZ –TWO YEARS LATER



Gary Wax

Having just passed the two-year anniversary of the California Supreme Court’s “paradigm shift” regarding the admissibility of out-of-court hearsay statements through expert testimony (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 588), it’s time to take stock of how the seminal case—*People v. Sanchez* (2016) 63

Cal.4th 665 (*Sanchez*)—is being applied.

Before *Sanchez*, courts interpreted the Evidence Code broadly, permitting experts to repeat out-of-court hearsay statements if they were part of the “reasons and matters” relied on in forming the expert opinion, subject to limiting instructions and the trial court’s discretion. (See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) Experts were often permitted to convey hearsay statements to juries under the guise of explaining their “reasons” for the opinion. Experts, thus, became conduits for bringing hearsay before the jury and laundering it to make it admissible.

Sanchez changed the law. Overruling prior precedent, the Court held that an expert witness can no longer testify about “case-specific facts” asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception. (*Sanchez, supra*, 63 Cal.4th at p. 686.) The Court nevertheless reaffirmed the principle that an “expert may still rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so.” (*Id.* at p. 685, emphasis omitted.)

What are case-specific facts?

“Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Sanchez, supra* 63 Cal.4th at p. 676.) *Sanchez* provided four common examples, attempting to draw a line for courts and counsel between case-specific facts (now inadmissible via expert testimony) and facts that are merely general background derived from the expert’s training and experience (still admissible):

1. *The length of skid marks at an auto accident scene.* After *Sanchez*, if an expert personally measures the

skid marks, the expert can describe the length of the marks as a basis for the conclusion, but cannot repeat hearsay statements from others who will testify. An expert can still testify, in general terms, about how automobile skid marks are left on pavement and that a given equation can be used to estimate speed based on those marks. Likewise, testimony that a car leaving marks of a certain length was traveling at 80 miles per hour when the brakes were applied is admissible.

2. *Whether, during the autopsy of a suspected homicide victim, hemorrhaging in the eyes was noted.* After *Sanchez*, this case-specific fact cannot be established through an expert, but it still can be established through the autopsy surgeon’s testimony, other witnesses who saw the hemorrhaging, or authenticated photographs. Testimony about what circumstances might cause such hemorrhaging is still admissible as background information. And testimony about what conclusion can be drawn from the presence of the hemorrhaging is still admissible after *Sanchez*.

3. *That a defendant’s associate had a diamond tattooed on his arm.* After *Sanchez*, an expert cannot testify regarding this case-specific fact, but the fact can still be established by someone who saw the tattoo, or by an authenticated photograph. Furthermore, an expert can still testify, as background information, that the diamond is a symbol adopted by a given street gang. The expert can also testify that the presence of a diamond tattoo demonstrates that the person belongs to the gang.

4. *That an adult suffered a serious head injury at age four.* If the expert is a physician who treated the patient for the injury, he or she can describe the injury, but if the expert is merely repeating information received from the patient or records, and there is no other evidence on the issue, he or she cannot so testify. After *Sanchez*, such evidence should be established by a witness who personally saw the injury sustained, by a doctor who treated it, or by diagnostic medical records. Testimony about how such an injury might be caused, or its potential long-term effects, however, is still admissible as background information. And testimony that the patient is still suffering from the effects of the injury and its manifestations is also properly admitted.

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Sanchez - Two Years Later...continued from Page 8

The *Sanchez* rule in practice

Since *Sanchez*, multiple courts, including Courts of Appeal and the Supreme Court, have applied its rule where the evidence was case-specific, if the party invoking it objected contemporaneously and the admission of the evidence caused prejudice. Multiple courts have also acknowledged the rule's application not only in criminal cases but also in civil cases. The following summaries of published appellate opinions applying the *Sanchez* rule shows the variety of circumstances in which it can arise.

***People v. Stamps* (2016) 3 Cal.App.5th 988.** The testimony of a pharmacist expert who concluded that particular pills were pharmaceuticals based solely on a visual comparison of seized pills to those displayed on the Ident-A-Drug website was inadmissible. “After *Sanchez*, reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue.” (*Id.* at p. 996.)

