ASSOCIATION OF BUSINESS TRIAL LAWYERS

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What Judges Are Taught About Trials

Hon. Patricia Lucas (Ret.)

Hon. Beth Freeman

As your case advances toward trial, have you wondered what your trial judge thinks about, stresses about, when it comes to managing the trial? If you have, that's a good thing: the best advocates are the ones who put some effort into imagining, and then understanding, the judge's experience and mindset. It's a variation on the conventional advice about a judge's questions during motion argument: pay attention to these precious windows into the mind of the decision maker.

Trial management is not all intuitive, and judges go to class to learn the law and to

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Also in This Issue

The Importance of Mentoring Junior Trial Attorneys

Hon. Marie S. Weiner (Ret.)

Law firms now recognize the importance of having junior trial attorneys make substantive court appearances and participate in civil trials. This effort needs to go hand-in-hand with taking the time to mentor those junior attorneys about how to handle themselves in court. I suggest that law firms and senior trial attorneys revisit the training method of individual mentoring, and take the time to do so.

This article is the *second* in a series, identifying overlooked opportunities for mentoring that should be provided to junior trial attorneys. All of the examples are real.

Putting Deposition Testimony into Evidence

You took the deposition of the witness, and now you want to use it to impeach that witness at trial. Or you simply want to put certain deposition testimony into evidence, because the witness is not available for trial. That's when the momentum of the trial comes to a grinding halt – because the junior trial attorney has not been mentored about how to actually do this. So I, the judge, have to help walk them through the process

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Caroline McIntyre

Do's and Don'ts with Does

Caroline McIntyre

Most California state court complaints contain boilerplate language regarding Doe Defendants. But attorneys do not always carefully consider how the Doe Defendant language is drafted, or what steps are needed to properly substitute a party in place of a Doe Defendant. Doe Defendants have the opportunity to challenge improper amendments. As such, it is important for Plaintiffs and Defendants to know the specific requirements for Doe amendments.

Do Know the Statute

California Civil Procedure Code Section 474 ("Section 474") governs the designation of Defendants by fictitious names and subsequent amendment once the true name is discovered. When a Defendant is properly named under Section 474, the amendment relates back to the filing date of the original complaint. *Woo v. Superior Court*, 75 Cal. App. 4th 169, 176 (1999). This allows Plaintiffs to avoid the bar of the statute of limitations when they are ignorant of the identity of the Defendant.

Section 474 demands strict compliance with its requirements in order to claim the benefits of the statute. The statute reads, in pertinent part:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint…and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly…

Note that substituting a Doe Defendant is only allowed under Section 474 where the amended allegations are based on "the same general set of facts" as the allegations in the original complaint. *Austin v. Massachusetts Bonding & Insurance Co.,* 56 Cal. 2d 596, 602 (1961). A Doe amendment relates back to the original complaint only when it "seeks to hold the defendant responsible for the same occurrence and damage alleged in the original complaint." *Altman v. Morris Plan Co.,* 58 Cal. App. 3d 951, 963 (1976).

But Section 474 does not apply where liability is purportedly based on an entirely different "offending instrumentality," even when the new complaint seeks recovery for the same injury. *Coronet Manufacturing Co. v. Sup. Ct.,* 90 Cal. App. 3d 342, 347 (1979) (denying in a wrongful death action an attempted Doe amendment under Section 474 where Plaintiff tried to alter the cause of death from a defective hair dryer to a defective table lamp because "[a]lthough [the two complaints] relate to a single death at a single location they are different 'accidents' and involve different instrumentalities").

Do Review Accessible Information

Under the statute, a Plaintiff must be ignorant of the true name of the Defendant. But "[a] plaintiff is 'ignorant of the name' if he knows the identity of the person but is ignorant of the facts giving him a cause of action against such person." *Wallis v. Southern Pac. Transportation Co.,* 61 Cal. App. 3d 782, 786 (1976). "This lack of knowledge of the true name of a defendant must be real and not feigned, and must not be willful ignorance, or such as might be removed by some inquiry or resort to information easily accessible." *Schroeter v. Lowers*, 260 Cal. App. 2d 695, 700 (1968). In that regard, a Plaintiff is required to "review readily available information that discloses the defendant's identity to invoke the section 474 relation-back doctrine; otherwise, the plaintiff is not in good faith using section 474." *Woo*, 75 Cal. App. 4th at

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Amy Briggs

On INSURANCE

Amy Briggs

The vast majority of civil disputes are resolved through some form of mediation. When insurance money is involved, litigators should be sure to take steps to ensure that their client's interests are protected. A recent case from the Ninth Circuit provides a good reminder of what to do in preparation for any settlement discussions.

The Ninth Circuit insurance decision—*Vizio, Inc. v. Arch Insurance Company*—arose out of consumer lawsuits brought against Vizio starting in late 2015. The broker put both the primary insurer and the excess insurer (Arch) on notice of the lawsuits. Arch, the excess insurer, responded and requested additional information. The primary insurer denied coverage. Although Vizio provided the denial to Arch, it did not provide any further "substantive" updates, a point the district court and the Ninth Circuit noted several times. As it turns out, Arch subsequently decided to deny coverage. However, it never informed its insured, Vizio, of its denial.

