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LITIGATION INSIGHTS

Moore's Federal Practice & Procedure

Wagstaffe's Civil Procedure Before Trial

August 2019

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

CLASS ACTIONS

Standing of Class Representatives

NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.

926 F.3d 528, 2019 U.S. App. LEXIS 16885 (9th Cir. June 5, 2019)

The Ninth Circuit holds that when a class is certified and the class representatives are subsequently found to lack standing, the class should be decertified and the case dismissed.

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TAKING TESTIMONY

Testimony by Remote Transmission

Gil-Leyva v. Leslie

2019 U.S. App. LEXIS 19235 (10th Cir. June 27, 2019)

The Third Circuit holds that a defendant sued in an official capacity cannot be held personally liable for costs and attorney's fees awarded for improper removal.

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VENUE

Forum Selection Clauses

City of Albany v. CH2M Hill, Inc.

924 F.3d 1306, 2019 U.S. App. LEXIS 15802 (9th Cir. May 29, 2019)

The Ninth Circuit holds that the effect of a forum selection clause requiring venue in a county without a federal courthouse is to limit litigation to state court in that county and prohibit removal.

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THE WAGSTAFFE GROUP CURRENT AWARENESS

Candace Kelly, Regional Solutions Consultant

Do you need to know the latest legal developments dealing with pretrial civil procedure? Are you tired of looking all over Lexis Advance for them? If so, look no further than The Wagstaffe Group Current Awareness!

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This source is a Lexis exclusive and companion piece for The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial, as well as, a standalone source containing analytical articles on the latest legal development. These articles refer to current issues within the federal courts and current cases or legal issues addressing specific rules of civil procedure. They also contain direct links to these cases and to the specific sections within the Wagstaffe Practice Guide that can assist you with further understanding the topic of the article. Remember, the Wagstaffe Practice Guide has those helpful videos that walk you through that topic.

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Below are a few examples of the Wagstaffe Group Current Awareness:

Allegations of Citizenship on "Information and Belief" Sufficient to Overcome Facial Challenge to Diversity Jurisdiction

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The Wagstaffe Group Current Awareness

August 18, 2019

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Cite: 2019-18 The Wagstaffe Group Current Awareness 02 (2019)

Section: Vol. 2019; No. 18

Body

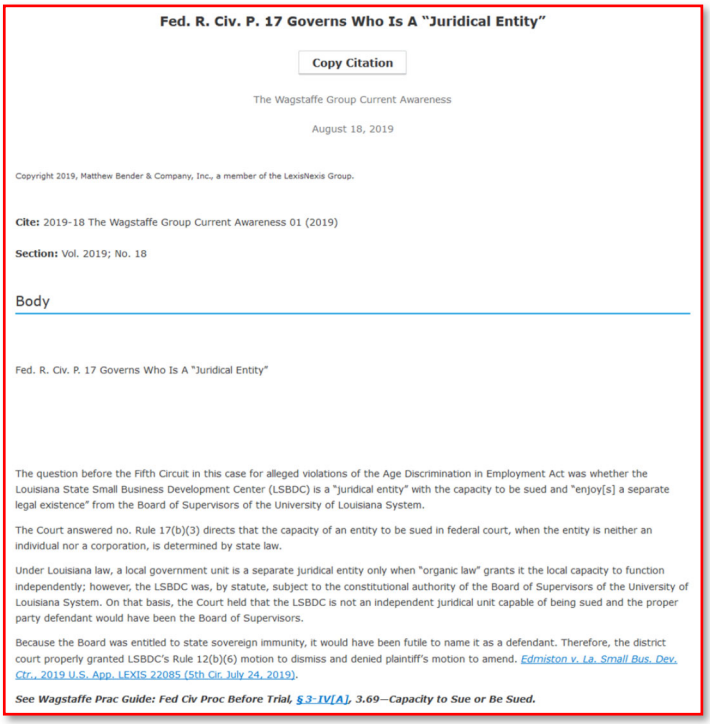
Allegations of Citizenship on "Information and Belief" Sufficient to Overcome Facial Challenge to Diversity Jurisdiction

A defendant removed a purported class action to federal court, asserting in its notice of removal that it was a citizen of two states and that the named plaintiff and class members were, upon information and belief, citizens of a third state. Plaintiff brought a facial challenge to the existence of diversity. The district court granted plaintiff's motion to remand.