***People v. Selivanov* (2016) 5 Cal.App.5th 726.** A forensic accountant testified about a collection of financial reports produced on QuickBooks. (*Id.* at pp. 771-772.) The testimony was properly admitted because it fit within the “authorized statements” hearsay exception. (*Id.* at p. 776.)

***People v. Burroughs* (2016) 6 Cal.App.5th 378.** The trial court improperly admitted expert testimony relating to documents such as police reports, probation reports, and hospital records. (*Id.* at p. 404.) After an exhaustive analysis of the various available hearsay exceptions, the Court of Appeal held that much of the documentary evidence upon which the experts relied did not fall within any hearsay exception, and was prejudicially and erroneously admitted. (*Id.* at pp. 407-408.) In dictum, the court also acknowledged that the *Sanchez* rule applies in civil cases: “[N]othing in *Sanchez* indicates that the Court intended to restrict its holdings regarding hearsay evidence to criminal cases.” (*Id.* at p. 405, fn. 6.)

***People v. Williams* (2016) 1 Cal.5th 1166.** The trial court properly sustained the prosecutor’s objection to expert testimony parroting statements made by the defendant’s family members and foster mother regarding the effect of the defendant’s mother’s alcoholism on his

development. The expert’s knowledge came from videotaped interviews and other out-of-court hearsay statements. (*Id.* at pp. 1199-1200.) To the extent the expert was allowed to testify about inadmissible hearsay, the error was not prejudicial because there was other admissible evidence in the record regarding defendant’s childhood exposure to alcoholism and his alcohol dependence. (*Id.* at pp. 1200-1201.)

***People v. Ochoa* (2017) 7 Cal.App.5th 575.** The defendant’s failure to object to expert testimony forfeited his *Sanchez* argument, and in any event, the error was harmless because of other independent admissible evidence in the record. (*Id.* at p. 586.)

***People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1.** The court held that *Sanchez* applies in civil cases, such as this gang activity/nuisance lawsuit. (*Id.* at pp. 10-11, 34.)

***People v. Roa* (2017) 11 Cal.App.5th 428.** The trial court prejudicially erred by allowing experts to recite case-specific facts from probation officers’ reports and police reports “that were not independently proven by admissible evidence.” (*Id.* at p. 433.)

***David v. Hernandez* (2017) 13 Cal.App.5th 692.** The defendant’s failure to make a hearsay objection at the time the life-care-planner expert testified forfeited defendant’s *Sanchez* argument on appeal. (*Id.* at p. 704.)

***People v. Bona* (2017) 15 Cal.App.5th 511.** “Although *Sanchez* is a criminal case, it also applies to civil cases—such as this one—to the extent it addresses the admissibility of expert testimony under Evidence Code sections 801 and 802.” (*Id.* at p. 520.)

***People v. Garton* (2018) 4 Cal.5th 485.** Although some expert testimony regarding case-specific facts noted in an autopsy report was inadmissible hearsay, the error was harmless because there was no dispute at trial about the cause of death. (*Id.* at p. 507.)

***People v. Flint* (2018) 22 Cal.App.5th 983.** *Flint* reconciled a superficial conflict in post-*Sanchez* cases regarding whether an expert can testify to independently proven competent evidence if the expert has no personal knowledge regarding the evidence. *Flint* analyzed two lines of authority to determine whether *Sanchez*’s “independently proven by other evidence” exception requires the expert to have personal knowledge. *Flint*

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concluded that the cases were only “superficially in tension with one another,” and that the correct analysis boils down to harmless error: Even in the absence of personal knowledge, if facts can be independently proven from admissible evidence in the record, there’s no harm in admitting hearsay because there’s no likelihood of a different result. (*Id.* at p. 1000.)