Fast forward to 2018, when Vizio decided to settle the underlying consumer lawsuits. It did not inform Arch of the upcoming settlement opportunity, nor did it provide Arch with a settlement analysis, a case evaluation, a budget, or the mediation statements (presumably this was because it had not heard from Arch). When it settled, Vizio did not obtain Arch's consent and paid about $11 million if its own money.

Vizio then sought to recover from Arch. The district court dismissed Vizio's complaint against Arch on the ground that the insured was required to give notice of the claims *after* exhaustion of the primary policy, and that the original notice of the claim somehow did not count. The Ninth Circuit rejected that logic but found that there was no coverage for a different reason: Vizio had failed to obtain Arch's consent prior to settling.

A quick note about the importance of "consent" in the world of insurance. Many liability policies contain a clause that requires the insurer's consent prior to settling a claim. (Some policies refer to these as "no voluntary payments" provisions. *See, e.g., Low v. Golden Eagle Ins. Co.,* 110 Cal.App.4th 1532, 1544 (2003)). Absent economic necessity, insurer breach, or other "extraordinary" circumstance, these clauses are enforced, even where there is no prejudice to the insurer. *Jamestown Builders, Inc. v. General Star Indem. Co.*, 77 Cal.App.4th 341, 346 (1999).

Vizio's strongest argument was, of course, that Arch had breached the policy first by failing to respond to Vizio's original notice in 2016 and by failing to inform Vizio that it had denied coverage. But the Ninth Circuit rejected that argument.

First, it held that Arch *had*, in fact, responded to Vizio's notice and requested additional information as part of its investigation. But Vizio could not allege that it had provided substantive updates to Arch or that there had been any communication between them for years.

Second, the Ninth Circuit held that the consent requirement would only be excused if Vizio had requested coverage and Arch had denied it. *Low*, 110 Cal.App.4th at 1547 ("[I]t is only when the insured has requested and been denied a defense by the insurer that the insured may ignore the policy's provisions forbidding the incurring of defense costs without the insurer's prior consent and under the compulsion of that refusal undertake his own defense at the insurer's expense.") In this case, Arch never told Vizio it was denying coverage and Vizio

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HOWARD ULLMAN

On ANTITRUST

Howard Ullman

Rather than take a deeper dive into a particular issue or recent case, let's look at the top five developments in U.S. antitrust law in 2023.

1. **<u>New draft merger guidelines</u>**. On July 19, 2023, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued their long-awaited draft Merger Guidelines. The draft Merger Guidelines, once finalized, will replace both the 2010 Horizontal Merger Guidelines and the withdrawn 2020 Vertical Merger Guidelines. The 60-day public comment period expired on September 18, 2023. The draft Merger Guidelines reflect how DOJ and FTC currently assess mergers during the investigation phase but are not binding on the courts.

Among other things, the draft Merger Guidelines lower the market concentration threshold for the presumption that a merger is illegal (from 2,500 on the so-called Herfindahl-Hirschman Index to 1,800). Deals that result in combined market shares above 30% may also be presumptively unlawful. Vertical mergers with more than 50% foreclosure are also presumptively illegal. The draft Guidelines also identify concerns with serial acquisitions (*e.g.*, a series of small acquisitions) and partial acquisitions. Other changes include a new focus on mergers that entrench or extend a dominant position, eliminate potential competition, or harm workers.

2. **<u>Enhanced enforcement efforts relating to online markets</u>**. At the time of this writing, the DOJ just finished presenting evidence in its case against Google in the Northern District of California concerning Google's alleged dominance of online search and, *inter alia*, Google's payments for search exclusivity on Apple devices.

The FTC and 17 state attorneys general filed suit against Amazon in the Western District of Washington in September, alleging that the online retail and technology company is a monopolist that uses a set of interlocking anticompetitive and unfair strategies to illegally maintain its monopoly power. These alleged practices include anti-discounting measures that allegedly punish sellers and deter other online retailers from offering prices lower than Amazon, conditioning sellers' ability to obtain "Prime" eligibility for their products on sellers using Amazon's costly fulfillment service, degrading customer experience by replacing relevant and "organic" search results with paid advertisements, and biasing Amazon's search results to preference Amazon's own products.

Meanwhile, Facebook / Meta prevailed in an appeal involving dozens of state attorneys general who alleged that Meta had illegally maintained monopoly power in the social networking market through its acquisitions of photo-sharing app Instagram in 2012 and WhatsApp in 2014, and that it gained further power through data policies that harmed app developers. The decision largely turned on statute of limitations rules. A somewhat parallel case brought by the FTC in the D.C. District Court remains pending. The FTC's amended complaint highlights the competitive importance of data and argues that privacy degradation can constitute an antitrust harm.

Finally, in April, the Ninth Circuit largely upheld the ruling in the case brought by Epic Games against Apple finding that Apple's App Store policies do not violate federal antitrust law but its anti-steering rules regarding alternative payment methods do violate California's Unfair Competition Law. The Supreme Court is now deciding whether to take up the case.

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Ragesh Tangri

Letter from the President

Ragesh Tangri

First off, on behalf of the ABTL, a very Happy Spring to all of our members! We are in the midst of an exciting, eventful, and informative year, which I'll describe below.

