ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

Volume XIX No. 2 Summer 2017

Q&A with Judge Melissa R. McCormick

By Cathy T. Moses

[Editorial Note: Before her appointment to the Orange County Superior Court in 2015, Judge McCormick was a litigation partner in the Newport Beach office of Irell & Manella LLP from 2004 to 2015 and an associate there from 1997 to 2003. Before joining Irell & Manella, Judge McCormick served as a law clerk to Judge Emilio M. Garza of the United States Court of Appeals for the Fifth Circuit and to Chief Judge Judith N. Keep of the United States District Court for the Southern District of California. She received her law degree from the UCLA School of Law, where she was an editor of the UCLA Law Review, and her undergraduate degree from Stanford University with Honors and University Distinction. Judge McCormick is a Past President of ABTL-OC.]

Q: Why did you decide to apply to the Superior Court, after spending most of your career in private practice?

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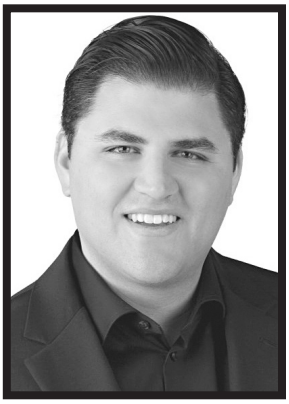
Using Demonstratives to Effectively Communicate Your Complex Business Case to a Jury

By Sherry S. Bragg and Darrell P. White

Business attorneys understand that complex business litigation involves complex issues, usually encompassing voluminous amounts of complicated financial data in the form of balance sheets, income statements, and cash flow summaries. It is certainly possible for jurors who own their own businesses or have accounting backgrounds to quickly synthesize financial information. However, most jurors are unfamiliar with this type of financial information and will find it difficult to comprehend, at best. A juror who is not able to understand the story that the financial data tells will be a less likely ally to your client's position in the jury room. Thus, the biggest challenge for the business attorney is how to effectively present these complex matters to a jury.

The starting point of trial preparation in a complicated business case is to reframe the focus from how complex the case is to how you can go about simplifying the case for the jury. Should you start your opening by acknowledging how difficult it will be to digest all the technical financial data? No. You never want to start out by telling the jury how complex the case is. This will only cause them to be fearful of the case, to be offended, or to simply tune out. Instead, you want to tell them a story that is familiar and relatable. Presenting your complex business case in terms of common themes will go a long way in making the matter



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The President's Message
By Mark A. Finkelstein

I have always been proud to be associated with ABTL. ABTL, true to its mission, promotes civility and professionalism amongst the Orange County bench and bar. Indeed, through ABTL, I have formed many great friendships with my Orange County colleagues as we have spent time together at the fantastic dinner programs, as well as at the Annual Seminars. This type of camaraderie is one of the reasons that Orange County is such an amazing place to practice law. If all opposing counsel could enjoy a glass of wine with each other at an ABTL event, we no doubt would see far fewer examples of litigation gamesmanship or discourteous behavior.

This month, however, I am especially proud of this tremendous organization and all of its members, and you should all feel the same.

On June 7th, we held our 18th annual Robert E. Palmer Wine Tasting Dinner for PLC. As probably everyone reading this knows, the Public Law Center is Orange County's pro bono law firm and provides access to justice for low-income and vulnerable residents of our community. While we are still tallying the receipts and pledges, through your collective efforts, the Orange County chapter of ABTL raised tens of thousands of dollars for PLC. And since PLC is able to turn every $1 donation into about $8 of legal services for members of our community, we were able to effectively raise enough money to provide hundreds of thousands of dollars of free legal services to the most underprivileged members of Orange County. What a great way to spend an evening with friends and colleagues!

As if raising money for PLC was not reason enough to get together, our Wine Tasting Dinner also featured some of Orange County's greatest attorneys—Judge Andy Guilford, Judge Nancy Wieben Stock, Tom Malcolm, and Don Morrow. It just so happens that these four fantastic lawyers also were instrumental in ABTL-OC's early years, with three of them serving as President of this organization at some point in their careers. Will O'Neill moderated the interesting, and educational, discussion. In one of our

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Adding an Alter Ego to a Judgment: How Long Can You Wait?
By David B. Clark and Chris Maciel

Collecting on a judgment can often be as difficult as obtaining the judgment itself. But one tool that is helpful to a plaintiff when attempting to collect is the ability to amend a judgment to add a new judgment debtor. Indeed, performing such an amendment can provide a new path to recovery for a plaintiff—something that can be particularly useful when the new debtor is an alter ego of a previously named defendant.

For over three decades, the First District Court of Appeal case of *Alexander v. Abbey of Chimes*, 104 Cal. App. 3d 39 (1980) has been the seminal California state-court case on amending a judgment, and it holds that a plaintiff seeking to add an alter ego must act diligently when moving to amend or risk having its motion denied. Recently, however, an apparent district split emerged in California when, in *Highland Springs Conference & Training Ctr. v. City of Banning*, 244 Cal. App. 4th 267 (2016) ("*Highland*"), the Fourth District held that undue delay in bringing a motion to amend was an insufficient ground to deny such a motion, and that prejudice resulting from the delay must also be shown. As discussed below, whether *Alexander* or *Highland* controls may significantly affect a plaintiff's strategy when attempting to enforce a judgment, and it may determine the level of risk to a potential judgment debtor well after litigation has completed.