The appellate court reversed. Allegations of jurisdiction, particularly those relating to minimal diversity for the purposes of CAFA removal jurisdiction, need only encompass a plain statement of the parties' citizenships (and the amount in controversy). As such, the defendant properly alleged the citizenship of other parties upon information and belief. Such allegations are sufficient to withstand a facial challenge to the pleading of jurisdiction.

It is only in response to a factual challenge to jurisdiction that the pleading party must prove each party's citizenship with evidence. The case was remanded with directions to proceed in the district court. *Ehrman v. Cox Communs., Inc.*, 2019 U.S. App. LEXIS 23671 (9th Cir. Aug. 8, 2019).

See Wagstaffe Prac Guide: Fed Civ Proc Before Trial, §7-VII[B], 7.498—Minimal Pleading Diversity Jurisdiction; see Wagstaffe Prac Guide: Fed Civ Proc Before Trial, §7-VII[C][2], 7.514—Facial Challenge: Allegations of Complaint Fail to Establish Jurisdiction.



Fed. R. Civ. P. 17 Governs Who Is A "Juridical Entity"

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Fed. R. Civ. P. 17 Governs Who Is A "Juridical Entity"

The question before the Fifth Circuit in this case for alleged violations of the Age Discrimination in Employment Act was whether the Louisiana State Small Business Development Center (LSBDC) is a "juridical entity" with the capacity to be sued and "enjoy[s] a separate legal existence" from the Board of Supervisors of the University of Louisiana System.

The Court answered no. Rule 17(b)(3) directs that the capacity of an entity to be sued in federal court, when the entity is neither an individual nor a corporation, is determined by state law.

Under Louisiana law, a local government unit is a separate juridical entity only when "organic law" grants it the local capacity to function independently; however, the LSBDC was, by statute, subject to the constitutional authority of the Board of Supervisors of the University of Louisiana System. On that basis, the Court held that the LSBDC is not an independent juridical unit capable of being sued and the proper party defendant would have been the Board of Supervisors.

Because the Board was entitled to state sovereign immunity, it would have been futile to name it as a defendant. Therefore, the district court properly granted LSBDC's Rule 12(b)(6) motion to dismiss and denied plaintiff's motion to amend. *Edmiston v. La. Small Bus. Dev. Ctr.*, 2019 U.S. App. LEXIS 22085 (5th Cir. July 24, 2019).

See Wagstaffe Prac Guide: Fed Civ Proc Before Trial, §3-IV[A], 3.69—Capacity to Sue or Be Sued.

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NEW FROM JIM WAGSTAFFE

INNOVATING PRESENTING WITNESSES VIRTUALLY IN 21ST CENTURY TRIALS

By: Jim Wagstaffe

1. Introduction – Welcome to 21st Century Litigation

Famed inventor Dean Kamen cogently said that "every once in a while, a new technology, an old problem, and a big idea turn into an innovation." You want innovation in modern litigation practice? Try presenting virtual testimony at trials via the new technologies of video conferencing devices such as Skype and FaceTime.

In 21st Century litigation we need to use 21st Century tools. And like it or not this includes broadening the use of virtual appearances in court by lawyers and witnesses. And this means, as we will see, understanding the controlling terms of Fed. R. Civ. Proc. 43(a) and how they will evolve in the years to come.

The incentives for allowing virtual appearances and testimony are multifold: addressing the often crippling expense of travel; providing an alternative to unexpected or necessary witness unavailability; and expanding the use of video conferencing to live time depositions, virtual court appearances and enabling vital witnesses in widespread MDL-like litigation to avoid the uneconomical aspects of repeat court room performance.[1]

And mark the wise old words of a LexisNexis practice guide author: the prevalence of live time virtual exchanges in everyday life combined with the inevitable advent of AI and holographic relocation could someday have us all come to think of "live" appearances and testimony as we do the phonograph and iPod—worthwhile but economically inferior to modern alternatives.

2. A Not So Very Scary Litigation Innovation

Today's judges should know that every smart phone can connect people almost anywhere in the world through two-way video using free services—fundamentally altering the ability to be present. And what kind of litigation world are we in when tools I use every weekend with faraway grandkids (FaceTime and Skype) can't be used by litigators wanting to put on their cases in court?

As few as 20 years ago, video conferencing was expensive and technologically challenged as it typically required the use of close circuit TV transmission. Judges and their staff understandably resisted the extraordinary planning and disruption such requests entailed—to say nothing of the sense that online testimony seemed the stuff of science fiction.