Programs: We are hopeful that this can and will be our first year since 2019 with a full slate of dinner programs. We're excited to return to that, as we have heard, and believe, that the chance to break bread together is an important feature of our programs. And we intend to stick with our new schedule—socializing from 5:30 – 6:30, dinner from 6:30 – 7:30, and the program from 7:30 – 8:30, to get everyone on their way a little earlier than our 2019 schedule did. Our programs, The Ethos of Trial, The Trust Busters: Insights on Competition from FTC Officials, and The Challenges of Cryptocurrency/Blockchain Litigation, were great successes.

Membership: we currently have 1586 members – a very strong showing. We are hopeful that with dinner programs returning and our chapter hosting the annual seminar (see below), we'll reach a membership total that compares favorably to our historically high numbers.

New Judicial Board Members: In recent months we've had the pleasure of welcoming new members of the bench to our board: the Hon. Edward Chen (from the Northern District); the Hon. Jacqueline Scott Corley (also from the Northern District); the Hon. Nancy Fineman (from the San Mateo Superior Court); and the Hon. Brian Ferrall (from the San Francisco Superior Court). We welcome Their Honors to our ranks and look forward to their contributing great ideas for our programming and other efforts by our chapter.

Annual Seminar: Our chapter is the host chapter for this year's Annual Seminar. It will be held October 17 – 20 at the lovely (and recently renovated!) Meritage Resort in Napa. Our programming committee—in collaboration with the programming committees of our fellow chapters—is already hard at work developing an entertaining and informative schedule of programs for the Seminar, so mark your calendars now, and watch for an email invitation in the coming months!

I'll close by wishing you the best for 2024, and saying that I'm looking forward to seeing all of you at our dinner programs, the Annual Seminar, and around town.

Best,
Ragesh Tangri

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What Judges Are Taught About Trials

share best practices. For several years, I have been privileged to teach judges a plenary class on Trials at the California Judicial College, along with Judge Darrell Mavis of the Los Angeles Superior Court. All California bench officers are required to attend the College early in their judicial careers. In preparing for this year's class, it occurred to me that it could be useful to trial attorneys to know what's on that syllabus. To round out the lesson to benefit those who practice in federal court, my former state court colleague and now Federal District judge, Beth Freeman, has agreed to provide color commentary on how federal judges consider the same issues.

We will focus on four key areas where the judge's proactive management can be critical in ensuring a trial conducted fairly and efficiently and in a manner that shows respect for the jurors by minimizing time they spend just waiting: pretrial conferences, time limits, motions in limine, and voir dire.

1. Conducting Pretrial Conferences

Judges recognize that the pretrial conference is a critical opportunity to discuss with counsel problems that can generate delay during trial, and to spot problems that counsel may not have identified. In any jury trial, the judge will be mindful of respecting and protecting the jury—which in large measure means minimizing wasted time. The major complaint among jurors who have served in a trial is the down time, waiting for reasons not apparent and not explained, leading them to reasonably assume that much of the down time could have been avoided.

A primary source of trial delay is witness scheduling. Judges are taught to be clear in framing their expectations to counsel: "Witnesses wait, jurors don't." Checking in every day as to who will be testifying that day and the next day, and reminding lawyers not to run out of witnesses, is considered the best practice. Particularly problematic can be the scheduling of busy expert witnesses, but pursuant to Code of Civil Procedure section 367.75(c), there is a strong legislative preference for allowing experts to testify remotely—which should minimize scheduling challenges. Accommodating witnesses with physical or mental disabilities may require flexibility as to the day or time when they are able to testify. Always mindful that trial cannot get underway until all participants are present, judges will inquire about the need for language interpreters.

Judges learn that it is not always prudent to rely on counsel to raise issues during trial at a time that allows for sufficient discussion but doesn't keep the jury waiting. Many judges will require counsel to be present every day at a set time before the jury is scheduled to arrive, for the purpose of raising issues about the day's proceeding without impinging on the jurors' time. Even this may not be enough: attending to many issues that require their attention, counsel may still wait until just before the jurors arrive to raise issues for discussion, so the judge will usually check in, proactively, at the time counsel arrives: "Anything to discuss before the jury comes in?"

On the federal side, judges are aided by the mandates of Federal Rules of Civil Procedure 16 covering pretrial conferences, scheduling and management. Early in the life of the case parties meet with the judge to discuss case management and to open the gates on discovery under Rule 26 including initial disclosures. Once the case schedule is set the parties must show good cause to alter it. Whether a judge engages in active case management throughout the life of the cases depends on each judge's preference. In complex cases, active case management is highly recommended and discussed at length in the Manual for Complex Litigation.

The final pretrial conference is the key tool for the judge to impose order on the trial process. A trial plan is developed that will control the presentation of the case. Rule 16(e). The final pretrial statement controls the trial and only those claims set forth in the parties' joint statement and adopted by the court in the final pretrial order will proceed to trial. Rule 16(d), (e). That includes claims or defenses not previously pled, *999 v. CIT Corp* 776 F.2d 866, 870, although considerations of prejudice would ordinarily prevent new claims right before trial.

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Federal judges follow the same wise procedures as outlined above in sleuthing out issues that might cause delay or surprise during trial.

