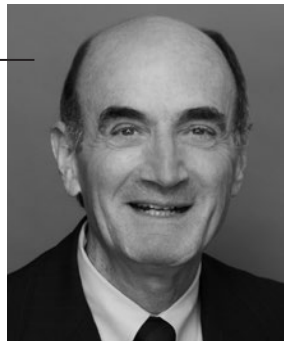
SELECTED EVIDENCE ISSUES WITH DEPOSITIONS OF THE PERSON MOST QUALIFIED/KNOWLEDGEABLE IN CALIFORNIA AND FEDERAL COURTS IN THE NINTH CIRCUIT

Written by Hon. Allan J. Goodman (Ret.)



It is the final status conference (FSC) in superior court. Your witness list includes the person most qualified (PMQ) of your client whose deposition was taken for two days, during which the testimony elicited is helpful to establishing your case in chief.

When the time comes during the FSC for confirmation of witnesses, your adverse counsel utters these words: "We object to our adversary eliciting trial testimony from its PMQ; the PMQ has no personal knowledge of the testimony which he gave during his deposition that his counsel seeks to have the jury hear."

Your protestations that this testimony is critical to your case are unconvincing to the sympathetic but unapologetic trial judge, who rules: "Counsel, while I appreciate your position, on the authority of *LAOSD Asbestos Cases*; *Ramirez v. Avon Products, Inc.* (2023) 87 Cal.App.5th 939 (*Ramirez*)), the request to preclude the testimony of the PMQ is granted." (See *Williams v. J-M Manufacturing Co., Inc.* (2024) 102 Cal. App.5th 250.)

WHAT JUST HAPPENED ... AND WHY?

While there will be a more detailed explanation below, a brief statement of the holding of *Ramirez* is: In California state court, a fact witness must testify based on personal knowledge and, as a PMQ, the proposed witness lacked that essential predicate requirement.

BACKGROUND AND ANALYSIS

CALIFORNIA STATE COURTS

We begin with the mechanics of the California statute, Code of Civil Procedure section 2025.230 (§ 2025.230 or the statute). Depositions of PMQs are authorized by this statute. A party to litigation may take the deposition of an *entity* (which "is not a natural person") in addition to any other depositions. After naming the entity, the deposition notice "shall describe with reasonable particularity the matters on which examination is requested." (*Ibid.*) Ideally, this subject matter list should be agreed upon in a meet and

confer session in which the categories or subjects for the deposition are agreed upon and the person or persons to be deposed as PMQ will be designated prior to issuance of the formal notice. (Hereinafter reference to the PMQ includes multiple PMQs as more than one may be required to respond in particular cases.)

Resolving the scope and details of the matters to be the subject of the PMQ deposition can be difficult; one lawyer's specificity can be another's vagueness. If/when issues arise with respect to the matters designated for examination that the parties do not resolve, section 2025.410 authorizes the filing of objections to the notice; however, the objections must be filed within the three-day time limit specified in the statute. Alternatively, the objecting party can apply for a protective order as authorized by section 2025.420.

Determining who is *"most qualified to testify"* raises its own set of issues. Section 2025.230 limits the persons who may be designated to those *current* "officers, directors, managing agents, employees or agents who are most qualified to testify on [the entity's] behalf as to [the matters designated] to the extent of any information known or reasonably available to the deponent." A rule of reason applies to the designation.

In *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390 (*Maldonado*), the court pointed out that the person designated is required to be within the group of persons specified in the statute (*id.* at p. 1398) and the burden is on the entity to identify the appropriate witness (*id.* at pp. 1395-1396.) The *Maldonado* court also noted that former employees, et cetera, are *not* among those who may be designated (even though they may have the knowledge to respond to issues identified in the deposition notice). (*Ibid.*) (Nothing in the PMQ statute prevents a party from separately taking the deposition of former employees, however.)

The limitation to current employees can make preparation difficult, particularly when the topics designated require knowledge that predates the PMQ's tenure with the entity, such as allegations of long-term exposures to toxic materials.