Of course, for decades, we've become accustomed to presenting edited excerpts of videotaped deposition testimony at trial. See The Wagstaffe Group Practice Guide: Fed. Civ. Pro. Before Trial at § 36.108; Fed. R. Civ. Proc. 30(b)(3).[2] Yet, presenting one-sided video excerpts is far inferior to live time transmitted questions and answer, and such technology is now inexpensive and part of everyday life. See *Taylor v. FedEx*, 2017 U.S. Dist. LEXIS 12 (E.D. Cal. December 20, 2017) (live time testimony inexpensive, practical and easy to set up).

However, given some entrenched and historic resistance to admitting virtual testimony at trial, one can enter-

[1] See *In re Vioxx Prod.Liability Litig.*, 439 F.Supp.2d 640, 664 (E.D. La. 2006) (court orders upper-level Merck officer over whom the company had significant control to testify by contemporaneous videoconferencing).

[2] Similarly, courts routinely examine video testimony and video evidence on summary judgment. It can even demonstrate, if incontrovertible, no genuine issue is disputable. *Scott v. Harris*, 550 U.S. 372, 380 (2007); TWG at § 43.22.

tain skepticism about how soon this everyday innovation will find its way routinely to the court room. These doubts no doubt stem from the strange truism that courts and the legal community are often the very slowest to adapt to new technologies and change.

3. The "Modern" 1996 Solution: Rule 43(a)

Since 1996 and although it expresses a preference for in-person trial witnesses, Rule 43 of the Federal Rules of Civil Procedure has provided that courts have discretion to admit trial testimony "by contemporaneous transmission from a different location." Upon motion, a party can ask that the court grant such a request upon a "showing of good cause in compelling circumstances with the appropriate safeguards in place."

As a general matter, court will consider multiple factors when analyzing whether to utilize the innovation of remote testimony at deposition or trial. These include the demonstrated need to bypass the normal in-court testimony paradigm, the relative prejudices to the parties and the flexibility required by the nature of the case and the court's available technology. See *In re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liability Litig.*, 2016 U.S. Dist. LEXIS 195409 (N.D. Tex. September 20, 2016) (court allows remote testimony in MDL case calling for flexibility and with appropriate safeguards).

4. Establishing Good Cause in Compelling Circumstances

As suggested above, courts will not routinely order live time video testimony as witnesses appearing in court is still preferred. However, if the requesting party can show "good cause in compelling circumstances" Rule 43(a) allows a court to compel testimony in this virtual manner.[3]

The 1996 Advisory Committee Notes on Rule 43(a) understandably express a preference for live testimony (due to a perception of improved assessment of demeanor and truth telling). Mere inconvenience is said not to be a compelling reason for FaceTime or Skype—even when compared to video depositions. *Id.* However, the case law and the 1996 Advisory Committee Notes describe multiple situations in which live time transmitted testimony will satisfy the "good cause in compelling circumstances" criteria. These include the following:

- *Medical Issues:* A showing that a witness is unable to attend due to an illness or medical condition can satisfy the required standard.[4]
- *Disability:* It can be particularly compelling when a court allows live time testimony as an accommodation to disabled witnesses.[5]
- *Difficult and Expensive Travel*: A showing related to travel challenges also can satisfy the standard—although the order may be more difficult to obtain for party-controlled witnesses.[6]
- *Serious Prejudice*: Courts also are amenable to remote testimony when a denial would seriously prejudice the moving party, such as an unexpected unavailability of critical percipient or expert witnesses, or substantial administrative costs such as procuring the testimony of a party or witness in prison.[7]

In each of these circumstances, courts have appeared more willing to allow remote testimony when the costs or

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[3]This is a particular easy showing to make if the parties actually consent to the procedure. See *Scott Timber v. United States*, 93 Fed. Cl. 498, 500 (2010); M. Hindman, FJC Research Appendix: *Review of Case Law Related to Witnesss Testimony by Remote Transmission* (2017).

[4] See *Humbert v O'Malley*, 303 F.R.D. 461, 465 (D. Md. 2014) (travel could trigger PTSD symptoms for rape victim); but see *Martal Cosmetics, Ltd. v. Int'l Beauty Exch. Inc.,* 2011 U.S. Dist. LEXIS 25157 (E.D. N.Y. March 11, 2011) (finding insufficient medical records evidence to prove witness unable to appear).