2. Imposing Time Limits

Judges want to know what counsel's estimates are for the duration of the trial, but need to independently evaluate those estimates which are often unrealistically optimistic. To time-qualify a jury, judges must strike a difficult balance: estimating a trial duration that allows ample time for completion of evidence, argument and deliberations, but not making the estimate so long that jurors will have to be excused who could have served if the trial estimate were shorter. Once the jury is sworn, there is always some measure of stress around getting the case to the jury before individual jurors start to become unavailable.

For these reasons, judges are taught to consider imposing reasonable time limits on the trial overall or on specific segments of the trial such as voir dire, presentation of evidence, and argument. (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 19.) The *Crane School* case provides specific guidance for using this management tool: consult with counsel, inform the jury, check in daily, and enforce the limit. Imposing time limits encourages counsel to be thoughtful about their presentations and to consider stipulations concerning facts not really in dispute. Often, the result is a trial that is even shorter than the time limits—and the jury never seems to mind if the trial is shorter than expected.

Time limits are the norm in federal court. That includes limits on voir dire and presentation of the case. Parties have no right to conduct voir dire in federal proceedings. As the Supreme Court has said jury selection is "particularly within the province of the trial judge." *Skilling v. United States*, 561 U.S. 358, 386 (2010). That said, most judges allow at least limited opportunity for the attorneys to ask questions. It's an issue that should be thoroughly explored at the final pretrial conference. Time limits for presentation of evidence are also tightly controlled, and within the discretion of the trial judge. Usually, those time limits are a small fraction of the time requested, so attorneys need to be prepared to pivot in their case presentation.

3. Managing Motions in Limine

Thoughtful motions in limine can greatly streamline a trial, and the court's rulings sometimes will inject new clarity sufficient to facilitate settlement. However, many civil trial judges are burdened by excessive motions in limine. Judges are taught how to discourage and to manage problematic motions.

One favored management technique is to require counsel to meet and confer before any motions in limine are filed, and to direct that no motion should be filed unless counsel know (from meeting and conferring, not simply "suspecting") that the motion will be opposed. If the motion will not be opposed, there should be a stipulation and not a motion. Counsel may also be required to meet and confer again when oppositions have been filed, to determine if, with the benefit of full briefing, the parties may be able to reach a stipulation. This approach should eliminate any motions in limine which seek, instead of the admission or exclusion of evidence, "rulings which would merely be declaratory of existing law or would not provide any meaningful guidance to the parties or witnesses" or address "[m]atters of day-to-day trial logistics and common professional courtesy." (*Kelly v. New West* (1996) 49 Cal.App.4th 659, 670-71 [reversing nonsuit where "misuse and abuse of motions in limine" caused "denial of due process for plaintiff"].) Among the 28 motions in limine filed by defendant were motions to exclude speculative testimony, to exclude prior incidents unless a proper foundation is laid, and to preclude witnesses not identified in discovery—all of which the appellate court deemed "meaningless" and at best premature.

Judges are also taught that certain motions in limine are "a recipe for reversal." (*Tung v. Chicago Title Co.* (2021) 63 Cal.App.5th 734, 740 [reversing where in limine ruling improperly excluded evidence based on defective pleading].) Trial judges should "be wary" of an in limine motion, "no matter how captioned," that seeks to preclude evidence because of a problem with the pleadings. (*Id.*) Similarly, a motion in limine that seeks to preclude evidence on the ground that the moving party prevails as a matter of law may really be a summary judgment

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motion made at the outset of trial. Such in limine motions "circumvent procedural protections …, risk blindsiding the nonmoving party, [and] could infringe a litigant's right to a jury trial…." (*Amtower v. Photon Dynamics* (2008) 158 Cal.App.4th 1582, 1593-94.)

It's not so different in federal court. Motions in limine are not a mini-trial and not a do-over for summary judgment. Often parties seek to exclude unfavorable evidence, particularly expert opinions that would be unfavorable to their case. And it seems that every objection comes with the added assertion of bias or confusion under Federal Rules of Evidence 403. Judges are on to this tactic, and we generally know the difference between real prejudice (inflaming the passions of the jury) vs. a concern that evidence is "bad for my case". Jury confusion is rarely a thing, although lawyers often assert that it is.

That said, motions in limine have real value in working out complex evidence issues before the jury is seated and can aid in the smooth presentation of the trial. There are no federal rules limiting the number of motions or their content, just general guardrails. It is up to the trial judge to decide whether to rule on the motions pretrial or during trial. Often context matters and motions may be deferred.

4. Managing Voir Dire

Jury selection is not conducted the same way in every California courtroom. What screening is done before jurors reach the courtroom, or even the courthouse, varies greatly: scheduling conflicts, undue hardship, Covid anxieties, or even English language competency may or may not be addressed, at least to some extent, before a panel arrives in the courtroom. Because judges are encouraged to learn exactly what jurors have experienced before they arrive in their courtroom, lawyers are well advised to be aware as well.