Amending a Judgment in California

A court's ability to amend a judgment is derived from the California Code of Civil Procedure, which allows courts to adopt "any suitable process or mode of proceeding" so long as it is conformable to the Code. Cal. Code Civ. Proc. § 187; *see also Toho-Towa Co., Ltd. v. Morgan Creek Prods., Inc*., 217

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Discovery of Foreign Lands: *Aérospatiale's* Lasting Impact on Evidence Requests in Transnational Litigation
By Madison Grant

Forty years after the Hague Evidence Convention and its landmark 1987 interpretation by the Supreme Court in *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987), compelling the discovery of evidence abroad remains a significant potential obstacle in transnational litigation. Litigants conducting discovery abroad must either conform with the balancing test developed in *Aérospatiale*, or comply with the standards of the Hague Evidence Convention to guarantee foreign cooperation. This article summarizes the procedural options available to litigants in U.S. courts for obtaining evidence located abroad.

The United States legal system enables broad production of evidence at various stages of litigation, with a uniquely robust system of discovery as compared to the rest of the world. Parties are generally entitled to all relevant information proportional to the needs of the case and not otherwise privileged. In addition, the discovery process is largely conducted without judicial intervention unless necessary to resolve disputes. In contrast, most foreign civil and common law systems are characterized by restrictive discovery procedures, strict governmental or judicial control, monitoring, and oversight. Indeed, many foreign legal systems do not allow any pre-trial discovery at all.

Friction between the American and foreign systems can, and often does, cause problems for U.S. litigants seeking evidence located abroad. These clashing systems not only affect private litigants but also complicate international relations. In foreign countries, where fact gathering is often a governmental function, discovery requests from U.S. litigants can be perceived as an infringement on sovereignty. To prevent U.S. litigants from conducting discovery in their jurisdiction, some foreign states have enacted blocking statutes which prohibit their own citizens from complying with extraterritorial discovery orders. In some situations, compliance with a U.S. discovery

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Young Lawyers Division Update
By Adrianne Marshack

We are excited about the events we have already had and the ones that are upcoming in the second half of 2017. We hope the Young Lawyers will continue their enthusiastic attendance.

Brown Bag Lunches—United States District Court Judge David O. Carter has offered to host another Brown Bag lunch, which will be scheduled shortly. Based on last year's lunch, we can be assured that attendees will be in for a unique treat.

Thank you to United States Magistrate Judges Karen E. Scott and Douglas McCormick of the Central District of California, Central Division, and to Justices Richard Aronson and William Bedsworth of the California Court of Appeal, Fourth District, Division Three, for already hosting Brown Bag lunches for us.

Member Mixer with the Orange County Bar Association's Corporate Counsel Section (July 20, 2017 at AnQi)—The intention of this mixer is to give younger attorneys the opportunity to meet in-house counsel in Orange County to help establish relationships. Friends now may equal clients down the road. It is never too early to begin expanding your network. Tickets will be $30 and will include appetizers and one drink. Space will be limited, so when you see the invitation in your email, sign up ASAP.

Path to Judgeship Panel (September 21, 2017)—We have assembled a tremendous panel of judges, former members of the Orange County Bar Association's Judiciary Committee, and members of the JNE Commission, all of whom are familiar with the process of becoming a state court judge, and what the teams tasked with vetting judicial candidates are looking for. The panel will consist of Orange County Superior Court Assistant Presiding Judge Kirk Nakamura, Orange County Superior Court Judge Melissa McCormick, Dean Zipser of Umberg Zipser LLP, and Kimberly Knill, Senior Appellate Court Attorney for the California Court of Appeal, Fourth District, Division Three.

There will be additional events scheduled as the year progresses, so please stay tuned and we hope to see you!

♦ *Adrianne Marshack is a partner at Manatt, Phelps, & Phillips, LLP*

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A: I had practiced law for almost twenty years at a private law firm. At mid-career, I was interested in working in a public service position in the next period of my career. The Superior Court offered me the opportunity to do that, while allowing me to use the legal skills I had acquired over the years to help the public and the court.

Q: Before you were appointed to the court, you specialized in complex business litigation and intellectual property litigation at Irell. You now oversee an open criminal trial court, where you handle a variety of felony and misdemeanor criminal matters. How did you get up to speed in an area of the law in which you had not practiced?

A: The court has excellent training programs for new judges and I attended those shortly after I started, and the court has continuing education courses for more experienced judges. In addition, my colleagues, both bench officers and court staff, have been invaluable resources. I also did, and continue to do, a significant amount of independent reading and legal research regarding both specific issues that arise in my court and more general criminal law topics.

Q: What does your typical day look like?

A: The court day for a criminal judge on my panel varies from day-to-day. Some days we are in trial, overseeing felony and misdemeanor trials. Other days we handle a combination of preliminary hearings, criminal motions, and court-supervised probation cases. We also handle criminal duty matters such as search and arrest warrants on a rotating basis.

Q: What is your favorite part of the job?

A: One of my favorite parts of being on the court is interacting with lawyers, parties, and other members of the public on a daily basis. For a person who always enjoyed appearing in court as a lawyer, working in the courtroom on a daily basis is a terrific part of the job.

Q: Any practice tips for new lawyers who are beginning their careers, whether in private practice or the public sector?

A: I encourage all litigators, including new litigators, to look for opportunities to get into the courtroom and ideally to try cases. There is no substitute for present-

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ing live witnesses, making legal arguments to a judge in a courtroom setting, dealing with the unexpected events that inevitably arise during a trial, and making quick decisions about cases on your own in a trial setting. I know from my years in private practice that it can be difficult in some practice settings for lawyers to have opportunities to try cases; for litigators whose daily law practice does not include trial work, I encourage them to think creatively about ways in which they can get into the courtroom, such as by handling pro bono litigation or availing themselves of volunteer programs or internships that include courtroom work.