[5] *S.E.C. v. Yang*, 2014 U.S. Dist. LEXIS 42580 (N.D. Ill. March 30, 2014) (citing advanced pregnancy in permitting remote witness testimony).

[6] See *Rodriquez v. SGLC, Inc.*, 2012 U.S. Dist. LEXIS 120862 (E.D. Cal. August 24, 2012) (more discretion for third-party witnesses); *Katzin v. United States*, 124 Fed. Cl. 122, 126 (2015) (substantial expense for witness with medical practice located 900 miles from court); *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D. D.C. 2000) (travel from Oklahoma to District of Columbia a serious inconvenience); but see *Herman v. United States*, 129 Fed. Cl. 780 (2017) (travel to D.C. from New York not compelling circumstance).

needs of travel were unforeseeable or involved legal limits on such travel (e.g. international restrictions).[8]

5. The Challenge of Safeguarding Fairness

Even if there is good cause in compelling circumstances to allow remote testimony, courts can still deny such a request if there are not appropriate safeguards to ensure fairness in maintaining the vital aspects of live testimony. See Fed. R. Civ. Pro. 43(a). These safeguards, while understandably involving the technical capabilities of the trial court, also include the following:

- The interactive capabilities of the chosen technology;
- The ability to identify, administer the oath to, and exchange exhibits with the witness;
- The protection of attorney-client communications (especially at deposition); and
- Avoiding undue influences and limiting persons in the room.

While a virtual witness (at deposition or trial) may often appear voluntarily, the real trick is to utilize the compulsory subpoena process of Rule 45 to compel attendance at the chosen faraway location. This technique works as Rule 45(b)(2) now reads that a subpoena "may be served at any place in the United States" – thus allowing for nationwide service of a subpoena issued by the forum court.

Combining the geographic breadth of Rule 45 with the innovation of contemporaneous video transmission, courts have held that this allows, for example, video testimony presented live time with a faraway subpoena-compelled appearance.[10]

6. Convincing Your Judge to Allow Virtual Appearances and Testimony

Despite the general use of videoconference in everyday life, it can still be a tall task to overcome the 1996 rubric of Rule 43(a) that such an order is exceptional and limited to "compelling circumstances." Here are some formulations to convince your judge to accept this "new" technology:

- *Live time testimony is routinely used across the country.* See, e.g. See *Jackson v. Mendez*, 2015 U.S. Dist. LEXIS 154719 (E.D. Cal. November 13, 2015).
- *Embrace change.* See, e.g., *In re: Actos Prod. Liability Litig.*, *supra* (use of remote testimony allowed because court "open to re-examination of old habits and routines which might have . . . created the types of Gordion knots that can lead to the stasis this Court and the parties seek to avoid").
- *Live time testimony can ensure fairness and economy.* See *Nelson v. City of New York*, 60 Misc. 3d 353 (2018) (avoidance of travel expense, witness unavailability and other prejudice).
- *It can work easily and without technological distraction or court expense.* Be sure to demonstrate the ease of use, especially in courtrooms already equipped with judge and jury computer screens in place.

7. Conclusion—It's a Changing World

In an age of routine Skype/FaceTime family calls, telemedicine, virtual parental visitations and even some

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[7] See *Scott Timber v. United States*, 93 Fed. Cl. 498 (2010); *Perotti v. Quinanes*, 790 F.3d 712, 725 (7th Cir. 2015) (balancing test in weighing costs to state in allowing remote testimony from inmates).

[8] See *El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007) (witness unable to secure visa to U.S.); *Sille v. Parball Corp.*, 2011 U.S. Dist. LEXIS 158765 (D. Nev. July 8, 2011) (motion denied as there as "nothing unexpected concerning the ability of Plaintiff's witnesses to attend").

[10] *In re Actos (Pioglitazone) Products Liability Litig.*, 2014 U.S. Dist. LEXIS 2231 (W.D. La. January 8, 2014) (allowing witnesses to testify by videoconference since defendant's employees were unavailable to testify in court).

[11] Stay on top of this new technology and all new developments in civil litigation with The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial (LexisNexis 2019) and our Current Awareness online feature updating new cases on a weekly basis.

Skype Marriages, it might be difficult to understand why it remains essential to convince your judge that the innovation of live time virtual testimony (and court appearances) is nothing to fear. But as Tom Freston wisely advised: "Innovation is taking two things that already exist and putting them together in a new way."[11]

CLASS ACTIONS

Standing of Class Representative

NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.