Determining when to schedule the PMQ deposition. Scheduling is a function of the nature and complexity of the case. For example, PMQ depositions can be useful to get "the lay of the land" in complex cases. If, the case involves the allegation of exposure to a toxic substance over a sustained period of time, scheduling a PMQ deposition early in discovery can yield information on past purchases of target substances, historic workplace safety protocols — even names of former employees (for separate, individual depositions), as a precursor to more targeted discovery. Or other discovery may lead to a set of categories to be explored with the PMQ. And a PMQ deposition can lead to identification of other persons to be deposed for their personal knowledge (which may well be admissible at trial. If the PMQ deposition notice includes a request to produce documents, it is the obligation of the PMQ to seek those documents or categories of documents from throughout the organization. (See *Maldonado*, *supra*, 94 Cal.App.4th at p. 1396.)

How detailed must the PMQ's inquiry and preparation to testify be? Notwithstanding a literal reading of the term PMQ, the statute contemplates that the person designated need not have *personal knowledge* about the subjects identified in the PMQ deposition notice; rather, he or she is obligated to conduct an inquiry to be prepared to respond at the deposition with information on the subject(s) identified that is "reasonably available" to the deponent identified by the responding entity.

Determining what is "reasonably available" can lead to difficulties. Two examples: (1) if there is no one currently within the organization with the knowledge that would be responsive, the entity cannot be required to produce a former employee to testify — as noted above, that is precluded by the statute itself; and (2) the more detail in the requests made, the more difficult it likely would be for the PMQ to recall those details when being questioned at the deposition notwithstanding that the PMQ conducted a rigorous review of company data in good faith. Cases occasionally point out that a PMQ deposition is "not a memory test."

The statute is premised on the good faith of the parties — in making workable designations of matters which will be the subject of the deposition, and in designating person(s) who will conduct investigation(s) in good faith and who will carefully prepare to testify.

If a PMQ deposition reveals that the PMQ designated was not the appropriate person, there is no statutory restriction on serving a new PMQ notice.

Time limit and sanctions. The presumptive seven-hour time limit does not apply. (§ 2025.290, subd. (b)(5).) The location of the PMQ statute in the Civil Discovery Act means a PMQ notice of deposition is enforceable in the same manner as other depositions.

FURTHER DISCUSSION OF RAMIREZ

While *Ramirez* arose in the context of an appeal from the granting of a motion for summary judgment, the trial evidence analysis is the same: Matters which would be excluded under the rules of evidence if proffered by a witness as lacking personal knowledge (or as hearsay, opinion, etc.) are inadmissible at either stage of the case when offered by the party whose PMQ was deposed. (*Ramirez*, *supra*, 87 Cal.App.5th at p. 946; see *Hayman v. Block* (1986) 176 Cal.App.3d 629, 639.)

The *Ramirez* trial court had described the PMQ's testimony (set out in a declaration) as the PMQ having made an "independent review," which was the basis for the "facts" set out in her declaration. (*Ramirez*, *supra*, 87 Cal.App.5th at p. 947.) The appellate court found this description to be inadequate; the court pointed out that there is no such thing as a "corporate representative witness," explaining: "The Evidence Code recognizes only two types of witnesses: lay witnesses and expert witnesses .... [citing Evid. Code, §§ 702, subd. (a) & 801]. [P] ... [P] the Evidence Code also does not recognize a special category of 'person previously designated as most knowledgeable' witness. 'Person most qualified' is a term from the Code of Civil Procedure pertaining to the deposition of entities which are not natural persons. ... [P] This section is part of the Civil Discovery Act. [Citation.] To state what should be obvious, the 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. (Code Civ. Proc., § 2017.010 [discovery must be relevant but may be of 'matter [that] either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.'].) 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. As ... section 2025.620 makes clear, deposition testimony 'may be used against any party who was present or represented at the taking of the deposition ... *so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness.*' (*Code Civ. Proc., § 2025.620.)*" (*Ramirez*, *supra*, at p. 947.)