Similarly, individual judges vary in how they conduct initial in-courtroom screening. Judges exchange best practices about how to conduct hardship and language competence screening, and whether and how to involve counsel in these processes. Judges are encouraged to brief attorneys fully on their voir dire procedures at a pretrial conference: how many jurors will be questioned before challenges begin (first twelve, six-pack, twelve-pack, entire panel); what is the process for challenges for cause; use of juror questionnaires; and how many alternates will be seated and when and how are they selected. Even many experienced attorneys are not aware that when a need arises to seat an alternate juror, absent a stipulation that juror is not the "next one" but is selected randomly from the alternates. (Code of Civil Procedure section 234.) In the pre-voir dire conference, a judge "shall consider and discuss with counsel the form and subject matter of voir dire questions," but a judge may not require counsel to submit voir dire questions in advance unless a particular counsel engages in improper questioning. (Code of Civil Procedure section 222.5(a), (b)(1).)

Judges are required by statute to allow, if any party requests, mini-openings before voir dire begins. (Code of Civil Procedure section 222.5(d).) Most judges consider this to be a great idea, and may proactively suggest it to counsel. In training, judges discuss the prevalent mindset of many potential jurors that their number one goal is to be excused, and that the mini-opening may serve as a trailer of "coming attractions" that could persuade some jurors that this duty is also an opportunity to hear an interesting story. The mini-openings are likely to be subject to a reasonable but short time limit which will be enforced.

Following the court's initial examination (Standards of Judicial Administration, section 3.25), counsel are allowed to conduct "liberal and probing examinations calculated to discover bias or prejudice" in aid of the exercise of both peremptory challenges as well as challenges for cause. (Code of Civil Procedure section 222.5(a), (b)(1).) However, the court may exercise discretion to impose reasonable limits on scope of examination, and may set time limits as long as they are not unreasonable or arbitrary or as part of inflexible one-size-fits-all-cases policy. (Code of Civil Procedure section 222.5(b)(1) and (2).) Judges are taught to proactively manage improper voir dire questioning (Code of Civil Procedure section 222.5(b)(3), starting with the pretrial conference.

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Finally, although it does not become effective in civil cases until January 2026, judges are trained to understand the sea change in the law concerning exercise of peremptory challenges which the Legislature has wrought in Code of Civil Procedure section 231.7, addressing unconscious bias.

Jury selection in civil trials in federal court has several surprising differences compared to state court. First, juries can be made up of 6-12 jurors, there are no alternate jurors, and their verdict must be unanimous absent stipulation. FRCP 48. Peremptory challenges are limited to three per side. 28 U.S.C. 1870. Handling hardship excuses, use of questionnaires and oral voir dire differ judge to judge. Generally, there is a growing use of written questionnaires which often are sent electronically to the jurors before jury selection. Rarely is a six-pack used and so attorneys need to be prepared to question the entire panel before cause and peremptory challenges. Criminal trial jury selection is more similar to state court procedures.

Much like the state court practices, federal judges trade best practices on jury panel size, hardship and cause procedures. We aren't bound by law to allow mini opening statements, but it is an option attorneys should request.

Jury investigation practices can also come under the watchful eye of the judge, sometimes prohibiting "friending" a juror to gain access to their social media accounts. And, although in the Northern District of California trial judges routinely conduct jury selection, there is authority for the delegation of voir dire to a magistrate judge with consent of the parties. *Wellness Int'l Network, Ltd v. Sharif* 135 S. Ct. 1932, 1943-44. On the issue of unconscious bias in the use of peremptory challenges, there is no federal counterpart to the newly enacted state law, but there is a strong concern that such bias not be part of the jury selection process. Remember, Batson applies in civil cases, *Edmonson v. Leesville Concrete Co.* 500 U.S. 614 (1991)

Regardless whether you're in state or federal court, it's important to recognize that each judge has a particular approach to jury selection and it's important to ask many questions at the final pretrial conference so that you can be prepared and not get crosswise with your judge.

Patricia M. Lucas served for twenty years on the Santa Clara Superior Court, where she was presiding judge and handled a docket of complex civil cases. She is now a neutral at JAMS.

Judge Beth Labson Freeman is a District Court Judge in the Northern District of California. Previously, Judge Freeman served as a Superior Court Judge in San Mateo County.

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The Importance of Mentoring Junior Trial Attorneys

so that the trial can continue – unfortunately right in front of the client or jury. Or you might have a judge who doesn't give a darn whether or not you have a clear record on appeal – because that is *your* job – so they simply allow the attorney to fall on their own petard with the mumbled mess being presented by the junior trial attorney, that may or may not be understood by the court reporter. See why it is better to take the time to train the junior trial lawyers *before* they go to trial?

Initially, the original deposition transcripts need to be lodged physically with the department of the trial judge. Photocopies can be used instead if counsel for the parties submit a stipulation and proposed order prior to trial. The judge needs the deposition transcript in order to be sure that it is read correctly into the record, and to rule upon any objections made at the deposition before the testimony is read into evidence.

Here is an example of a standard way to use deposition testimony for impeachment: "I would like to read from the witness' deposition taken on November 14, 2021, starting at page 25, line 13 to page 26, line 4." You then wait a beat or two to give the judge time to find that page in the deposition transcript, and give time for opposing counsel to interpose any objections. Please tell the judge whether there are any objections made at the deposition (on those particular pages) that need to be ruled upon *before* you read the testimony. You then read the deposition by saying "Question" at the beginning of each question, and you say "Answer" at the beginning of each answer. That's all you have to do. You *do not* read any objections made during the deposition (because objections are not evidence, and you have already alerted the judge to rule upon those objections).

