

PUBLICATIONS



Decades of strategic case development and trial experience.

AVAILABILITY OF REMOTE TESTIMONY DOES NOT CONTROL VENUE DETERMINATION

Case Updates

9.19.22

In *Ryck v. Superior Court of San Francisco County* (2022) 81 Cal.App.5th 824, the California Court of Appeal held that the San Francisco Superior Court abused its discretion when it denied a motion to transfer venue from San Francisco to San Diego, where the motor vehicle accident at issue in the case occurred. Although most witnesses were located in California, the trial court relied on the fact the Legislature statutorily provided for remote testimony through July 1, 2023 as the primary basis for maintaining the case in San Francisco. In a published decision, the Court of Appeal reversed, ruling that the remote testimony rules may not be used as a basis to maintain a venue that does not further the interests of justice, which is the key consideration in change of venue motions.

Background Facts

Stella Grace Yeh (“Yeh”) was a student at the University of San Diego. On the night of the incident, she attended an off-campus party where she became inebriated. A friend requested her a ride home through the Uber Application, and a licensee of the Driver Version of the Uber App accepted the request and began driving Yeh home. While on the freeway, Yeh, who was sitting in the front passenger seat, forcefully vomited across the dashboard and interior windshield. The driver exited the freeway, and Yeh got out of the vehicle. The driver claimed he offered to take Yeh back to the original pick-up location, but Yeh declined. Yeh used her Uber App to request a new ride, and that driver arrived, but was unable to locate her. About half an hour later, a witness saw Yeh wandering the freeway, where she was ultimately struck and killed by two cars.

The entirety of these events occurred in San Diego County, but the case was filed in San Francisco, solely because Uber Technologies, Inc. (one of the named defendants) maintains its principal place of business there. The plaintiffs also named as defendants the two drivers.

PROFESSIONALS

Kevin D. Smith

Steven R. Disharoon

RELATED SERVICES

Transportation

PUBLICATIONS

The second driver (“Petitioner”), joined by others, moved for a change of venue to San Diego County under section 397, subdivision (c) of the Code of Civil Procedure, citing the convenience for witnesses and the interests of justice. The Superior Court denied the motion, reasoning that any witnesses who lived too far from San Francisco could appear remotely under Code of Civil Procedure section 367.75, which was enacted during the COVID-19 pandemic and remains in effect until July 1, 2023.

Change of Venue Question

In its motion to the trial court, Petitioner noted that Yeh’s death occurred 494 miles away from the courthouse in San Francisco, and that the only connection between San Francisco and the case was Uber’s principal place of business. San Diego, on the other hand, is where the incident occurred and where the majority of the witnesses reside. Petitioner’s motion argued that a change of venue would “ensure that the countless non-party lay and government witnesses will not be burdened by having to attend a trial hundreds of miles from their homes and places of employment.”

The trial court denied the motion, reasoning as follows: “Defense counsel’s declaration merely indicates where third-party witnesses reported residing three years ago. Moreover, [Petitioner’s] motion ignores the sea change in litigation over the past 18 months. Many depositions and much trial testimony are now given via audio/video platforms such as Zoom. This is certainly what San Francisco jurors expect. Thus, it matters little, if at all, where a witness resides at the time of trial as travel is unnecessary.”

The court was also unpersuaded by the argument that jurors may need to visit the San Diego locations where the events in this case took place. Citing the availability of video footage, the court felt that the jurors would have adequate access to view the locations without being physically present.

General Rules Governing Venue

Pursuant to Code of Civil Procedure section 392 et. seq., a party may file an action where any one of the named defendants resides or does business and/or where the incident in question occurred. Thus, in the situation involving multiple parties, venue may be proper in more than one county. Under section 397, subdivision (a), “[w]hen the court designated in the complaint is not the proper court,” the court may “change the place of trial.” (See also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2003) ¶ 3:550, p. 3-130 (Weil & Brown).) In addition, under section 397, subdivision (c), the court has discretion to transfer the case to another county “[w]hen the convenience of witnesses and the ends of justice would be promoted by the change,” even if the complaint was filed in a “proper” county. (*Id.* at ¶ 3:553, p. 3-130.1.) It is the second type of motion that is at issue here.

If the majority of witnesses reside in the county to which the party seeks to move the case, the court will give this high consideration. “A conclusion that the ends of justice are promoted can be drawn from the fact that by moving the trial closer to the residence of the witnesses, delay and expense in court proceedings are avoided and savings in the witnesses’ time and expenses are effected.” (*Pearson v. Superior Ct., City & City of San Francisco* (1962) 199 Cal.App.2d 69, 77.)