Q: Do you have any advice for lawyers who aspire to be judges one day?

A: The best preparation for the bench is to be an excellent lawyer in one's practice area and to practice law with high ethical standards and good judgment.

Q: Have you had any role models or mentors as you have navigated your legal career?

A: Yes, many. None of us gets anywhere in life without help from other people, certainly I have not. I had many mentors at Irell, especially in the early years of my career there; many excellent and patient lawyers who trained me and took an interest in my development as a lawyer. I have also had role models and mentors in the larger legal community, including some of my ABTL-OC friends and colleagues. And in my position at the court, I now have another group of role models and mentors in the many experienced bench officers of our court, so many of whom have welcomed me and offered advice and assistance.

Q: Over the years, you have been very involved with and have held leadership positions in many Orange County organizations. Now that you are a judge, what organizations are you still involved with, and why are they important to you?

A: I serve on the Judicial Advisory Board of the Constitutional Rights Foundation (CRF-OC). I previously served on the CRF-OC Board for several years, including as president, and I coached a high school mock trial team through CRF-OC. I have been active in CRF-OC because I believe in CRF-OC's programs for high school students, many of which provide important civics and government education to students in our county.

I have also remained active with ABTL-OC as a Past President because ABTL provides a unique and positive opportunity for lawyers and judges to work together and exchange ideas about legal topics and issues facing the legal profession and the courts. I have also found ABTL-OC's programs over the years to be timely and informative for both lawyers and judges.

Q: Your husband, Douglas McCormick, is a Federal Magistrate Judge and the two of you have three young children, yet both of you have remained involved in the community. Any time management tips or suggestions for attorneys similarly juggling demands on their time?

A: Well, I have a wonderful spouse who approaches everything we do as a team effort. Beyond that, we pretty much stumble from day-to-day and hope for the best.

♦ *Cathy T. Moses is a litigation associate at Irell & Manella LLP.*

Want to Get Published?

Looking to Contribute An Article?

The ABTL Report is always looking for articles geared toward business trial lawyers.

If you are interested, please contact our Editor Justin N. Owens at JOwens@sycr.com

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previous issues, the ABTL Report focused on the founding of our chapter in 1997, and in June we were treated to stories and tips from some of the early ABTL pioneers.

Not to be overshadowed by the tremendously entertaining and educational June program, our April program was also a "can't miss" event. At that program, we heard an engaging account of the $500 million trial win in the *ZeniMax v. Oculus VR* case from Phillip Philbin (real name!), one of the lead trial lawyers for ZeniMax.

Turning to future events, I hope all ABTL members will join us on July 26 for a members only judicial mixer on the rooftop of The Michelson building. The event will be completely free to attend, and is being funded solely through generous donations from Gibson, Dunn & Crutcher LLP, Crowell & Moring, LLP, Stradling Yocca Carlson & Rauth, P.C., Orrick Herrington & Sutcliffe, and Jones Day. This is the first time we have held such an event, and I hope many of you will attend and make it a success. If you have not yet joined ABTL, this is a great time to do so (and, remember, your summer clerks can join for just $20).

Looking ahead to the fall, in addition to our regular September dinner program, we've got the highlight of our year—the Annual Seminar. This year's event will take place on October 5-8 at the Omni La Costa Resort & Spa in Carlsbad. The theme is "When the Perfect Storm Hits: Managing the Crisis Event." This theme is particularly timely, as it seems hardly a week goes by without one company or another (or the government) trying to manage a high-profile crisis. Registration is open, so sign up now!

I hope all of you have a fantastic and fulfilling summer, and I look forward to seeing you at the upcoming ABTL events.

♦ *Mark Finkelstein is a litigation partner at Jones Day's Orange County office.*

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Cal. App. 4th 1096 (2013); *Greenspan v. LADT LLC*, 191 Cal. App. 4th 486 (2010); *see also Oceans II, Inc. v. Skinnervision, Inc.*, 2015 U.S. Dist. LEXIS 95985, *7, 2015 WL 4484208 (C.D. Cal. July 20, 2015) (applying § 187 at the federal level). Under this long-established practice, courts are "encouraged" to act with "[t]he greatest liberality . . . in the allowance of such amendments in order to see that justice is done." *Greenspan*, 191 Cal. App. 4th at 508 (internal citations omitted); *see also Mirabito v. San Francisco Dairy Co*., 8 Cal. App. 2d 54 (1935); *Thomson v. L. C. Roney & Co*., 112 Cal. App. 2d 420 (1952).

While amendments to judgments are often ministerial in nature, a more substantive amendment occurs when a new entity or individual is added as a judgment debtor. Such an amendment may take place, for example, after a plaintiff (or other eventual judgment creditor) discovers that the judgment debtor is merely the alter ego of another person or entity. *See id.*; *Danko v. O'Reilly*, 232 Cal. App. 4th 732 (2014); *Misik v. D'Arco*, 197 Cal. App. 4th 1065 (2011). And although the legal rationale is that such an amendment "does not add a new defendant but instead inserts the correct name of the real defendant," *Misik*, 197 Cal. App. 4th at 1072, the change nevertheless provides a plaintiff with another possible avenue for ultimate judgment collection.