Attorneys sometimes also say introductory things like: "Do you remember having your deposition taken? At your deposition you swore to tell the truth, right? Do you understand that lying under oath is a crime? I am now going to read from your deposition." This might be okay the very first time that you use a deposition at a jury trial, so that the jury gets the initial understanding that this is testimony taken under oath prior to trial; which is later reinforced by the standardized jury instruction. But this preparatory litany is completely unnecessary and a waste of time with subsequent witnesses, or in the context of a court trial. So skip it.

Rookies also say, "Do you remember that you said at your deposition . . . blah blah blah?" The witnesses almost *always* says, "I don't know; I can't be sure what I said at my deposition." It absolutely doesn't matter whether or not the witness remembers what they said at the deposition. They are telling the truth when they say, in front of the trier of fact, that they don't remember precisely what they said at deposition. By engaging in this introduction, you have just diluted your upcoming impeachment. It makes the witness sound sincere, and it wastes everyone's time. Juries and judges do not like their time wasted. So skip it.

After you read the deposition for impeachment, that's it! You move on to the next question to the witness. You do not need to say things like, "Did I read that correctly? Isn't that what you said?" The witness is not allowed to comment upon deposition impeachment, as there is no question pending – that is for rebuttal by opposing counsel. Impeach, and move on, without giving the opportunity for the witness to "explain." This isn't rude, it is advocacy, and the rules of the game.

Read the deposition testimony with inflection. Read it like people actually speak, not a droning monotone. On the other hand, don't read it like you are an actor doing a part, or with an exaggerated or strange intonation.

If you want to put a lengthy portion of the deposition into evidence at trial, i.e., three pages or more, you should plan to have it photocopied and ready to hand to the courtroom clerk to mark as an exhibit *or* hand to the court reporter so that the reporter has it available for correct transcription. This generally is the situation where the attorney wants to present a witness by deposition, rather than live. This applies whether it is deposition testimony read orally into the record, or deposition testimony played by video/visually to the jury. It

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is my general practice to require trial counsel to designate the deposition testimony prior to trial, allow any objections to that designation be made by opposing counsel, rule upon those objections, and then receive into evidence the designated deposition portions. Those portions of the transcript have to be photocopied and officially marked as a trial exhibit. (See CRC Rule 3.1115.) The Court then puts the designated deposition testimony in evidence. This absolves the court reporter from having to type that same deposition testimony into the transcript – it is already in the trial record as evidence, with no mistakes!

Train the junior trial lawyer as to what deposition testimony is actually admissible. Make sure that the junior trial attorney knows Code of Civil Procedure Section 2025.620 regarding use of depositions at trial, and related portions of the Evidence Code, to know when to properly use depositions. Is it admissible for any purpose, such as testimony of an opposing party? Is it only admissible as inconsistent with trial testimony? It is actually "inconsistent"? Does the answer contain inadmissible hearsay?

Effective use of depositions is a key skill for all trial attorneys, and a necessary component of mentoring junior trial lawyers.

[*Next time: Get Dressed Before You Come to Court]*

Hon. Marie S. Weiner (Ret.) served on the San Mateo County Superior Court from 2002 to 2024, most recently as the Civil Supervising Judge. Judge Weiner also served as the designated Complex Civil Litigation Judge for 11 years. Judge Weiner is a member of the ABTL Northern California Chapter Board.

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Do's and Don'ts with Does

180. Accordingly, Plaintiffs should spend time up front investigating potential parties and update that investigation as additional information is obtained during discovery.

<u>Do Use Required Language in the Complaint</u>

Counsel should make sure that the original complaint contains adequate language regarding fictitious Defendants that will meet the requirements of Section 474 later on. In that regard, the Complaint should clearly state that Plaintiff is ignorant of the true names of the defendants sued by the fictitious names and that the names are fictitious. *Kerr-McGee Chemical Corp. v. Sup. Ct.,* 160 Cal. App. 3d 594, 598 (1984). In *Kerr-McGee,* the court determined Kerr-McGee Chemical Corp. could not be substituted as a Defendant for Trona Medical Clinic under Section 474 where the original complaint did not allege that Trona Medical Clinic was a fictitious name and that Plaintiff was ignorant of its true name. *Id.*, at 597-598.

In addition, the Complaint must allege that the Does were responsible for the acts complained of. *Winding Creek v. McGlashan*, 44 Cal. App. 4th 933, 941-942 (1996) (the allegation that "each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged" and "proximately caused" plaintiff's damages, coupled with the allegation that each was acting as an agent for the others, sufficed to name the "Doe" Defendants.)

Care should be taken to make sure that use of a defined term "Defendants" in the original complaint includes the Doe Defendants. *Winding Creek,* 44 Cal. App. 4th 933 at 941 (The addition of "s" to "Defendant" in the charging allegations will suffice as long as the complaint does not limit the word "Defendants" to those sued by their correct names); *Scott v. Garcia*, 370 F. Supp .2d 1056, 1064 (S.D. Cal. 2005) (Where a party is not

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included in the definition of the Doe Defendant, the attempted Doe substitution fails).

Also, Plaintiffs should make sure that any amended complaints continue to include the Doe allegations. Otherwise, the Doe amendments may not relate back to the filing of the original complaint. *See Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* 114 Cal. App. 4th 1135, 1144 (2004) (filing Doe amendments when the amended complaint did not contain Doe allegations did not comply with Section 474). Doe Defendants should examine the original Complaint carefully for these issues, as they might provide a basis to challenge the amendment.

