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October 2011: Trial Update

Five-Minute Limitation on Voir Dire Warrants Reversal in Criminal Case: The New York Court of Appeals overturned the conviction of a criminal defendant on the ground that the trial court improperly limited defense counsel to five minutes of questioning for each round of voir dire. Although the governing criminal procedure statute grants New York trial courts broad discretion to limit the scope of voir dire, the Court held that the courts' discretion is not unlimited and that fixed time constraints on voir dire can in certain circumstances constitute reversible error.

The Court of Appeals did not establish any baseline requirement for the length of voir dire, reasoning that the appropriate allotment will vary with the circumstances. Acknowledging that New York appellate courts had previously upheld time limits of ten and fifteen minutes, the Court ruled that five minutes was unreasonable in light of the facts and complexity of the case. In this regard, the Court emphasized that the defendant had been charged with four serious violent felonies and that the limited questioning revealed several areas of potential bias that defense counsel was unable to effectively probe. In particular, the victim was a popular DJ in the New York area and several potential jurors were aware of his celebrity. In addition, a number of potential jurors were themselves crime victims and the case involved sensitive issues of self-help, as the victim had pursued and constrained the defendant with considerable force prior to his apprehension by police. The Court ruled that the five-minute limitation on voir dire resulted in prejudice because it appeared, based on the uncontroverted contention of defense counsel, that a number of problematic jurors ultimately sat on the jury.

Two dissenting judges concluded that the defendant had not preserved a challenge to the voir dire time limit because counsel lodged only a generic objection in the trial court and failed to articulate why additional time was needed. The case is *People v. Steward*, 950 N.E.2d 480 (N.Y. 2011).

Non-Resident Cannot Be Compelled to Travel to California for Deposition: A California Court of Appeal ruled that non-residents cannot be ordered to appear in California for deposition. The court's holding extends both to residents of other nations and to residents of states other than California.

The plaintiffs, who were injured in an Idaho car accident, noticed the depositions of five Toyota employees who lived in Japan. After the trial court ordered the production of the Japanese witnesses, Toyota obtained a writ of mandate from the appellate court vacating the order. The Court of Appeal relied on the *California Code of Civil Procedure* § 1989, which provides that a witness cannot be obligated "to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service." Drawing on the legislative history and text of the provision, the court concluded that § 1989 covers not only trial witnesses, but also witnesses testifying at deposition. In so holding, the court rejected the reasoning of *Glass v. Superior Court*, 204 Cal. App. 3d 1048 (1988), which had reached the opposite conclusion. This split among the California appellate courts may well prompt the California Supreme Court to take the case on review.

Concurring Justice Klein invited the legislature to act. Agreeing that the statutory scheme precluded trial courts from ordering non-residents to appear for deposition in the state, Justice Klein reasoned that such a prohibition makes little sense in a global economy and grants non-resident corporations an unfair advantage over California corporations by shielding their personnel from extensive discovery. Justice Klein implored the legislature to revisit § 1989 "at the earliest opportunity."

In a subsequent order modifying its opinion, the Court of Appeals clarified that its analysis was limited to depositions of natural persons and that it had expressed no view as to whether trial courts can compel the deposition of an individual testifying on behalf of a non-resident corporation. See *Toyota Motor Corp. v. Super. Court*, 197 Cal. App. 4th 1107 __ Cal. Rptr. 3d __, (2011).