***In re Ruedas* (2018) 23 Cal.App.5th 777.** The *Sanchez* rule applies prospectively only. (*Id.* at p. 780.)

***People v. Veamatahau* (2018) 24 Cal.App.5th 68.** Disagreeing with *Stamps*, *supra*, 3 Cal.App. 5th 988, *Veamatahau* held that an expert’s testimony about the appearance of pills in a computer database in a case involving illegal possession of a controlled substance did not involve case-specific facts because the expert’s testimony was merely background information, which is still admissible under *Sanchez*. (*Id.* at pp. 73-76.)

***People v. McVey* (2018) 24 Cal.App.5th 405.** The trial court properly excluded unauthenticated medical records, police reports, and related expert testimony involving the victim because they included case-specific hearsay and were not covered by the business records exception. (*Id.* at pp. 411-413.)

***People v. Yates* (2018) 25 Cal.App.5th 474.** The Court of Appeal reversed the trial court because it misapplied *Sanchez* by permitting experts to testify about case-specific facts contained in state hospital, criminal, and juvenile records, which were not covered by a hearsay exception or independently proven by competent evidence. (*Id.* at pp. 484-486.) *Yates* also agreed with *Burroughs* and *Roa* that *Sanchez* applies in civil cases.

Tips for practitioners

Sanchez’s ramifications are significant. Some practitioners may need to break out, and dust off, the ol’

law school outline or the Evidence Code to brush up on the basics. Now more than ever, you’ll need to familiarize yourself with the various hearsay exceptions and understand exactly how they apply.

- **Medical reports.** *Sanchez* did not make proffering expert testimony concerning medical reports significantly more difficult because multiple hearsay exceptions can potentially apply—e.g., business records, state of mind, or physical condition exceptions—or the facts may have been admitted by a party. But to the extent counsel proffers a medical record containing a physician’s opinion, counsel is now required to offer that physician’s testimony so the opinion will not be excluded as hearsay.

- **Police reports.** When it comes to police reports, the *Sanchez* hurdle can be almost unsurmountable. Before *Sanchez*, an accident reconstruction expert could testify about witness statements in police reports. But after *Sanchez*, counsel will have to track down the witness. That’s not always a simple task.

- **Prior bad acts.** Another potential pitfall involves prior-similar-occurrence evidence. No longer can counsel simply have an expert repeat the hearsay contained in written reports about these prior incidents. Now counsel will have to track down and depose each and every person who has personal knowledge about the prior occurrences.

Are the incident reports on which your expert relied crucial to your case? If so, you should think about what other foundational witnesses you’ll need to call. If complying with *Sanchez* is going to greatly increase the length of your trial, perhaps you can get opposing counsel to stipulate to the records’ admissibility. Don’t wait until trial to game-plan how you’re going to get that key incident report in. Plan ahead!

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“Perpetual” Contracts Under California Law...continued from Page 1

service contracts, and real property agreements.

Conversely, contracts not governed by the California Commercial Code that call for a set number of performances are terminable upon completion of the set of performances. Such contracts often involve a set number of deliveries or a specific quantity of goods—for instance, a yield of a crop planted on a specific plot of land, or all of the materials required to complete a particular project. Contracts of this type that specify that they continue until some event occurs are generally not indefinite: courts determine that the contractual obligations of the parties end upon occurrence of that specified event.

Even where a contract does not call for a set of performances and is not terminable upon completion, California courts will attempt to avoid construing the contract as perpetual. In *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union, Local 16*, 69 Cal. 2d 713, 727 (1968), the California Supreme Court created a three-step analysis to cabin the duration of perpetual contracts. First, courts look to find an express term of duration in the contract. Second, if an express term is absent, the court looks to the intention of the parties in order to imply a duration, if that is possible. In doing so, the court looks at whether duration can be inferred from the nature of the contract and the circumstances surrounding it. To show implied intent, parties may introduce extrinsic evidence which the court can use in construing the contract’s duration. See *Am. Indus. Sales Corp. v. Airscope, Inc.*, 44 Cal. 2d 393, 397 (1955) (“[W]hen the parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms.”).