Don't Forget to Check the Local Rules

Certain courts only require parties who are seeking to amend a complaint to substitute defendant's true name for Doe to use a printed form, filling out the name of the defendant who will be served as a Doe. In contrast, other courts require an application and order to amend the complaint. And while some courts will grant this application on an *ex parte* basis, other courts require fully noticed hearings. So it is important to check the local rules to make sure the correct procedure is followed.

Don't Delay

Parties do not have a free pass under Section 474 to amend complaints with Doe Defendants at any time in the litigation. Instead, Section 474 provides a plaintiff must amend the complaint to state the true name of the defendant "when his true name is discovered."

Section 474 includes an implicit requirement that Plaintiffs may not "unreasonably delay" their filing of a Doe amendment after learning a Defendant's identity. *A.N. v. County of Los Angeles*, 171 Cal. App. 4th 1058, 1066-1067 (2009). In *A.N.*, the Plaintiff sought review of an order from the trial court which granted a motion filed by six individual Defendants challenging for unreasonable delay amendments that substituted their names for fictitious names shortly before trial. The amendments had been filed and served more than two years after the filing of the complaint. The trial court found the delay to be unreasonable and prejudicial. The Court of Appeal affirmed the order, noting that Section 474 includes an implicit requirement that a Plaintiff cannot unreasonably delay the filing of a Doe amendment after learning of a Defendant's identity.

"Unreasonable delay" includes a prejudice element, which requires a showing by the Defendant that he would suffer prejudice from Plaintiff's delay in filing the Doe amendment. *A.N.,* 171 Cal. App. 4th at 1066-1067. The Court of Appeal expressed its concerns about the amendments on the eve of trial:

> We see no reasonable explanation in the record for A.N.'s roughly two-year delay in filing and serving the Doe amendments…The trial court's decision to grant the motion to quash the Doe Amendments implicitly incorporates a finding of prejudice, and the court's express comments at the hearing on the motion – to the effect that it was 'very concerned' about the Doe Defendants being 'brought into this spinning vortex shortly before trial' - confirms such an implicit finding. We agree with the trial court's finding. The Doe Defendants were brought into the case less than one month before the case was set to begin trial, and it does not require speculation to recognize that a party who is drawn into litigation on the eve of trial will face difficulties in preparing a defense in such short order.

Id., at 1068.

Courts have recognized prejudice because of the time lapse between the acts complained of and the time of service. A plaintiff "should not be permitted to name a known defendant in a fictitious manner hoping to surprise a defendant by reviving 'claims that have been allowed to slumber until evidence

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has been lost, memories have faded and witnesses have disappeared."' *Munoz v. Purdy*, 91 Cal. App. 3d 942, 946-947 (1999). *See also Barrows v. Am. Motors Corp.,* 144 Cal. App. 3d 1, 8 (1983) ("Unreasonable delay in filing an amendment after actually acquiring such knowledge [of a defendant's identity] can bar a plaintiff's resort to the fictitious name procedure.")

Doe Defendants brought late into the "spinning vortex" of litigation face challenges by not having counsel present at prior depositions and not having the benefit of posing their own questions at depositions. They may also be faced with propounding their own written discovery and reviewing voluminous written discovery already propounded in a short period time. And, given the passage of time, the same evidence and witnesses may not be available. Doe Defendants may raise these types of arguments with the Court to support a prejudice argument. Existing Defendants may also be able to articulate prejudice suffered by the Doe amendments as the amendments will increase costs for Defendants and may delay the litigation and trial. As a result, Plaintiffs should be mindful to make any Doe amendments as soon as they discover facts giving rise to a cause of action against that party.

Do Know the Method to Challenge Doe Amendments

Improper service of a Defendant under Section 474 may be challenged by a motion to quash. *Optical Surplus. v. Superior Court*, 228 Cal. App. 3d 776, 783-784 (a trial court is required, as a matter of law, to grant a motion to quash service of summons when a party is wrongly served as a Doe Defendant); *Maier Brewing Co. v. Flora Crane Serv., Inc.,* 270 Cal. App. 2d 873, 875-876 (1969) ("If the terms of Code of Civil Procedure section 474 have not been complied with, the purported defendant has not been named as such in the complaint. A service upon one not named in a complaint does not confer jurisdiction to proceed upon the complaint against him, and a motion to quash is proper."); *but see A.N.,* 171 Cal. App. 4th at 1063-1064 (motion to quash under California Civil Procedure Code Section 418.10 challenges personal jurisdiction and may not be the proper procedure to challenge a Doe amendment, but the court should look to the substance of the motion, not its label, in assessing whether Section 474 was satisfied).

The Doe Defendant challenging the amendment may make an evidence-based motion, arguing that the Plaintiff "unreasonably delayed" his filing of the challenged amendment. *A.N.*, 171 Cal. App. 4th at 1066-1067. Plaintiff's opposition should include the dates upon which counsel learned the names of the Doe defendants and why their identities could not have been learned before the amendments were filed, as well as address the reason for any delay between learning the names of the Doe Defendants and filing the amendments. The *A.N.* court noted Plaintiff's failure to provide such information in its opposition:

> We see no reasonable explanation in the record for A.N.'s roughly two-year delay in filing and serving the Doe amendments…we see no express statement explaining the dates upon which A.N.'s counsel learned the names of the Doe Defendants, nor do we see any explanation of whether and why their identities could not have been learned before August 2007.