To add a debtor to a judgment, a plaintiff must show that three criteria are met. First, the plaintiff must establish that the party to be added as a judgment debtor "had control of the underlying litigation and [was] virtually represented in that proceeding." *Relentless Air Racing, LLC v. Airborne Turbine Ltd. P'ship*, 222 Cal. App. 4th 811, 815–816 (2013). Second, the plaintiff must show "such a unity of interest and ownership that the separate personalities" of the judgment debtor and the entity to be added "no longer exist." *Id.* And third, the plaintiff must show that "an inequitable result will follow if the acts [of the judgment debtor] are treated as those of the entity alone." *Id*. Thus, the requirements for amending a judgment to add an alter ego in California are straightforward, and as noted earlier, courts are afforded significant discretion in granting such motions to amend. *Greenspan*, 191 Cal. App. 4th at 508.

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Unreasonable Delay: Sufficient Grounds for Denying a Motion?

Given court's liberality in granting motions to amend a judgment, a plaintiff's failure to raise alter ego allegations in a lawsuit often does not preclude it from adding an alter ego to an eventual judgment. See*, e.g.*, *Misik*, 197 Cal. App. 4th at 1074–75. For years, however, a plaintiff wishing to add an alter ego debtor was still required to act diligently post-judgment or risk losing its right to amend, and it was required to do so regardless of whether prejudice resulted from any delay. *See Alexander*, 104 Cal. App. 3d 39.

In contrast to the long-standing rule, one might argue that "unreasonable delay" should preclude a plaintiff from amending a judgment only if prejudice to the judgment debtor resulting from that delay could also be shown. Such a test would be similar to, for example, that of laches, which requires a showing of both unreasonable delay and prejudice. *Miller v. Eisenhower Medical Center*, 27 Cal. 3d 614 (1980) (setting forth the test for laches). But in *Alexander v. Abby of Chimes*, the First District ignored the issue of prejudice when it precluded amendment to a judgment. 104 Cal. App. 3d 39.

In *Alexander*, the plaintiffs sought recovery on a promissory note against Abbey of Chimes ("Abbey"), a California corporation. *Id.* at 43. Judgment was entered against Abbey, the only defendant in the case, in 1971, and there was "no indication" that the plaintiffs (at this point, judgment creditors) made any attempt to satisfy the judgment against Abbey or Abbey's successor corporation. *Id.* Nonetheless, six years after the judgment was entered against Abbey, the plaintiffs moved to amend the judgment to include Abbey's sole stockholder, McCormac, as a judgment debtor. *Id.* The trial court granted the motion and McCormac appealed. *Id.* at 42.

The Court of Appeal expressly held that the case was "a proper case for amendment of the judgment." *Id.* at 46. Regardless, it reversed the trial court's ruling and held that amendment should not be permitted because "the motion to amend the judgment was not timely made." *Id.* at 47. Interestingly, the *Alexander* Court did not rely on any case considering a motion to amend a judgment to justify its reversal. *See id.* at 47–49. Rather, the court primarily relied on *McIntire v. Superior Court*, 52 Cal. App. 3d 717 (1975), a case where the court prevented an amendment to a *complaint* where the plaintiff failed to act diligently. *Id.* at 720 ("to justify the addition of new defendants, plaintiff must have acted with due diligence to bring them in as parties.") Thus, rather than address the issue of prejudice, the court relied on its findings that the plaintiffs had "no explanation . . . for the close to seven-year delay in filing" the motion, had not "ever made any effort to satisfy the judgment until the motion was filed," and likely knew of McCormac's "connection with Abbey at the time of the filing of the complaints or at the time of trial." *Alexander*, 104 Cal. App. 3d at 48. The court therefore held that amendment was improper.

For years, *Alexander* has been the seminal case on whether a plaintiff had lost its right to amend a judgment to include an alter ego. But, last year, the Fourth District disagreed with the holding there, finding that *Alexander* "is a departure from settled case law." *Highland*, 244 Cal. App. 4th at 284. In *Highland*, the plaintiffs moved to recover attorney fees and costs from a company, SCC/Black Bench. *Id.* at 273. SCC/Black Bench did not oppose the plaintiffs' motion, and the court awarded the requested fees. *Id.* Four years later, the plaintiffs (at that point, judgment creditors) moved to add a second company as a judgment debtor on the basis that SCC/Black Bench was merely an alter ego of this second company. *Id.* The trial court, relying on *Alexander*, denied the plaintiffs' motion to amend. It stated that although it "likely" would have granted the plaintiffs' motion if it had been brought earlier, the plaintiffs "failed to act with due diligence in bringing the motion." *Id.*

On appeal, the Fourth District reversed the trial court. It held that a party opposing a motion to amend a judgment on the basis of alter ego could not merely rely on the plaintiffs' undue delay in bringing the motion. *Id.* at 282. Instead, the *Highland* Court held that the test for laches should be used to determine whether delay should result in denial of a motion to amend. *Id.* The Fourth District's reasoning was clear: "the denial of a motion to amend a judgment to add an alter ego defendant based solely on the moving party's unreasonable delay in filing the motion" creates "a de facto limitations period on a section 187 motion to amend a judgment, even though no limitations period applies to the motion." *Id.* at 286–287. And, as the *Highland* Court explained, the Legislature specifically chose not to have any such limitations period because it "does not wish to hamper courts in exercising their authority

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to carry their jurisdiction into effect by ensuring their judgments are enforced against the 'real defendants.'" *Id.* at 287. In so holding, the *Highland* Court created an apparent district split as to whether a plaintiff's delay in bringing a motion to amend a judgment is an independently sufficient basis for denial.

