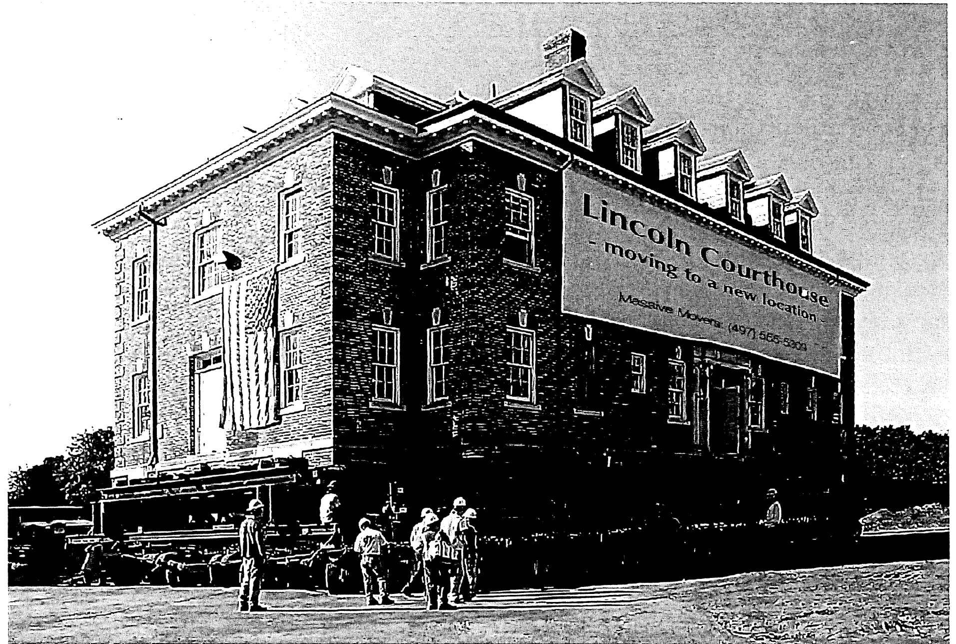
Ch-Ch-Ch-Changes: Strategies for Successfully Moving to Change Venue Based on Inconvenience



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In California state courts, personal injury plaintiffs are free to file suit in any one of several venues, including where the incident occurred or where any defendant resides. In multi-party cases, the opportunity to forum shop increases with each new defendant. A venue transfer motion under California[1] Code of Civil Procedure section 397, subdivision (c), based on the convenience of witnesses, is one of few tools available to defendants to escape an unfavorable jurisdiction. A successful motion can truly become a "game changer" and the ruling is difficult to overturn on appeal. But such motions require careful planning, proper drafting and extensive factual support. This article provides the roadmap for how to prepare a successful venue transfer motion.

THE BASICS

Defendants are typically at a plaintiff's mercy on venue if suit is filed in a proper county[2] – which varies depending on the parties and the claims asserted in the lawsuit. (*See generally* Code Civ. Proc., §§ 392, 393, 394, 395, 395.1, 395.2, 395.5.) Even so, a defendant may have recourse if the plaintiff's chosen forum is inconvenient to non-party witnesses *and* the ends of justice will be met by a transfer of venue. (Code Civ. Proc., § 397, subd. (c) [stating the court "may, on motion, change the place of trial ... [w]hen the convenience of witnesses and the ends of justice would be promoted by the change."]; *see also Peiser v. Mettler* (1958) 50 Cal.2d 594, 607.) The grant or denial of such a motion is subject to reversal only on a clear showing of an abuse of discretion. (*See State Bd. of Equalization v. Super. Ct.* (2006) 138 Cal.App.4th 951, 954; *Fontaine v. Super. Ct.* (2009) 175 Cal.App.4th 830, 836.) Nonetheless, the defendant's burden is significant and not easily met.

A. Inconvenience

When evaluating a change of venue motion, the Court looks to the inconvenience of *non-party witnesses*. (*Wrin v. Ohlandt* (1931) 213 Cal. 158, 159-160; *Corfee v. S. Cal. Edison Co.* (1962) 202 Cal.App.2d 473, 478 ["Ordinarily only convenience to third-party disinterested witnesses will be considered."].) The convenience of the parties,[3] party-affiliated witness (such as the parties' employees[4] and the parties' expert witnesses) and the parties' attorneys or experts is not considered in determining whether to transfer venue. (*See Dillman v. Super. Ct.* (1962) 205 Cal. App.2d 769, 773-774; *see also Lieberman v. Super. Ct., supra*, 194 Cal.App.3d 396, 401 ["[T]he court may not consider the convenience of the *parties* or of their *employees* in passing upon the motion." (citations omitted, emphasis added)]; *Lieppman v. Lieber* (1986) 180 Cal.App.3d 914, 920 ["Convenience of counsel is not a permissible basis for a change of venue motion."]; Weil and Brown, *et al.*, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2016) § 3:556-57.)

But before the Court considers the convenience of the witnesses, the defendant must show the inconvenienced witnesses' proposed testimony is admissible, relevant and material to some issue in the case as shown by the record before the court. (*Peiser v. Mettler, supra*, 50 Cal.2d at p. 607.) Cumulative testimony will be given little consideration. (*See Int'l Investment Co. v. Chagnon* (1959) 175 Cal.App.2d 439, 446.)