As for the specific defects in that PMQ's testimony, the *Ramirez* court pointed out that the PMQ had *no personal knowledge* that the entity had never used asbestos in its products; nor was the PMQ an expert witness who could rely on hearsay to form an opinion on a relevant matter. (The court also rejected the attempt to use documents attached to the PMQ's declaration, pointing out they were hearsay, and some contained double hearsay.) (*Ramirez*, *supra*, 87 Cal.App.5th at p. 946.) Thus, even PMQ testimony authenticating documents is likely to be problematic in a trial setting.

A key to understanding the holding of *Ramirez* is its focus on the nature of the distinction between that which is *discoverable* from that which is *admissible*, whether on motion for summary judgment, motion for summary adjudication, or at trial. PMQ depositions are good vehicles to obtain discovery, but as the defense learned on appeal in *Ramirez*, additional foundational steps — and witnesses — are likely needed to make admissible information obtained in a PMQ deposition.

In some cases, the PMQ may also have personal knowledge of relevant facts; and *Ramirez* does not stand as an obstacle to the evidentiary value of that testimony.

More generally, not all questions are appropriate for a PMQ deposition. (Cf. *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1263 [Court of Appeal pointed out that some lines of questioning may be more appropriate for, e.g., interrogatories than for depositions].)

The utility of the PMQ deposition depends on the particular matters at issue. If the PMQ deposition produces "fruit," it can be processed into admissible evidence, for example, by following the PMQ deposition with depositions of persons whose identities were learned during the PMQ deposition who do have personal knowledge, with interrogatories, or with requests for production of documents or requests for admissions. It may also be the case that the testimony sought to be elicited meets the *Ramirez* test of being adduced from a "lay witness" or an "expert witness." (See. *Ramirez*, *supra*, at p. 947.)

And, if the PMQ witness turns out to be someone with personal knowledge valuable to the inquiring party, there is no restriction on taking the PMQ's deposition in a personal capacity; only the latter deposition is subject to the presumptive seven-hour limit of section 2025.290, subdivision (a). (§ 2025.610, subd. (c)(1) [specifically authorizing a later deposition of the PMQ in his or her individual capacity].) (In some cases, counsel will take the PMQ and "personal" deposition simultaneously; managing the seven-hour time limit becomes an issue in that circumstance.)

FEDERAL DISTRICT COURTS

Determining who is/are to testify. Rule 30(b)(6) of the Federal Rules of Civil Procedure sets the parameters for the similar process in federal court: The party noticing a deposition of an adverse entity under Rule 30 must name the "public or private corporation, [] partnership, [] association, [] governmental agency, or other entity"; and must describe "with reasonable particularity the matters for examination." Once the notice or subpoena is served, the entity "must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf." In addition, the party noticing the deposition "set[s] out the matters on which each person designated will testify." Rule 30 requires that the parties "must confer in good faith" about the matters which are to be the subject of the deposition. To prepare for the deposition, the deponent identified must prepare to "testify about information known or reasonably available to the organization."

While similar to section 2025.230 in several respects, Rule 30 expands the scope of those who may testify to include "other persons who consent to testify on its behalf," thus not limiting the persons the responding party can designate to current officers, et cetera. This expansion of potential deponents can be helpful, for example, when events at issue occurred years earlier (e.g., in environmental exposure cases) before the tenure of current managers or employees. With any designation, it is up to the target entity to select the person or persons to prepare and be deposed. Designating a person not currently affiliated with the entity does open the entity's files to that person, of course. Designating someone other than a current officer, employee, et cetera can affect the outcome of the "personal knowledge" requirement, as discussed below. (As many of the federal cases use the designation PMK to describe the witness, that term is used in this article.)

How has this requirement been implemented? Ninth Circuit cases generally state that Rule 30 requires that the person designated be the "most knowledgeable" (PMK) or "most qualified." Thus, in *Mattel Inc. v. Walking Mountain Productions* (9th Cir. 2003) 353 F.3d 792 (*Mattel*), the court stated that issuance of a deposition notice under the Rule obligates the target to produce the most qualified person to testify on its behalf. (*Mattel*, *supra*, at p. 797, fn. 4, abrogated on other grounds in *Punchbowl, Inc. v. AJ Press, LLC* (9th Cir. 2024) 90 F.4th 1022.) In practice, the PMK is someone who has made the search and investigation to prepare to be deposed rather than the person who has the most knowledge of anyone in the target entity, as is next discussed.