Third, if neither an express nor an implied term can be found, the term of duration will be construed to be a reasonable time. Obligations under the contract are terminable at the will of either party after that party gives reasonable notice to the other party and after a reasonable time has elapsed. However, California courts go to great lengths to avoid such a construction for multiple reasons. First, courts avoid this construction because it is often

either illogical or against public policy. See *Cooper Cos. v. Transcon. Ins. Co.*, 31 Cal. App. 4th 1094, 1103-04 (1995) (deeming the “troubling ramifications” resulting from interpreting an insurance contract terminable at will “unreasonable”). Second, courts disfavor perpetual contracts because they permit courts to infer the contractual intent of parties for a contract of a “reasonable time”—often without any evidence that such intent was shared by the parties themselves at the time of contracting. Thus, where no express duration exists, courts will usually imply a duration under the second step based on the contracting parties’ intent. Courts conclude that a contract contains a perpetual term only if such a reading is compelled by the unequivocal language of the contract. See *Zimco Rests., Inc. v. Bartenders & Culinary Workers Union, Local 340*, 165 Cal. App. 2d 235, 238 (1958).

Despite their best efforts to avoid such a construction, there are instances in which California courts have found that a contract is perpetual. For example, in *Zee Medical Distributors Ass’n, Inc. v. Zee Medical, Inc.*, 80 Cal. App. 4th 1 (2000), an association of distributors brought an action seeking a declaration that its contract with the supplier lacked a definite duration and was thus terminable at will. The Court of Appeal held that the plain, unambiguous language of the contract expressly provided for a term of indefinite duration and that the contract was therefore terminable at the will of either party. *Id.* at 13-14.

While the three-step analysis applies generally to all perpetual contracts, special issues present themselves in certain areas. For example, contracts governed by the California Commercial Code are subject to a different analysis. The California Commercial Code states that where a contract provides for successive performances but is indefinite in duration, the agreement is valid for a reasonable time, but unless otherwise agreed, the contract may be terminated at any time by either party. It also provides, however, that termination of a contract by one party, except on the happening of an agreed event, requires that reasonable notification be received by the other party. An agreement dispensing with notification is invalid if its operation would be unconscionable. See Cal. Com. Code § 2309 (West 2002).

Contracts addressing periodic payment situations also

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bedevil California courts. In determining whether a party must make periodic payments under a contract that provides no fixed date for termination of the party's obligation, the court looks at whether there is an ascertainable event that may supply a basis for implying a termination date. For example, in *Lura v. Multaplex, Inc.*, 129 Cal. App. 3d 410 (1982), an individual sued a corporation for breach of a contract under which he agreed to secure customer accounts for the corporation in exchange for commissions based on the corporation's sales to those accounts. The contract contained no provision specifying how long these commissions would be paid. The California Court of Appeal reversed the trial court's holding that the obligation was terminable at the will of either party so long as reasonable notice was given. *Id.* The plaintiff's only duty under the contract was to secure accounts. Once he had done so, the only obligation remaining was that of the corporation to pay the agreed-upon compensation. Because the plaintiff had already performed the services he was contractually obligated to perform, the defendant was thus obligated to continue paying the commissions to the plaintiff as long as it continued to benefit from the accounts plaintiff secured. The Court of Appeal thus held that the corporation could not terminate the agreement by simply giving reasonable and sufficient notice of its intent to cease making commission payments because the contract already contained an ascertainable event under which the termination would necessarily be implied: the corporation's termination of sales to the accounts plaintiff procured. *Id.* at 415.

Another area in which California courts have addressed the issue of perpetual contracts is exclusive distributorships. In *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709 (1982), for example, the California Court of Appeal held that, absent a provision requiring cause for termination, an agreement creating an exclusive distributorship is, much like contracts with an indefinite duration, terminable by the supplier at will upon reasonable notice.