926 F.3d 528, 2019 U.S. App. LEXIS 16885 (9th Cir. June 5, 2019)

The Ninth Circuit holds that when a class is certified and the class representatives are subsequently found to lack standing, the class should be decertified and the case dismissed.

Background. The plaintiff, an engineering firm, was a customer of the defendant, a concrete supplier, and ordered products through a telephone order line. The defendant began using a new telephone system that failed to inform callers that calls were being recorded. A billing dispute arose and, after the defendant produced recordings of calls, was settled in the defendant's favor. The plaintiff then filed the present suit under state law prohibiting the recording of calls without consent, seeking $5000 in statutory damages for each violation.

The plaintiff also sought certification of a class defined as "All persons who called Defendant with a cellular telephone and selected the Aggregate or Ready Mix Dispatch lines through Defendant's telephone system, whose calls were recorded by Defendant, during the time period beginning July 15, 2009, and continuing through December 23, 2013." The defendant opposed certification, asserting that the proposed class would not meet the Rule 23(b)(3) predominance requirement because individualized determinations would be required as to consent. The district court certified the class. The defendant then moved to decertify the class, identifying nine customers who had actual knowledge of the defendant's recording practices during the class period and continued to place orders. The district court then agreed that the predominance requirement was not satisfied and decertified the class.

The plaintiff proceeded to a bench trial on its individual statutory damages claim. The district court ruled against the plaintiff, reasoning that it lacked standing because, even if the defendant had violated the statute, the plaintiff had not suffered a concrete and particularized injury resulting from the violation. The plaintiff appealed the class decertification order but did not appeal the judgment in the defendant's favor as to the individual claim.

Lack of Standing Required Decertification. The district court had decertified the class on the ground that the class did not satisfy Rule 23(b)(3)'s predominance requirement. However, the case presented a more fundamental question, the Ninth Circuit said: whether a class must be decertified when the class representative is found to lack standing as to its individual claims. A plaintiff has Article III standing if the plaintiff (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision [Spokeo, Inc. v. Robins, 577 U.S. —, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)]. To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. In a class action, this standing inquiry focuses on the class representatives. If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief individually or on behalf of any other member of the class. If the individual plaintiff lacks standing, the court need never reach the class action issue. Moreover, when a class is certified and the class representatives are subsequently found to lack standing, the class should be decertified and the case dismissed [*see* Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1023 (9th Cir. 2003); Williams v. Boeing Co., 517 F.3d 1120, 1125 (9th Cir. 2008)].

This principle was dispositive here, the Ninth Circuit said. After decertification, the district court had held that the plaintiff lacked standing to bring its claim under the state statute. The plaintiff had not appealed this standing determination and had therefore waived the right to challenge it.

The plaintiff argued that it had standing to appeal the decertification order notwithstanding the adverse judgment against it on the merits. It cited to two exceptions to the mootness doctrine that may permit a class representative to appeal a decertification decision even if the representative's individual claims have been mooted. First, it is well settled that a class representative whose individual claim has been mooted but who retains a "personal stake" in class certification may appeal a certification decision [*see* Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 336, 340, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)]. Second, when the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of the personal stake in the outcome of the litigation [*see* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)].

Neither of these mootness principles can remedy or excuse a lack of standing as to the representative's individual claims, the Ninth Circuit said. The first exception would apply only if the plaintiff had had a viable claim that later became moot. Here, the claim was moot from the beginning. Similarly, if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum.

Neither mootness exception stands for the proposition that a class can be certified if the class representative lacked standing as to its individual claim.

The Ninth Circuit concluded that the plaintiff lacked standing and had waived any argument to the contrary. Accordingly, the district court did not abuse its discretion in decertifying the class.

TAKING TESTIMONY

Testimony by Remote Transmission

Gil-Leyva v. Leslie

2019 U.S. App. LEXIS 19235 (10th Cir. June 27, 2019)

The Tenth Circuit holds that a district court may allow remote testimony only for good cause in compelling circumstances, and mere inconvenience generally does not satisfy this standard.

