LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, FEBRUARY 8, 2023

PERSPECTIVE

Ramirez: responding to restrictions on the affirmative use of PMQ testimony

By Don Willenburg

A new Court of Appeal decision will likely have wide-ranging effects on civil practice involving long-ago events. Litigants that are not "natural persons" are required to designate a "person most qualified" ("PMQ") to appear at depositions. (Code Civ. Proc., § 2025.230.) Such witnesses customarily testify in contexts other than depositions as well. Recently, *Ramirez v. Avon Products, Inc.* 2023 DJDAR 607 ruled that testimony from a PMQ based on investigation, while appropriate for discovery, is inadmissible in evidence because it is based on hearsay, not personal knowledge.

Defendant Avon won summary judgment relying on a declaration from a PMQ that "Avon never included or used asbestos as an ingredient or component of its cosmetics products. Since the [early 1970's,] Avon has required its talc suppliers provide only asbestos-free talc." The PMQ began work at the company in 1994, but had done "investigation" in preparation for her PMQ deposition. The trial court held that was good enough, and overruled plaintiffs' objections to the declaration.

The Court of Appeal reversed. "The Evidence Code recognizes only two types of witnesses: lay witnesses and expert witnesses," and only experts can testify based on hearsay. "There is no special category of 'corporate representative' witness." "Even trained and sworn police officers who are authorized by the State of California to investigate crimes are not exempt from the requirements of the Evidence Code when testifying at trial in a non-expert capacity. Gallo was simply a lay witness, and as such she was limited to matters as to which she had personal knowledge. ssThe Evidence Code ... does not recognize a special category of 'person previously designated as most knowledgeable' witness."

The decision distinguished admissibility from discovery. "[T]he purpose of discovery is to permit a party to learn what information the opposing party possesses on the subject matter of the lawsuit, and the scope of discovery is not limited to admissible evidence. [Citation omitted.] Thus, the mere fact that a person is asked about a matter at a deposition and provides information in response does not make that testimony admissible at trial."

The standard PMQ investigative process magnifies, rather than diminishes, the hearsay concerns. "Given the time frame involved, Gallo is most likely 'channeling' information from people who not only lacked personal knowledge themselves, but acquired their information from people who also lacked personal knowledge. This oral passing of information raises exactly the reliability concerns which animate the personal knowledge requirement, not to mention the rule against hearsay."

The Court of Appeal held not only that the PMQ's declaration testimony was inadmissible, but that she could not authenticate the old documents. Avon did not lay the groundwork for arguing the business records exception to hearsay, and the exception probably would not apply to many of the documents culled from corporate files anyway.

The decision may not break much new doctrinal ground, but it likely will have a huge practical effect. Much like Avon's witness here, PMQs routinely question employees and former employees, review corporate records, and testify in deposition, declarations and trial based on that investigation. So, what can an entity litigant (corporate or otherwise, defendant or plaintiff) do to make evidence of such witnesses and long-ago events admissible?

1. Personal knowledge. The best and most obvious response is to identify and designate witnesses who have personal knowledge of the entity's history and operations. This may require designating multiple witnesses for different topics. It will also not be possible in many instances, most notably for events and conditions decades ago.

2. The entity litigant could also try to use prior testimony of PMQs or other witnesses who did have personal knowledge, under the "former testimony" hearsay exception in Evidence Code section 1292. The statute's first two requirements are straightforward enough: "(1)The declarant is unavailable as a witness" and "(2) The former testimony is offered in a civil action." It's the third condition that will be difficult and require skillful advocacy, as well as fortuitous circumstances: "The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing." It is much easier if you are offering the former testimony against someone that was a party to the former proceeding (Evid. Code, § 1291), though presumably that will be rare.

3. Some documents may qualify for the "business records" hearsay exception under Evidence Code sections 1271 & 1272. This is great if you can meet the standards, but

Don Willenburg *is a partner at Gordon Rees Scully Mansukhani, LLP. He can be reached at dwillenburg@grsm.com.*

many documents that may be in the files of a business or other entity will not qualify for this exception.

The business records exception applies only to "a record of an act, condition, or event … when offered to prove the act, condition, or event," and even then only if:

"(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

(Evid. Code, § 1271.) Query whether after *Ramirez* subdivision (c) will also require personal knowledge. That could effectively negate the business records exception for old records.

4. Other documents may escape hearsay via the "ancient documents" exception. "Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter." (Evid. Code, § 1331.) The proponent of the over-30 (since when is over 30 "ancient?" But I digress) writing will need to have separate admissible evidence that "the statement has been since generally acted upon as true by persons having an interest in the matter." It might be possible to do this by "daisy-chaining" prior PMQ testimony asserting the truth of the statement. Prior PMQs are presumably "persons having an interest in the matter." (So could be opposing litigants in those prior cases.) That could work even if the prior PMQ testimony could not come in under the former testimony exception.

5. Another possibly applicable hearsay exception is for documents affecting property. "Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement."

(Evid. Code, § 1330.) Section 1330 could potentially apply to, for example, recitals in merger and acquisition documents.

6. Expert opinions. As *Ramirez* suggested, experts may render opinions based on hearsay, which could include the hearsay testimony and documents. At least two limitations are immediately apparent. First, you are unlikely to find an expert in the history of your client. You may, however, locate an expert in the history of the industry or field in which your client operates who can render general opinions about industry practices, etc. Second, while an expert can render an opinion based on hearsay, the expert cannot relate to the jury the content of any case-specific hearsay. *People v. Sanchez*, 63 Cal.4th 665 (2016).