B. Promoting the Ends of Justice

Courts do not require direct evidence that transferring venue will promote the ends of justice. (*See Benjamin v. Benjamin* (1954) 128 Cal.App.2d 367.) Rather, a conclusion that the ends of justice are promoted can be drawn because moving a trial closer to the residence of the non-party witnesses will avoid delay and expense in court proceedings as well as save the non-party witnesses' time and expense. (*Pearson v. Super. Ct.* (1962) 199 Cal.App.2d 69.) When

Continued on page 16

the courthouse is closer, the witnesses' "personal attendance can be compelled; [t]hey can easily be recalled or, where their attendance has been compelled by subpoena, can be held subject to call under appropriate directions of the court." (*Id.* at p. 79.) The Court may look to direct facts set forth in supporting declarations and it may also consider any reasonable and relevant inference arising therefrom. (*Benjamin, supra,* 128 Cal.App.2d 367.)

Presumably the ends of justice will also be promoted in instances where the transferee venue is also the venue where the subject incident occurred (assuming this is not the original venue), or if the action has other strong ties to the requested transferee venue. This seems especially true where police and fire personnel are non-party fact witnesses because of the substantial burden on city and county resources if emergency personnel must attend trial at distant locations and are unavailable to respond to emergencies in their home county. Though there is no appellate case on this point, some courts have been receptive to the argument that public employees who must travel to testify in a distant court are taken away from important public safety work and the public employers must then pay overtime or make other accommodations to provide the same services. (*See Hong Sheng Chen, individually and on behalf of Estate of Yong Li Zhang; Jing Zhang; Wei Zhang v. Victor Wang and Mu Jing* (Super. Ct. Santa Clara County, No. 114CV261745), Order Granting Defendants' Motion to Change Pursuant to Code of Civil Procedure section 397, July 6, 2015.)

GATHERING THE EVIDENCE

To make a sufficient showing of witness convenience and promoting the interests of justice, defendants will use declarations and/or deposition testimony. The supporting facts – however presented – must show: (1) the name of each witness; (2) the expected testimony of each witness; and (3) facts showing why the attendance of said witnesses at trial will be inconvenient and why a transfer would serve the ends of justice. (*Peiser v. Mettler, supra,* 50 Cal.2d at p. 607.) Simply providing a name, a general statement of inconvenience to the witness and a vague or general idea of the witness' testimony will likely be insufficient.

Thus, when eliciting deposition testimony or preparing declarations on the issue of inconvenience, be sure to include as many *specific facts* as possible about why traveling to the current venue is inconvenient and why the transferee venue will be less so. For example, include statements regarding large distances (or shorter distances where the commute time would result in hours of travel) between the witnesses' residence or employment and the current venue (including the use of Google Maps print-outs), childcare difficulties, financial hardships, physical hardships (if witness is ill, fragile or elderly), and time away from necessary work, as the Court may find such facts persuasive. Do not be shy about asking for and including such details in the moving papers.

The moving papers must also show *each witnesses' testimony* is relevant to the action and admissible. Again, something more than a general statement regarding the witnesses' testimony is needed to show relevance and admissibility – otherwise the testimony may simply appear cumulative. For example, in *Corfee, supra,* 202 Cal. App.2d 473, a wrongful death/personal injury case arising out of an electrocution occurring in Santa Barbara County but filed in Los Angeles County, the moving party's attorney submitted a declaration listing witnesses by name and address with only "a brief notation" under the name of each witness "only briefly indicating the general subject of the testimony." (*Id.* at p. 475.) The court could only determine seven or more of the witnesses listed "would testify regarding the physical condition at the scene of the accident." (*Id.* at pp. 477-78.) Without more specific information, "the [trial] court could do little more than speculate as to whether the testimony was unnecessarily duplicative." (*Ibid.*)

While the moving defendants do not need to specifically state the testimony the witnesses will provide, they should indicate specific topics or areas of testimony as well as how testimony may/will differ among witnesses. Witnesses who *differ* in their testimony on certain facts are not cumulative, so highlighting factual disputes may justify the consideration of more witnesses in the inconvenience analysis. For example, if the third-party witnesses are first responders to an incident with catastrophic and fatal injuries, their individual testimony may differ depending on their tasks at the scene of the incident, positioning at the scene, treatment of different individuals, the exact location of vehicles, evidence observed at the scene, etc. Thus, a supporting declaration from the individual witnesses should give more detail than simply saying the witnesses will testify regarding observations made at the scene of the subject incident. And if the substance of witnesses' testimony is known from depositions, provide key transcript excerpts with the moving papers.

Finally, there is no magical number of witnesses who must be inconvenienced before a court will grant a change of venue motion. However, the more witnesses you can find who are inconvenienced and will provide non-cumulative, relevant and admissible testimony the better. (*See generally Garrett v. Super. Ct.* (1967) 248 Cal.App.2d 263 [finding an abuse of discretion where the trial court denied a motion to change venue despite the defendant identifying ten (10) witnesses either in or within subpoenaing distance of the transferee county which he intended to call at trial in support of his answer, counterclaim and cross-complaint and where the plaintiff made no showing the transfer would inconvenience other witnesses].)