Background. Ms. Leslie, a U.S. citizen, and Mr. Gil-Leyva, a Canadian citizen, met in Colorado in late 2007 and began cohabiting there in March 2008. Ms. Leslie and Mr. Gil-Leyva never formally married. In 2009, they relocated to Alberta, Canada, where their children were born. Ms. Leslie alleged that she endured physical abuse, occasionally in front of the children, and that she witnessed Mr. Gil-Leyva abuse alcohol, marijuana, and prescription narcotics. She testified that Mr. Gil-Leyva spanked the children, got angry and threw objects in their vicinity, and neglected their basic needs when left alone with them. She further testified that Mr. Gil-Leyva allowed unsafe living conditions, with non-child-resistant bottles of prescription narcotics, power tools, deconstructed machine parts, solvents, and other hazardous items lying in the home, some of which the children played with. She also testified about noxious fumes in the home from Mr. Gil-Leyva cooking solvents, pennies, and vehicle parts in the kitchen.

In November 2015, Ms. Leslie left home with the children and attempted to obtain passports for them at the U.S. Consulate in Calgary. She was informed that she needed the father's written consent for the application. Mr. Gil-Leyva refused to consent, and fearing Ms. Leslie would still try to leave the country, reported an abduction. Ms. Leslie filed a claim for emergency custody in the Provincial Court of Alberta, but withdrew the petition and returned home with the children after learning that the process would take several months.

Several months later, Ms. Leslie received word that her mother had been diagnosed with recurrence of a cancer for which she had been treated in 2009. Ms. Leslie convinced Mr. Gil-Leyva to give his consent for the children's passports so they could visit her ailing mother. About a week after arriving in Colorado, Ms. Leslie informed Mr. Gil-Leyva that she intended to stay beyond an agreed-upon date. Then, in October 2016, Ms. Leslie told Mr. Gil-Leyva that she would not return to Canada with the children. Mr. Gil-Leyva promptly booked a flight to Colorado, hoping to discuss the parties' relationship in person. Ms. Leslie, in turn, obtained a protection order against Mr. Gil-Leyva that restricted him to supervised visitations with the children. She then initiated state-court proceedings seeking full custody of the children.

In June 2017, Mr. Gil-Leyva filed this pro se action in federal district court, seeking an order returning the children to Canada under the Hague Convention and the International Child Abduction Remedies Act. With the parties' agreement, a magistrate judge presided over the entire case. In advance of a hearing scheduled for January 10, 2018, Mr. Gil-Leyva moved to appear via contemporaneous transmission under Rule 43(a) of the Federal Rules of Civil Procedure. The judge denied the motion on grounds that, as a pro se plaintiff, Mr. Gil-Leyva must litigate the case in person. The day before the scheduled hearing Mr. Gil-Leyva requested a four-to-six-week continuance so that he could make appropriate travel and legal preparations. He then telephoned into the hearing, despite the order denying his Rule 43(a) motion. The judge initially heard argument on whether to continue the hearing. She then denied a continuance and proceeded with the hearing as scheduled, overruling Ms. Leslie's objection to the reliability of Mr. Gil-Leyva's telephonic testimony.

On April 17, 2018, the magistrate judge issued a written order granting Mr. Gil-Leyva's request to return the children to Canada. Ms. Leslie timely appealed and requested a stay of the order under Rule 62(c) of the Federal Rules of Civil Procedure. The judge granted the motion and stayed the order pending resolution of the appeal.

No Abuse of Discretion in Permitting Telephonic Testimony. On appeal, Ms. Leslie argued that the magistrate judge abused her discretion in permitting Mr. Gil-Leyva to appear telephonically after denying his Rule 43(a) motion to testify in that fashion. The Tenth Circuit explained that, under Rule 43(a), a district court may allow remote testimony only for good cause in compelling circumstances and with appropriate safeguards. Mere inconvenience ordinarily does not satisfy this standard. In general, the rule contemplates situations in which a witness cannot appear in person for unexpected reasons, such as accident or illness. Other reasons "must be approached cautiously" [*see* Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment].

In this case, Mr. Gil-Leyva requested permission to testify remotely because he "resides in British Columbia, Canada, and currently lacks the financial means to travel to Colorado for the hearing." The magistrate judge denied this request, ex-

plaining that, as a pro se litigant, "the logistics of an evidentiary hearing mandate that he appear in person . . . to litigate his case." Nevertheless, at the subsequent hearing, the judge permitted Mr. Gil-Leyva to appear telephonically. The judge made no express finding that good cause justified departing from her prior ruling; she stated only that "[t]he hearing is set for today, and it will go forward."