Implications of *Highland*

While *Highland* is both well-reasoned and more recent than *Alexander*, some questions remain moving forward. For example, one issue that is unclear under *Highland* is what factual showing is needed to demonstrate that defendant's alter ego would be prejudiced by being added to the judgment. In many laches cases, a defendant can successfully argue that it has been prejudiced because it materially changed its position while the plaintiff waited to bring its claim. *See, e.g.*, *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 69 (2000). In contrast, motions to amend judgments often concern situations where a plaintiff is merely seeking to add the "real defendant" to the judgment. *Highland*, 244 Cal. App. 4th at 287; *Misik*, 197 Cal. App. 4th at 1072. Because, by definition, there is a "unity of interest" between the debtor on the judgment and the debtor to be added, it seems less clear under what circumstances the latter could successfully argue that it would be prejudiced by being added, in name, to a judgment. *Misik*, 197 Cal. App. 4th at 1073.

In addition, while the First District recently cited *Alexander* in a case concerning the amendment of a judgment, it expressly refused to address the conflict between *Alexander* and *Highland*. *See Hearn Pacific Corp. v. Second Generation Roofing, Inc*., 247 Cal. App. 4th 117, 148 n.24 (2016) (citing *Highland*, 244 Cal. App. 4th at 285–86 ("We have no occasion to decide whether to revisit *Alexander* in light of recent criticism that it dispensed with a required element of prejudice.")) A district split therefore currently appears to exist as to whether unreasonable delay alone is a sufficient basis for denying a plaintiff's motion to amend a judgment to add an alter ego. Moreover, because no other district has offered a post-*Highland* opinion on this issue, it remains uncertain how undue delay and prejudice will be reviewed statewide.

Given these uncertainties, it seems that litigants on both sides of the issue should proceed with great caution moving forward—particularly litigants outside the Fourth District. Specifically, despite the Fourth District's ruling in *Highland*, such plaintiffs should act still diligently when attempting to amend a judgment. Meanwhile, judgment debtors (and their alter egos) should now be especially cognizant of the possibility they may need to show prejudice to defeat an eventual amendment to a judgment.

For litigants in the Fourth District, an uptick in post-judgment activity for prior litigation can be expected. Indeed, the *Highland* decision may have given plaintiffs with uncollected judgments a welcome opportunity to amend and collect on those judgments. New litigation within the Fourth District may also now proceed differently. Assuming *Highland* remains good law moving forward, a plaintiff may no longer have to be as concerned with whether, "at the time of the filing of the complaint[] or at the time of trial," it had reason to believe that the defendant was an alter ego of another entity. *Alexander*, 104 Cal. App. 3d at 48; *see Highland*, 244 Cal. App. 4th at 287. Indeed, it is at least possible that based on *Highland*, plaintiffs attempting to save costs may desire to forego litigating the issue of alter ego until after a judgment is entered and collection has been attempted on a previously named defendant. *Id.* And as for defendants, they not only may be forced to litigate a case with the threat of amendment hanging over their heads, but they may also face that threat long after litigation has concluded. In short, Highland appears to give plaintiffs additional strategic options while adding significant risk for defendants.

♦ *David Clark and Chris Maciel are associates in the Business Litigation Practice Group in the Orange County office of Haynes and Boone.*

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order that falls within the reach of such a blocking statute carries civil or even criminal liability.

In 1972, in an attempt to reconcile these stark and often crippling differences between U.S. and foreign discovery procedures, the U.S. ratified the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("Hague Evidence Convention").

Discovery Mechanisms in the Hague Evidence Convention

The Hague Evidence Convention requires all signatory states to follow specific "Letter of Request" procedures for evidence production and to create "Central Authorities" to send and receive these Letters of Request. Typically, the requesting state's Central Authority will transmit a Letter of Request to the Central Authority of the foreign court best suited to execute the evidence request, with the foreign Central Authority returning evidence to the requesting Central Authority. The Hague Evidence Convention sets out strict guidelines for the content of a Letter of Request, and the receiving Central Authority's obligation to fulfill the request is conditioned on compliance with these stringent guidelines. If the Letter of Request sufficiently complies with the guidelines, then the Central Authority must execute the request expeditiously, unless execution of the request falls outside the functions of the foreign state's judiciary, or the execution would violate the state's sovereignty.

The Hague Evidence Convention imposes far greater substantive restrictions on the availability of discovery as compared to the Federal Rules of Civil Procedure. Perhaps the most important and controversial part of the Hague Evidence Convention is Article 23, which permits signatory states to deny all pre-trial document discovery, even if the relevant Letter of Request otherwise meets the procedural requirements. The large majority of signatory states have exercised this option. The wholesale denial of pre-trial document discovery under Article 23 creates a substantial obstacle for U.S. litigants.

Reach and Limits of *Aérospatiale*

Leading up to *Aérospatiale*, American courts grappled with the issue of the mandatory nature of the

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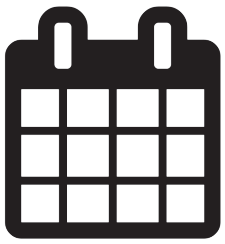
MARK YOUR CALENDARS



July 20, 2017
Joint ABTL — Young Lawyer Division / OCBA Corporate Counsel Section Mixer
6:00 to 8:00 p.m.
AnQi Gourmet Bistro & Noodle Bar
3333 S. Bristol Street
Costa Mesa, CA 92626

◊

July 26, 2017
Summer Judicial Mixer
5:30 to 7:30 p.m.
Hyundai Capital Building Rooftop
3161 Michelson Drive, Irvine

◊

September 13, 2017
Dinner Program
The Westin South Coast Plaza

◊

October 5-8, 2017
ABTL 44th Annual Seminar
Omni La Costa Resort & Spa
Carlsbad, California

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November 8, 2017
Dinner Program
The Westin South Coast Plaza
Holiday Gift Giving Opportunity

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Hague Evidence Convention for parties to a lawsuit pending in U.S. federal court; did it preempt the Federal Rules? Simply offer a procedural alternative to litigants? Or did the Convention serve as a first-resort, with the Federal Rules as a backup option?