What type of preparation is the PMK to make? The court in *Prokosch v. Catalina Lighting, Inc.* (D.Minn. 2000) 193 F.R.D. 633 (*Catalina*) described the obligation of the party responding to the notice for a PMK deposition as requiring it "to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter." (*Id.* at p. 638, citations omitted.) The court explained, "to allow the Rule to effectively function, the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute. Correlatively, the responding party 'must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought ... and to prepare those persons in order than they can answer fully, completely, unevasively, the questions posed ... as to the relevant subject matters.'" (*Id.* at p. 638, quoting *Protective Nat. Ins. v. Commonwealth Ins. Co.* (D.Neb. 1989) 137 F.R.D. 267, 278, citations omitted.) "[T]he Rule only operates effectively when the requesting party specifically designates the topics for deposition, and when the producing party produces such number of persons as will satisfy the request. ... [The responding party has] a duty to make a conscientious good-faith effort to designate knowledgeable persons ... to fully and unevasively answer questions about the designated subject matter." (*Catalina*, *supra*, at p. 638, citations omitted; see also *Marker v. Union Fidelity Life Ins. Co.* (M.D.N.C. 1989) 125 F.R.D. 121, 126 (*Marker*) [court ordered production of a second PMK when the first PMK was unable to give "complete, knowledgeable and binding answers on behalf of the corporation" with respect to the target's data processing system].)

Again, the PMK is not required to be the *most knowledgeable* person. The responding party "need only produce a *person with knowledge* whose testimony will be binding on the party" (*Rodriguez v. Pataki* (S.D.N.Y. 2003) 293 F.Supp.2d 305, 311, italics added) and who is prepared to answer "fully" the questions asked on the subjects designated in the notice" (*Bank of New York v. Meridien Biao Bank Tanzania Ltd.* (S.D.N.Y. 1997) 171 F.R.D. 135, 151).

Designation of appropriate deponents is aided when (1) the requesting party specifically designates the topics for deposition, and (2) the responding party produces "such number of persons as will satisfy the request," *and* "prepare[s] them so that they may give complete, knowledgeable and binding answers on behalf of the corporation" (*Marker*, *supra*, 125 F.R.D. at p. 126.)

Further, designation of the PMK is to be made in good faith. In an effort to end the technique of identifying a series of PMKs who were not actually qualified as required by the Rule, a practice known as "bandying," Rule 30 was amended in 1970 to reduce the use of this obfuscatory technique. (See Rule 30 Notes of Advisory Com. on Rules — 1970 Amend.)

Rule 26(c) applies should a party need a protective order to address disputes over the terms, conditions, time, or location of the deposition.

How detailed must the PMK's inquiry and preparation to testify be? The relevant clause in the Rule has been the subject of discussion in many cases. What emerges is that the designated witness must review all matters known or reasonably available to the PMK with the objective that the deposition will be a meaningful one; that the responding party will not "'sandbag[]'" the opponent by "conducting a halfhearted inquiry before the deposition but a thorough and vigorous one before trial. This would totally defeat the purpose of the discovery process." (*U.S. v. Taylor* (D.C.N.C. 1996) 166 F.R.D. 356, 362.) The entity has the obligation to educate the PMK.

Scope of the examination. Authorities in the Ninth Circuit extend the scope of the permitted examination beyond that responsive to the subjects listed in the deposition notice; any question relevant to the claims or defenses of any party may be asked even though not specified in the list provided or agreed upon. Thus, in *Detoy v. City and County of San Francisco* (N.D.Cal. 2000) 196 F.R.D. 362 (*Detoy*), the court stated that such a limit would "ignore the liberal discovery requirements of Rule 26(b)(1)…." (*Id.* at p. 366.) In reaching this conclusion, the *Detoy* court reasoned that the PMK deposition notice is "the minimum about which the witness must be prepared to testify, not the maximum." (*Ibid*., citing *King v. Pratt & Whitney* (S.D.Fla. 1995) 161 F.R.D. 475.)