Availability of Remote Testimony Is Not a Controlling Factor

The trial court based its denial of Petitioner’s motion primarily on the idea that “any witnesses inconvenienced by the location of the trial in this matter would be permitted to testify remotely via audio/video platforms such as Zoom.” Although pandemic-era legislation permitting remote testimony serves efficiency and practicality purposes, it did not mark a permanent change in law,

PUBLICATIONS

nor one that is controlling with respect to other statutes, like those pertaining to venue determinations.

Specifically, the Legislature enacted Code of Civil Procedure section 367.75 provides that “courts may conduct conferences, hearings, and proceedings, in whole or part, through the use of remote technology.” But this section also provides courts discretion to require an in-person appearance if it would “materially assist in the determination of the proceeding.” Moreover, the law is set to expire on July 1, 2023.

Furthermore, in enacting section 367.75, the Legislature could have revised section 397, subdivision (c) if it intended courts to assume that the residence of trial witnesses was no longer a key factor given the potential that they could testify remotely. The Legislature left section 397, subdivision (c) unchanged, however, and it also provided that the new remote-appearance rules can be used only after notice and an opportunity for a party to argue for the necessity of in-person testimony. Specifically, section 367.75, as well as newly-adopted Rules of Court, contemplate that a court will exercise its discretion to determine whether an “in-person appearance would materially assist in the ... effective management or resolution of the” case. (Code of Civ. Proc., § 367.75, subd. (b); California Rules of Court, Rule 3.672(d)(1).) Further, rule 3.672(d)(3) authorizes a court to continue a trial and require an in-person appearance if it determines such an appearance is necessary “at any time during a remote proceeding.”

The Court of Appeal found no basis to conclude that section 367.75 purports to advocate for remote testimony as a definitive substitute for all in-person testimony. It also noted that there is no clear indication that the Legislature will maintain section 367.75 after July 1, 2023. Further, there was no evidence that the trial in this action would definitively take place before July 2023.

The purpose of the statute is clear and fully explained by the Legislature: “As we continue to face a pandemic and an unprecedented backlog, remote hearings and trials are essential to allow the wheels of justice to continue to turn. Without a statute in place, when the State of Emergency is lifted the emergency rules will also expire, bringing us back to March of 2020, before the courts were able to pivot to remote hearings and hybrid trials.” (Sen. Rules Comm., Off. of Sen. Floor Analysis of Sen. Bill 241 (2021-2022 Reg. Sess.) Sep. 9, 2021.) In effect, these pandemic era rules permit temporary authorization for remote testimony in cases where both parties and the court agree.

The Court of Appeal noted specific instances where a court or party may prefer in-person testimony even if remote testimony is available. Specifically, it recognized that particular factors may sway a court’s judgment in favor of in-person testimony, such as the following:

- If in-person testimony will allow witnesses to more easily see physical evidence and engage with demonstrative evidence.
- If remote testimony may more easily lose the attention of jurors after watching hours of witness testimony on a screen.

The Court of Appeal proceeded to find that choosing a venue that is local to most of the witnesses and parties provides more flexibility when it comes to the trial. If the technology is not working, for example, the trial court could potentially switch to in-person testimony if the witnesses live locally, and/or continue the trial until the situation is otherwise resolved. A trial closer to the location of most witnesses provides the trial court the ability to determine, on a case-by-case basis, and even on a witness-by-witness basis, if testimony should take place remotely or in-person.

The Court of Appeal ultimately found that the Superior Court’s blanket determination that all trial testimony may be done remotely undermines the “discretion and flexibility built into the statutory scheme.” The lower court erred in reasoning that venue was unimportant because remote testimony would allow witnesses to testify from any location. Indeed, even if remote testimony is someday accepted as the norm, that, alone, still would not change applicable venue rules – requiring discrete

PUBLICATIONS

findings as to witness convenience and the interests of justice – and would not render the location of witnesses irrelevant in making a venue determination.

Kevin Smith is a distinguished trial attorney, a member of the American Board of Trial Advocates, and a founding partner of Wood, Smith, Henning & Berman, LLP. Steve Disharoon is the managing partner of Wood Smith's Petaluma, CA office, an experienced trial attorney, and a Certified Appellate Specialist (State Bar of California). Both regularly represent Uber Technologies, Inc., though were not counsel of record in the case discussed herein.