In *Aérospatiale*, the Supreme Court finally resolved the primacy debate, holding that—based on the facts of the case—the Hague Evidence Convention was not mandatory to parties involved in U.S. litigation, but instead merely optional, and the Court applied the Federal Rules of Civil Procedure to the discovery request at issue, rather than the Hague Evidence Convention. The Court determined there was no general obligation to first attempt discovery under the Hague Evidence Convention before resorting to the Federal Rules, but left litigants with a poorly defined, ad-hoc, comity-based balancing test to determine when discovery should occur under the Federal Rules and when it should be done in accordance with the Hague Evidence Convention. The majority noted that, for future discovery disputes, any mandated first-resort to the Hague Evidence Convention should take into account: 1) U.S. state interests; 2) the foreign state's interests; 3) the likelihood the Convention's procedures would be effective; 4) the breadth and intrusiveness of the requested discovery; and 5) any special difficulties foreign litigants might encounter in responding to U.S. discovery requests, *e.g.,* blocking statutes imposing civil or criminal penalties. *Aérospatiale*, 482 U.S. at 544 (largely mirroring the Restatement (Third) of Foreign Relations Law §442 (1987).)

In *Aérospatiale*, the Court expressly addressed the presence of a French blocking statute, holding that a blocking statute was not dispositive as to whether the Evidence Convention's procedures were or were not mandatory. The Court stated, "[t]he French 'blocking statute' does not alter our conclusion. It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute. . . . It is clear that American courts are not required to adhere blindly to directives of such a statute." 482 U.S. at 544 n.29 (citations omitted). While a blocking statute does not preclude American courts from issuing discovery orders under the Federal Rules, *Aérospatiale* leaves room for courts to consider such statutes under *Aérospatiale*'s balancing test.

By declining to award primacy to the Hague Evidence Convention over the Federal Rules, the *Aérospatiale* majority opinion served as a fortification of American discovery rules. Because the Hague Evidence Convention's Letter of Request procedure can be time consuming and require compliance with strict guidelines, the Federal Rules are almost always a more efficient and effective conduit to conduct discovery. In addition, as the U.S. government pointed out in its amicus brief, the decision prioritizes equal discovery: Foreign litigants have full advantage of liberal U.S. discovery rules in American courts—why should U.S. parties be restricted by the cumbersome Hague Evidence Convention procedures when they seek reciprocal discovery?

On the other hand, critics of the decision, including many foreign signatory states, fear the *Aérospatiale* Court stripped the Hague Evidence Convention of its practical effect by relegating it to use in limited circumstances when the ad-hoc balancing test weighs in its favor. When signed in 1968, the Hague Evidence Convention's purpose was widely understood to limit perceived procedural "fishing expeditions" by U.S. litigants in foreign courts. The *Aérospatiale* decision seemingly restored U.S. litigants' broad ability to compel production of evidence from foreign parties to a suit under the Federal Rules.

As an interesting aside, with respect to foreign service of process, the Supreme Court later found the Hague Service Convention mandatory, requiring foreign service to comply with both the Federal Rules *and* the Hague Service Convention in *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988). In May of this year, the Supreme Court revisited the Hague Service Convention. In *Water Splash, Inc. v. Menon*, the Supreme Court held that the Hague Service Convention permits service of a summons and complaint by mail when both the jurisdiction in which litigation is pending and the country in which service is received similarly permit service by mail. *Water Splash, Inc. v. Menon* 501 U.S. __, 37 S. Ct. 1504 (May 22, 2017).

Further Defining *Aérospatiale*: What's Left of the Hague Evidence Convention?

In the years following the *Aérospatiale* decision, litigants and courts' main concern has been formalizing a particularized understanding of when and how the Hague Evidence Convention applies in transnational litigation. In this regard, the *Aérospatiale*

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Court's comity balancing test was reinforced and honed in *Valois of America, Inc. v. Risdon Corp.*, in which the court held that the party seeking application of the Hague Evidence Convention procedures bears the burden of persuasion at trial to show the Convention applies. *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346 (D. Conn. 1997). The *Valois* court applied a three-pronged analysis similar to *Aérospatiale*, looking at "(1) the examination of the particular facts of the case, particularly with regard to the nature of the discovery requested; (2) the sovereign interests in issue; and (3) the likelihood that the Hague Convention procedures will prove effective." *Id*.

Furthermore, the *Valois* court provided some guidance to litigants as to how courts will use the *Aérospatiale* balancing test and where the most weight will fall. The court noted that post-*Aérospatiale* cases readily dismissed the second prong, finding no sovereign interest would be offended by use of the Federal Rules, while giving substantial weight to the third prong as the Hague Evidence Convention's procedures can be time consuming and expensive. *Id* at 346–48 (referencing *Rich v. KIS Cal., Inc.* 121 F.R.D. 254 (M.D.N.C. 1988); *Haynes v. Kleinwefers,* 119 F.R.D. 335 (E.D.N.Y.1988). Furthermore, to tip the balance on the third prong, litigants must persuade American courts of the efficacy of the Hague Evidence Convention. Given the Convention's stringent requirements, specifically Article 23's denial of all pretrial document production, making such a showing can be overly burdensome and difficult, resulting in heavier reliance by litigants on the Federal Rules.