Time limit. Unlike the California procedure, there is a presumptive seven-hour time limit on each PMK deposition under the Rule. (Advisory Comm. Note to the 2000 Amend. to Rule 30.) Federal district courts vary on whether the presumption applies when the witness is being deposed both as a PMK and as a fact witness. (Compare *Sabre v. First Dominion Capital, LLC* (S.D.N.Y. Dec. 12, 2001, No. 01-CIV-2145-BSJ-HBP) 2001 WL 1590544 [separate limits apply]; with *Miller v. Waseca Medical Center* (D.C.Minn. 2002) 205 F.R.D. 537 [combined time limit applies].)

Number of PMK depositions. The Ninth Circuit has indicated that a Rule 30(b)(6) deposition is "'treated as a single deposition even though more than one person may be designated to testify.'" (*Stevens v. Corelogic, Inc.* (9th Cir. 2018) 899 F.3d 666, 679, fn. 13; *Saevik v. Swedish Medical Center* (W.D.Wash. 2021) 2021 WL 50140877 [Notes of Advisory Com. on Rules — 1993 Amend.].) Thus, in this circuit, federal courts count PMK depositions as part of the 10 deposition presumptive limit of Rule 30(a)(2)A)(ii) but aggregate all PMK depositions as one.

Is the rule discussed in Ramirez also the rule in federal court? There is no Ninth Circuit authority on point. Review of recent rulings of district courts indicate a difference in outcomes. In *Tijerina v. Alaska Airlines, Inc.* (S.D.Cal. Jan. 24, 2024, No. 22-CV-203-JLS-(BGS)) 2024 WL 270090 (*Tijerina*), a district court in the Southern District considered whether PMK testimony should be excluded at trial as it lacked personal knowledge and was "impermissible lay opinion, among other arguments.

The *Tijerina* court discussed the issues as follows:

"The question posed by the present Motion is more complex than either party lets on…. '[C]ase authority is split on the issue of whether a corporate designee may testify concerning matters outside of his or her personal knowledge *at trial*.' (*Lister v. Hyatt Corp*., No. C18-0961JLR, 2020 WL 419454, at *2 (W.D. Wash. Jan. 24, 2020) (emphasis added). *The Ninth Circuit has yet to weigh in on this issue.* See *id.* (finding 'no authoritative ruling from the Ninth Circuit' on this topic). [P] Courts generally agree that when a party calls the *opposing side's* 30(b)(6) designee at trial, *the designee may provide testimony not based on personal knowledge if said testimony stays within the bounds of the 30(b)(6) deposition. See, e.g., Brazos River Auth. v. GE Ionics, Inc*., 469 F.3d 416, 434 (5th Cir. 2006). This conclusion follows from FRCP 32(a)(1), under which a deposition may be used against a party at trial if '(A) the party was present or represented at the taking of the deposition or had reasonable notice of it'; (B) the deposition is 'used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying'; and '(C) the use is allowed by Rule 32(a)(2) through (8).' *The first condition is met where a corporate party offers its own designee*. The second also poses no barrier under these circumstances, as statements made during a FRCP 30(b)(6) deposition constitute 'statement[s] of a party opponent' and are thus non-hearsay under FRE 801(d)(2). *Kraft Foods*, 2023 WL 5647204, at *8. And the third requirement is handled by FRCP 32(a)(3),[] which allows '[a]n *adverse party*' to 'use for any purpose the deposition of a party or anyone who, when deposed, was the party's ... designee under Rule 30(b)(6).' (Fed. R. Civ. P. 32(a)(3), emphasis added).