TIMING

As demonstrated above, a proper showing to transfer venue requires many facts which may not be apparent at the outset of litigation. Thus, unlike a venue motion based on improper venue (which must be brought within the same time limits as a responsive pleading), there is no express time limit within which to file a motion to change venue based on inconvenience. Rather, case law states such a motion cannot be "entertained" until after the defendant(s) have filed an answer "for the obvious reason that until the issues are

Continued on page 17

joined the court cannot determine what testimony will be material." (*Pearson v. Super. Ct., supra,* 199 Cal.App.2d at p. 75.) Thus, courts allow a "reasonable time" after an answer is filed to file this motion. (*Thompson v. Super. Ct.* (1972) 26 Cal.App.3d 300, 306; *see also* Code Civ. Proc., §396b.)

However, what constitutes a "reasonable time" is not well-defined and a defendant should file the motion as soon as sufficient supporting evidence is gathered – which will likely require early contact with third party witnesses and obtaining declarations or deposition testimony from third party witnesses. In any event, the moving defendant should include details regarding when deposition testimony or information supporting the motion was obtained to demonstrate it acted reasonably and timely.[5]

AND ONE MORE THING...

Where a venue transfer order is based upon inconvenience, *the defendant* is responsible for paying the costs and fees for transfer *at the time the notice of motion is filed.* (Code Civ. Proc., § 399, subd. (a).) In addition to the standard motion filing fee, a separate $50 fee to the transferor court is required for processing. (Gov. Code, § 70618.) A further separate check for the uniform filing fee must also be provided to the transferor court and will be transferred with the file to the transferee court. (*Ibid.*) Strict compliance with these requirements will eliminate a procedural ground for denial. However, check with the transferor court on payment of fees as some clerks do not want the additional fees until *after* the motion is granted.

SO NOW WHAT?

If the motion for change of venue is *denied,* a defendant who has not previously filed a response will have 30 days to move to strike, demur, or otherwise plead (Code Civ. Proc., § 396b, subd. (e); *see also* Cal. Rules of Court, rule 3.1326.)

If the motion for change of venue is *granted,* the transferring court is divested of jurisdiction (except to dismiss the case if the transfer fees are not paid). (*See Moore v. Powell* (1977) 70 Cal.App.3d 583, 587; *see also* Code Civ. Proc., § 399.) If the defendant has not yet filed a response, the defendant will have 30 days to do so after the transferee court sends notice the case was received and a new case number assigned. (Code Civ. Proc., § 586, subd. (a)(6)(B); Cal. Rules of Court, rule 3.1326.)

Once the time to seek a writ of mandate challenging the transfer order expires (and after payment is made of the costs and fees of the transfer), the transferor court's clerk will transmit the papers and pleadings in the case to the clerk of the transferee court. The transferee court's clerk must then mail notice to all parties who have appeared in the action providing the date transmittal occurred and the new case number. (Code Civ. Proc., § 399.)

CONCLUSION

Imagine how the evaluation of most defense cases would change for the better if venue moved from San Francisco to Sutter County, or Oakland to Lake County. To be sure, the liability and damages aspects of a case could improve dramatically in a less liberal venue. All the more reason to give serious thought to a venue transfer motion and to invest the requisite time and expense to marshal the evidence necessary to bring the strongest possible motion at the earliest opportunity.

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ENDNOTES

1 All statutory references are to California state statutes.

2 This article addresses strategies for change of venue motions based on inconvenience of witnesses only; motions to change venue based on improper venue or other grounds are not discussed.

3 It is well-established the "convenience of the parties is not to be considered in the absence of unusual circumstances of hardship." (*Union Trust Life Ins. Co. v. Super. Ct.* (1968) 259 Cal.App.2d 23, 28). However, little guidance exists as to what might serve as a "hardship." The only "hardship" identified is when "'the serious illness of a party will prevent his [or her] traveling to attend the trial in the other county and his [or her] testimony is material....'" (*Lieberman v. Super. Ct.* (1987) 194 Cal.App.3d 396, 401 [citations omitted].)

4 But when an adverse party calls the employees as witnesses (as opposed to on behalf of their employer), the employees' inconvenience may be considered. (*See J.C. Millett Co. v. Latchford Marble Glass Co.* (1959) 167 Cal.App.2d 218, 227 ["... when such employees are being called by an adverse party, the court may properly consider their convenience. [Citation.]"]; *see also Harden v. Skinner & Hammond* (1955) 130 Cal.App.2d 750, 757 ["... these [employee] witnesses are not being called by their employer to testify for such employer. They are being called by the adverse party and so are, as to him, ordinary witnesses."].)

5 Moreover, take advantage of delays caused by challenges to the Complaint and use the time to gather supporting evidence. For example, in one instance, a successful motion to change venue was filed approximately one year after filing of the original Complaint. The delay in filing an Answer occurred because defendants challenged the original Complaint, First Amended Complaint and Second Amended Complaint via motion to strike.