However, the most important element of the *Valois* balancing test, and the most determinative in how lower courts will rule on a given case, is the first prong, which examines the particular facts of the case and nature of the requested discovery. When discovery requests are specifically tailored and narrow, courts are more likely to allow discovery to proceed under the Federal Rules, while overly burdensome requests may tip the balance toward mandating Hague Evidence Convention procedures. *Valois*, 183 F.R.D. at 347.

Post- *Aérospatiale*—How Far Does It Go?

Aérospatiale only pertained to compelling evidence from parties to a suit already pending under the jurisdiction of an American court. The Supreme Court's ruling does not provide guidance on whether evidence requests to foreign non-parties to the suit abroad, or discovery sought to establish personal jurisdiction, can comply simply with the Federal Rules or must proceed under the Hague Evidence Convention.

Foreign Non-Parties

Compelling evidence from foreign non-parties abroad is the most clear-cut instance where the Federal Rules are inapplicable and the Hague Evidence Convention must be used. Because the Federal Rules, specifically Rule 45, have strict territorial limits prohibiting courts from issuing subpoenas against people outside the court's jurisdiction, they simply do not provide any avenue for discovery directed to foreign non-parties located abroad. In these situations, the Hague Evidence Convention is the only procedural tool available to litigants. *See In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985); *S.E.C. v. Stanford Intern. Bank, Ltd.*, 776 F.Supp.2d 323 (N.D. Texas 2011); *Intercontinental Credit Corp. v. Roth*, 595 N.Y.S. 2d 602 (N.Y. Sup. Ct. 1991);. Before the signing and ratification of the Hague Evidence Convention, U.S. litigants had to petition the U.S. government to submit "letters rogatory" to the foreign government constituting a discovery request for evidence from foreign non-parties. This process was riddled with procedural and diplomatic issues, and one of the Hague Evidence Convention's aims was to update this cumbersome procedure.

Jurisdictional Discovery

A crucial question post-*Aérospatiale* is whether the Hague Evidence Convention is mandatory for jurisdictional discovery. Although lower courts are split, the majority have held that *Aérospatiale* applies and there is no requirement to use the Hague Evidence Convention. These courts note that applying the *Aérospatiale* balancing test correctly best determines how jurisdictional discovery should proceed, by taking into account sovereign interests and the type and extent of evidence requested. *See In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 302 (3d Cir. 2004); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d. 45, 49 (D.D.C. 2000). However, a minority of courts hold that if jurisdiction

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over a foreign party has not yet been established, the Hague Evidence Convention provides the exclusive and mandatory mechanism for discovery. *SeeMeadWestvaco Corp. v. Rexam PLC*, No. 1:10CV511 (GBL/TRJ), 2010 WL 5574325 (E.D. Va. Dec. 14, 2010); *Knight v. Ford Motor Co.,* 615 A.2d 297, 301 (N.J. Super. Ct. Law Div. 1992).

Conclusion

The Supreme Court has spoken once, and only once, on the exclusivity of the Hague Evidence Convention *vis à vis* the Federal Rules, and *Aérospatiale* still stands as the guiding beacon for U.S. litigants. There are some clear boundaries where the Hague Evidence Convention is mandatory and exclusive, as when the evidence requested is found with non-party witnesses abroad. However, according to *Aérospatiale*, when the parties submit to the jurisdiction of an American court, the Hague Evidence Convention is neither mandatory nor exclusive. Courts are split on whether jurisdictional discovery should be conducted under the Federal Rules or through the Hague Evidence Convention's procedures, with a majority of courts applying the *Aérospatiale* balancing test.

The Federal Rules provide the most efficient, effective, and optimal mechanism for obtaining evidence, even when that evidence is located with a party to the suit abroad. However, the balancing test developed by the *Aérospatiale* Court and refined by lower courts can be unpredictable and inconsistent. In order to avoid the Hague Evidence Convention, litigants should tailor their requests to ensure they are not overly prying or expansive. Alternatively, to avoid the particularized case-by-case analysis developed post-*Aérospatiale*, litigants might choose to utilize the Hague Evidence Convention. The Convention's procedures are more cumbersome than the Federal Rules, but can be more predictable and may well go far to ensure foreign cooperation.

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more palatable and appealing to the jury.

Tell the jury a story. How would you describe the case to someone if you were at a dinner party? What happened between the parties that caused the conflict? What are the motives of the lawsuit? What is your client seeking? If you are asking the jury to award your client damages, why should they want to find in favor of your client, and in what amount? Telling your case in terms of a story makes your complex business dispute much more jury-friendly.

Once you have identified the appropriate theme or themes for your case, and have plotted out the story line, you will need to create the scenes by which you will tell the story. The scenes will involve not only the actors (i.e., the witnesses), but also the script (i.e., the evidence), and the props (i.e., the trial graphics). While the witnesses and the evidence of the case will be dictated by the particulars facts underlying the dispute, the creation of the trial graphics is where you, as the presenter of the story, will have an opportunity to showcase your creative genius.