"FRCP 30(b)(6) designees may not, however, offer testimony at trial that consists of 'hearsay not falling within one of the authorized exceptions.' *Brazos River*, 469 F.3d at 435. *And the exceptions provided by FRE 801(d)(2)* and *FRCP 32(a)(3)* do not apply when an organization wishes to elicit testimony from its own corporate designee. *See Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App'x 899, 907-08 (5th Cir. 2010) (holding where testimony is not sought by the adverse party, 'a corporate representative may not testify to matters outside his own personal knowledge "to the extent that information [is] hearsay not falling within one of the authorized exceptions."' (alteration in original) (quoting *Brazos River*, 469 F.3d at 435)); *McGriff Ins. Servs., Inc. v. Madigan*, No. 5:22-CV-5080, 2022 WL 16709050, at *2 (W.D. Ark. Nov. 4, 2022) ('[W]hen a party seeks to introduce its own 30(b)(6) deposition testimony at trial . . . "it may be in conflict with both [FRCP] 32(a)(1)(B) and [FRE] 602."' (quoting *VIIV Healthcare Co. v. Mylan Inc.*, 2014 WL 2195082, at *2 (D. Del. May 23, 2014))).

"In other words, 'Rule 30(b)(6) does not eliminate Rule 602's personal knowledge requirement' for trial witnesses. Brooks v. Caterpillar Glob. Mining Am., LLC, No. 4:14-CV-22-JHM, 2017 WL 3426043, at *5 (W.D. Ky. Aug. 8, 2017). This is not surprising, as FRCP 30(b)(6) is designed to streamline the discovery process, *SEC v. Hemp, Inc.*, No. 216CV01413JADPAL, 2018 WL 4566664, at *3 (D. Nev. Sept. 24, 2018), not alter the rules of evidence to be applied at trial." (*Tijerina, supra*, 2024 WL 270090 at pp.*2-*3, italics added.)

Irrespective of at least "hints" that it would have allowed admission of evidence at trial that the *Ramirez* court specifically would exclude, the *Tijerina* court's ruling allowed testimony by the PMKs only "'to the extent such information is based on [the witness's] personal knowledge and not on hearsay, or to the extent that an exception to the hearsay rule applies.'" (*Tijerina, supra*, 2024 WL 270090 at p.*3.)

On the other hand, in *Russell v. Walmart* (C.D.Cal. 2023) 2023 WL 2628699 (*Russell*), that court noted the absence of a definitive ruling by the Ninth Circuit and "the split in authority as to whether a corporate witness must have personal knowledge of the topics he or she will testify to at trial, also citing *Lister*. The *Russell* court then stated that it agreed with other courts "that have concluded that 'strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve,' by allowing a corporation to designate particular individuals that can testify to a wide range of topics. *See, e.g., Sara Lee Corp. v. Kraft Foods, Inc.*, (N.D. Ill. 2001) 276 F.R.D. 500, 503 (noting that if a corporate witness is held to the personal knowledge requirement it "might force a corporation to take a position on multiple issues through a Rule 30(b)(6) deposition, only to be left with the daunting task of identifying which individual employees and former employees will have to be called at trial to establish the same facts, and declining to "limit [the corporate representative's] testimony strictly to matters within [his] personal knowledge.") (internal citations omitted)." (*Id.* at p. 503) (For another discussion of this issue under the Federal Rules of Evidence, see *Brazos River Authority v. GE Ionics, Inc.* (5th Cir. 2006) 469 F.3d 416, 432-435.)

For this and another reason the *Russell* court stated that, as a "preview to its thinking," it was not inclined to strictly adhere to the personal knowledge requirement when it comes to Walmart's corporate witnesses." (*Ibid.*)

These cases, among others, indicate that the determination of the admissibility of evidence that would be excluded from admission at trial in California superior courts remains unsettled in district courts in the Ninth Circuit.

CONCLUSION

California Evidence Code section 702, subdivision (a) states: "Subject to Section 801 [relating to expert testimony], testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter."

Federal Rule of Evidence, Rule 602 states: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703."

While the two statutes are similar in their text, their implementation may well differ: What would be excluded from trial in state court, may be admitted in federal court. Trial lawyers will want to take this potential difference into account.

Hon. Allan J. Goodman (Ret.), now an arbitrator, mediator, appellate consultant, and discovery referee, was a Superior Court judge and periodically an Associate Justice Pro Tempore on the Second District Court of Appeal from 1995 through 2019. He is a member of the California and New York Bars.