Real property contracts present another instance in which the perpetual contract issue can arise. In the

landlord-tenant context, perpetual leases are complicated by both public policy and statutory guidance. For example, California Civil Code section 718 prohibits leases longer than ninety-nine years. However, more recent decisions have rejected the use of section 718 to limit the term of a lease unless it extends beyond ninety-nine years by its express terms. Further, courts also note that provisions allowing perpetual renewal of leases are disfavored because they potentially “put[] it in the power of one party to renew forever, and [are] therefore against the policy of the law,” even if perpetual renewals would not violate the rule against perpetuities. *Ginsberg v. Gamson*, 205 Cal. App. 4th 873, 884 (2012).

Even though perpetual leases are disfavored, California courts may interpret a lease as perpetual where there is “peculiar and plain language” showing that parties intended to create such a lease. *Id.* at 885. *Ginsberg* is an example of a case that did not meet that standard. There, the California Court of Appeal stated that a lease containing language allowing extension of the lease for additional five-year periods failed to “demonstrate a clear intent to create a right to unlimited extensions.” *Id.* at 890. The court noted that the ambiguous language referring to “additional periods” did not clearly show an intent to create the right to unlimited renewals. *Id.* at 891.

Without evidence of intent which can supply a basis to imply a duration or express language stating a definite duration, a contract may unintentionally become perpetual, and thus terminable at the will of either party. Accordingly, it is critical that attorneys drafting or reviewing contractual language ensure that their clients are aware of the duration for which the contract binds them.

Olivia Powar is an associate in the Los Angeles office of Skadden, Arps, Slate, Meagher & Flom LLP.

YLD UPDATE



Jen Cardelús



Andrew J. Holmer

After a summer of transition, the ABTL's Young Lawyers Division is looking forward to another exciting and action-packed year. For the 2018 term, Jen Cardelús will serve as chair of the YLD, with support from Andrew Holmer as vice-chair. For the upcoming year, the YLD will be hosting a number of events focused on providing opportunities for young lawyers to interact with the judiciary, engage with other young lawyers in the community, and strengthen our

ties with the larger legal community. Our first event of the term is an October 27 community-impact project with the Los Angeles Regional Food Bank. Volunteers will help prepare food packages for low-income seniors and women with infants and children in Los Angeles County; stay tuned for further details. An Advisory Committee of YLD members will organize the year's remaining calendar of brown-bag lunches, judicial mixers, practical panels, and social functions. YLD members who are interested in taking a more active role in planning these events are encouraged to contact Jen and Andrew.

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CALLING YOUNG LAWYERS

The ABTL Young Lawyers Division (YLD) is looking for

NEW MEMBERS

practicing 10 years or less to participate in the

Planning of Young Lawyers Division Events.

If you are interested, please contact

abtl@abtl.org.



Mark your Calendars

November 27, 2018

Dinner Program — The Millennium Biltmore
Wine Reception 6:00 p.m.
Dinner 7:00 p.m. to 9:00 p.m.

January 22, 2019

Lunch Program — The Millennium Biltmore
12:00 p.m. to 1:30 p.m.

February 2019

Dinner Program — The Millennium Biltmore
Wine Reception 6:00 p.m.
Dinner 7:00 p.m. to 9:00 p.m.

March 2019

Lunch Program — The Millennium Biltmore
12:00 p.m. to 1:30 p.m.

April 2019

Dinner Program — The Millennium Biltmore
Wine Reception 6:00 p.m.
Dinner 7:00 p.m. to 9:00 p.m.

June 2019

Judicial Reception
Reception 6:00 p.m. - 8:00 p.m.

ABTL 46th Annual Seminar

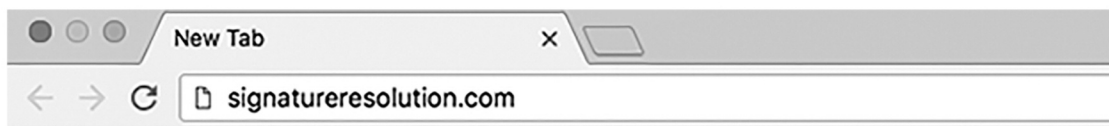
La Quinta Resort and Spa
October 3-6, 2019

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