The question is how do you creatively distill complex financial data into practical trial demonstratives to effectively communicate your client's story to the jury? The first thing to keep in mind is that a demonstrative display of any kind has more impact on a jury than simply an oral description of the matter. Research supports the common sense belief that any mode of demonstrative display is superior to using no visual evidence to make specific points during expert testimony. See Harold Weiss & J.B. McGrath, Jr., Technically Speaking: Oral Communication for Engineers, Scientists, and Technical Personnel (1963); D.M. Binder & M.J. Bourgeois, Effects of the Use of PowerPoint by Expert Witnesses (unpublished manuscript) (on file with the University of Wyoming). This is especially true in today's world of tech-savvy users, where most jurors have become accustomed to receiving information through digital media. A 1992 McGraw-Hill study, commonly referred to as the Weiss-McGrath report, found "a one-hundred percent increase in juror retention of visual over oral presentations and a six-hundred percent increase in juror retention of

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combined visual and oral presentations over oral presentations alone." Thus, trial attorneys in all cases should start their trial preparation from the premise that today's jurors have a greater capacity to understand more in-depth multi-media presentations and, in fact, may now demand trial graphics of greater quality and depth. The fact is that the use of video and computer capabilities in the courtroom expands a trial attorney's options for how to present evidence; can assist in delivering large amount of complex information in a format that is familiar and acceptable to today's population; and helps to keep the jury engaged in your client's story.

The question then for the complex business litigator is not if she will use trial demonstratives, but how she can most effectively use visual and other sensory aids at trial to successfully engage and educate the jury so that the client's story will be understood and accepted. Remember, the need to tell a compelling story to the jury does not disappear just because a case involves complex financial data. In fact, the task of explaining to the jurors the meaning of the data in a clear and engaging manner that helps them understand the case themes and supports the case story becomes that much more important in cases involving complicated financial material.

The following 4 step process is one way to develop effective trial demonstratives:

1. First, decide what message you wish to convey to the jury by the presentation. Perhaps you are trying to illustrate the fact that distributions of one partner were improperly being accounted for in the financial records as "management expense." Or maybe you want to show the jury that the financial transaction that the former partner now seeks to characterize as a "partner loan" was never identified or carried on the company's books and records as such. Whatever the message is, you should identify it before you start to assemble the relevant data you will need to make your point.

2. Next, cull through the financial data with your expert to ascertain the best source of the financial data you seek to present. This may be contained in the general ledger, the bank records, or the cash flow summaries. Wherever it is, you should identify it and understand it so that you can effectively use it to illustrate whatever point you are trying to convey. This point is worth stressing: in order to successfully tell the story, you must have command of the facts and information, regardless of their technical nature.

3. After you have determined the message you want to deliver and have identified the financial records that best illustrate your point, you should start with the creation of a very basic chart of the financial information you have selected using minimal formatting of fonts and colors. Starting with a solid, yet simple, graphic will give you a strong foundation of data upon which to expand your trial graphic, if appropriate.

4. Finally, you should refine and enhance the graphic as necessary to bring the case story to life. Remember that your goal is to tell a story, and that a story has a beginning, middle, and end. What part of the story does the demonstrative represent? Perhaps it is intended to reveal to the jurors the financial implications of the former partner's alleged misconduct, or to evidence the consequences of the managing member's mismanagement. Understanding the role of each demonstrative will help to keep you focused on what data you need to highlight for the jury. Remember that the goal of the demonstratives should be to help you explain the case story with little or no additional explanation.

The design of effective trial demonstratives can seem daunting in the face of years of financial records. Once you have identified the case story, how do you decide what data best exemplifies your client's contentions, and how do you reduce that data into meaningful graphic representations for the jury? Consider the best mode of delivery for your exhibits: electronic, foam board, or hand-written on an easel. A mix of electronic and print exhibits often works well to keep the jury's attention. If possible, you should collaborate with your financial expert and trial graphics vendor early on in the case to strategize about how to effectively utilize financial data to present the case story graphically to the jury. Taking control of this task from the outset will help you to stay focused on the case story, and to move the case strategically towards trial.

There are several visual elements of the trial graphics you may want to consider to assist in keeping the financial information manageable while communicating the case story. First, think about the

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volume of financial data you need to present, and choose the most powerful visual to represent that information. If your records are limited, a modest chart with just a few rows and columns may be the most effective method of delivering the information. If you have more data, you may want to consider using color-coded pie charts or bar graphs to illustrate your data points. Don't over-explain. Show only what is necessary to make your point. An effective method of presentation is to introduce the entire spreadsheet, and then call out only the relevant columns or rows of information needed to illustrate the point in a separate graphic. Use animation to gradually reveal the case story by calling up the relevant columns and rows on screen one by one. This adds a dramatic flair to the presentation and serves to engage the jurors in the story-telling journey. It can also be particularly effective when you need to refute the manner in which the opposing side has interpreted the data. In addition, make use of colors and highlighting to emphasize your key data, and to help tell the story. For example, use red to accentuate losses and green to show the positive income that should have been paid to your client. Finally, add common-sense labels where appropriate to focus the jury on relevant beginning and ending data points or other important details.

Another similar method is present graphics in a lecture-style presentation. For example, walking through an accounting to explain how a party "double-dipped" by mischaracterizing certain entries as fees when they were really profit can be accomplished by physically writing out each line item on an easel or using power point. Hand writing each line, one at a time, helps break the information into easy-to-digest pieces, versus introducing the information to the jury all at once or in a single slide. Interactive presentations like these can also help engage jurors, who are otherwise being presented with slide after slide of information.

So, what do you tell the jury about the case when you know that the financial information you will need to present to them encompasses 10 years of general ledgers, bank records, and cash flow summaries? Do you tell them that this is going to be a complicated business dispute that is going to require them to listen to weeks of dry testimony and comprehend thousands of pages of financial records? No. Instead, you tell them the story of how your client came to need their help, and how you are going to explore, together, the company's own books and records to reveal the very misconduct that you have told them about. Then, because you have been thoughtful and diligent in creating your trial graphics, you will be successful at trial in utilizing your demonstratives as compelling visuals to help you tell your client's case story.

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