Id., at 1067-1068.

When the Doe Defendant's motion to quash is filed at the same time as a demurrer, the trial court need not reach the demurrer, but may instead rule on the motion to quash for improper service under Section 474. *McClatchy v. Coblentz, Patch, Duffy & Bass, LLP*, 247 Cal. App. 4th 368, 375 (2016).

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Do's and Don'ts with Does

Do Proceed with Caution

Doe amendments are an effective tool to add Defendants later in the litigation with the possibility of the claims against the Doe Defendants relating back to the filing of the original complaint. But Plaintiffs must follow the requirements of Section 474 by including mandatory language about Doe Defendants in the complaint, not eliminating language about Doe Defendants in an amended pleading, understanding the Court's procedure for filing Doe amendments, and promptly filing the Doe amendments when they learn facts giving them a cause of action against the person. Doe Defendants who believe they have been prejudiced by the amendments or believe there are other procedural defects can seek relief from the Court by filing a motion to quash with an evidence based motion. Existing Defendants may also have a basis to challenge the Doe amendments if they can also show prejudice from the amendments, either through increased cost from the amendment or otherwise.

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On Insurance

never followed up with Arch. The Ninth Circuit again noted that Vizio also had not provided Arch with any substantive updates since the original notice. According to the Ninth Circuit, this meant that Vizio was still obligated to obtain Arch's consent prior to settling.

Putting aside my disagreement with the Ninth Circuit's logic, insureds and their counsel should seek to avoid losing out on coverage by taking the following steps.

First, the insured should have a clear understanding as to which policies might afford coverage for any settlement. Speculating as to what occurred in *Vizio*, the focus seemed to have been on a different line of liability insurance perhaps to the exclusion of the coverage potentially afforded under the Arch policy.

Second, within reason, provide the information an insurer requests. This is generally required anyway under the "cooperation clause" and it prevents an insurer from later claiming that it cannot possibly pay money to settle a claim because it is still waiting on information to complete its investigation. Also, both courts in *Vizio* thought it was significant (for different reasons) that the insured had not provided any substantive information to Arch for years.

Third, analyze the insured's exposure realistically. Defense attorneys understandably want to put their best foot forward in explaining the amazing and creative defenses they have developed through their legal ingenuity. The place to do that is in the mediation statement or summary judgment motion, not in the analysis for insurers and the client. Underestimating exposure almost guarantees that the insurers will not have enough authority at the mediation to settle the potential liabilities.

Fourth, provide the analysis well in advance of the settlement discussions. Follow up, and ask

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On Insurance

if the insurer is attending with authority. In other words, actively suss out whether your client has a coverage problem in time to do something about it.

Fifth, make sure the claims adjusters for all relevant insurers can attend. This means include them in scheduling well in advance. If the exposure is in excess of the primary insurer's limits, make sure the excess carrier is not only aware of the exposure but has agreed to attend the mediation or settlement conference. (Again, this was a problem in *Vizio*.)

Taking these steps will avoid unwelcome surprises and help ensure that the dispute has the best chance of resolution.

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On Antitrust

3. **Significant cases tried, with mixed results**. Although large antitrust cases are tried infrequently, there have recently been a higher-than-average number of trials. In March, a jury in Maine acquitted home health agency operators accused of conspiring to fix caretakers' wages. And in April, during trial, a Connecticut federal court dismissed DOJ charges against six aerospace and staffing company bosses accused of participating in an employee no-poach conspiracy, preventing the case from going to the jury. In a somewhat similar vein, in October, an Illinois federal jury held for Sanderson Farms following a six-week trial, rejecting chicken purchasers' claims that the company participated in an unlawful conspiracy to raise broiler chicken prices by limiting the supply of the chickens. On the other side of the ledger, also in October, a federal jury in Missouri decided that the National Association of Realtors and several brokerages unlawfully conspired to artificially inflate real estate agent commissions and found damages of nearly $1.8 billion (before trebling). And in November, a jury in Illinois found the country's two largest egg producers and two industry groups liable for conspiring to inflate egg prices through coordinated supply restrictions.

4. **Continued interest in labor markets**. Despite setbacks in labor cases, interest remains in labor markets and employee no-poach agreements. In August, the Seventh Circuit in *Deslandes v. McDonald's USA, LLC* returned the issue of no-poach agreements in McDonald's franchise agreements to the district court, holding that such agreements could be *per se* unlawful.

5. **Challenges to the FTC's authority**. In April, the Supreme Court in *Axon Enterprise Inc. v. FTC* held that respondents in federal administrative proceedings can raise constitutional challenges to those proceedings in federal court before exhausting the administrative process. Thus, district courts have jurisdiction to hear complaints that challenge the constitutionality of the FTC's decision-making process, including as to whether tenure protections of Administrative Law Judges render them insufficiently accountable to the President in violation of separation-of-powers principles.

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If 2024 is as busy as 2023, it will be another significant year for antitrust law.

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