The magistrate judge denied Mr. Gil-Leyva's Rule 43(a) motion on December 15, 2017, nearly a month before the January 10, 2018, hearing. Despite this notice, Mr. Gil-Leyva waited until the day before the hearing to request additional time to make travel and legal preparations. Unable to resolve this eleventh-hour request beforehand, the judge expressed concern that a continuance would prejudice Ms. Leslie, who had "expended time, energy, and money" to prepare for and attend the hearing. Ms. Leslie echoed this concern in her argument, stressing that she had expended "ample resources and time" and had traveled "over 160 miles in a pending snow storm" to get to the hearing. Ms. Leslie also worried that a continuance would simply prolong her "mental anguish" in dealing with the case. In light of this argument, the judge denied a continuance and admonished Mr. Gil-Leyva for failing to make a diligent effort to prepare for and attend the hearing.

It was against this backdrop that the magistrate judge decided to proceed with the hearing and permit Mr. Gil-Leyva to testify remotely, notwithstanding the order denying his Rule 43(a) motion. The Tenth Circuit reasoned that the judge's rejection of Mr. Gil-Leyva's continuance motion predetermined this result; having denied that motion, the judge *had* to allow remote testimony. A decision holding Mr. Gil-Leyva to the order requiring his in-person attendance would have necessitated a continuance for him to travel from Alberta to Colorado, which would have prejudiced Ms. Leslie. The appellate court found that, in these circumstances, there was good cause to allow remote testimony. The court also noted that Ms. Leslie "effectively advocated for this result" when she argued against a continuance. She could not then claim that it was an abuse of discretion for the judge to honor her request to proceed with the hearing as scheduled, despite Mr. Gil-Leyva's absence.

The Tenth Circuit also noted that the broader legal context in which this case arose supported its conclusion. The Hague Convention requires courts to act expeditiously in proceedings for the return of children. This means a district court has a substantial degree of discretion in determining the procedures necessary to resolve a petition filed pursuant to the Convention. In fact, in this context, a court is not even required to hold an evidentiary hearing. Certainly, then, a court that does hold a hearing has some latitude to deviate from ordinary rules of procedure that might delay a final resolution. The Hague Convention contemplates a judicial decision within six weeks from the date of commencement of the proceedings. This case had already been pending for six months when the magistrate judge held a hearing in January 2018 and Mr. Gil-Leyva had asked to postpone the hearing to prepare for travel. Concerned that the case was passing the point of expeditious resolution, the judge decided to proceed without Mr. Gil-Leyva being physically present. Given the impetus to quickly resolve the abduction claim, the judge had good cause to proceed in this manner.

Finally, the Tenth Circuit found that the magistrate judge did not commit reversible error in failing to implement "appropriate safeguards" to ensure the reliability of Mr. Gil-Leyva's remote testimony. In general, safeguards should ensure (1) accurate identification of the witness, (2) protection against any outside influence on the witness, and (3) accurate transmission [*see* Fed. R. Civ. P. 43(a) advisory committee's note to 1996 amendment]. In this case, although the judge failed to formally adopt safeguards, Ms. Leslie did not dispute that the person testifying was indeed Mr. Gil-Leyva and that his testimony transmitted accurately. Regardless, in ordering the children's return to Canada, the judge found no need to consider Mr. Gil-Leyva's "version of these events," because she found that Ms. Leslie's allegations, standing alone, had failed to show by clear and convincing evidence that Mr. Gil-Leyva "presents a grave risk of harm to the children." Mr. Gil-Leyva's testimony, then, did not prejudice Ms. Leslie, and any error in the judge's failure to adopt "safeguards" was harmless.

Conclusion. For these reasons, the Tenth Circuit ruled that the district court did not abuse its discretion in permitting telephonic transmission of testimony.

VENUE

Forum Selection Clauses

City of Albany v. CH2M Hill, Inc.

924 F.3d 1306, 2019 U.S. App. LEXIS 15802 (9th Cir. May 29, 2019)

The Ninth Circuit holds that the effect of a forum selection clause requiring venue in a county without a federal courthouse is to limit litigation to state court in that county and prohibit removal.

Background. The City of Albany, Oregon, brought this action in state court in Linn County, Oregon, alleging that the defendant, an engineering firm incorporated in Florida, breached its contract to provide engineering services to the City. The defendant removed the case to federal court based on diversity. The City moved to remand the case back to state court based on the venue-selection clauses in the parties' contracts. The district court granted the City's motion, and the defendant appealed. While an order remanding a case to state court ordinarily is not reviewable [*see* 28 U.S.C. § 1447(d)],

the Ninth Circuit allows review when remand is based on a venue-selection agreement [*see* Kamm v. ITEX Corp., 568 F.3d 752, 754–755 (9th Cir. 2009)].

Effect of Forum Selection Clause. The contracts between the parties contained venue-selection clauses that provided: "Venue for litigation shall be in Linn County, Oregon." However, there is no federal courthouse in Linn County—the courthouse for the District of Oregon, Eugene Division, in which Linn County lies, is located in the City of Eugene in Lane County. Despite the absence of a federal courthouse in Linn County, the defendant asserted that the venue-selection clause was ambiguous as to whether removal to federal court was permitted, arguing that a federal court may reasonably be deemed to be "in" a county merely by virtue of its judicial authority over cases that arise in that county.

The Ninth Circuit noted that it had not previously decided whether removal to federal court is permitted when a venue-selection clause provides that litigation shall occur "in" a county in which no federal courthouse is located. The plaintiff contended that the question had been resolved in *Docksider, Ltd. v. Sea Tech., Ltd.* In that case, the Ninth Circuit had considered a venue-selection clause selecting Gloucester County, Virginia, as the sole venue for any action under the contract, and it happened to be the case that no federal courthouse was located in Gloucester County. The Ninth Circuit ultimately held that the clause clearly designated the state court in Gloucester County, Virginia, as the exclusive forum [Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d 762, 764 (9th Cir. 1989)]. However, the question in *Docksider* was whether the venue-selection clause at issue was mandatory or permissive. The court did not consider whether a federal court located outside of Gloucester County, but encompassing that county within its jurisdiction, might be an appropriate forum.

More instructive, the Ninth Circuit said, was *Simonoff v. Expedia, Inc.* There, the Ninth Circuit considered a forum-selection clause limiting venue to the "courts in King County, Washington." The parties disputed whether that clause limited venue to the state court in King County, or whether it also permitted venue in the federal district court located in King County. The Ninth Circuit noted that the word "in" imposes a geographic limitation, and that when a federal court sits in a particular county, the district court is undoubtedly "in" that county. Accordingly, a forum selection clause that vests exclusive jurisdiction and venue in the courts "in" a county provides venue in the state and federal courts located in that county [Simonoff v. Expedia, Inc., 643 F.3d 1202, 1207 (9th Cir. 2011); *accord* Alliance Health Group, LLC v. Bridging Health Options, LLC, 553 F.3d 397, 400 (5th Cir. 2008); Global Satellite Commun. Co. v. Starmill U.K. LTD, 378 F.3d 1269, 1272 (11th Cir. 2004)].

The question in the present case had not been raised in *Simonoff*, as a federal courthouse was in fact located in the county designated by the parties. Based on *Simonoff*'s reasoning, however, an agreement limiting venue for litigation to a particular county unambiguously prohibits litigation in federal court when there is no federal courthouse located in the designated county. The clear import of the venue-selection clause at issue in this case was to ensure that any litigation arising out of the contracts would take place within the geographic boundaries of Linn County. If the case proceeded in federal court, litigation would instead occur in Lane County. Thus, permitting the defendant to remove the case to federal court would violate the plain terms of the parties' agreement.

This holding, the Ninth Circuit noted, is in accord with decisions of the Second and Fourth Circuits. Faced with similar venue-selection clauses and the absence of a federal courthouse in the county designated by the parties, those circuits also held that litigation in federal court was unambiguously barred [Bartels v. Saber Healthcare Group, LLC, 880 F.3d 668, 674 (4th Cir. 2018); Yakin v. Tyler Hill Corp., 566 F.3d 72, 76 (2d Cir. 2009)]. In *Yakin*, the Second Circuit so held even though there was a federal courthouse in the designated county at the time of the parties' agreement; by the time the plaintiff brought suit, though, the courthouse had closed. These cases show that the effect of a venue-selection clause providing for litigation "in" a particular county is to ensure that litigation occurs within the geographic boundaries of that county—nothing more, nothing less.

In short, the venue-selection clause at issue here precluded litigation in federal court because no federal courthouse was located in Linn County. The only way to effectuate the parties' agreement was to limit venue for litigation to the state court in Linn County.