# Anticipating 'Reid v. Google,' preserving objections for review

## *Steps trial counsel need to take to ensure evidentiary rulings on motions and avoid waiver on appeal*

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In *Reid v. Google*, No. S158965, the California Supreme Court is evaluating what it takes to preserve evidentiary objections in the summary judgment motion context. Existing law is that an objection is waived if the court does not expressly rule on it, which follows the standard rule that an objection made at trial is waived if not ruled upon. *Reid* may change this rule as applied to motions for summary judgment.

Waiver is a draconian result. It means that the evidentiary objection may not be revisited on appeal and even plainly inadmissible evidence must be considered to have been admitted without objection. This has led to a hodgepodge of rules in the lower courts, ranging from the now discredited practice of trial courts stating they have only considered admissible evidence, to a stomp-and-shout rule that objections are preserved if counsel requests rulings repeatedly and with some undefined, sufficient vigor.

In fashioning a rule, *Reid* necessarily will have to balance several competing considerations — among them: (1) the need to adapt rules designed for seriatim evidence presentation at trial to summary judgment motions' presentation of evidence in wholesale bunches; (2) the unfairness of visiting on parties the consequences of a court's failure to rule; (3) the danger of overburdening limited summary judgment hearings with extensive evidentiary objection matters; (4) parties' overburdening of trial courts with unnecessary and sometimes silly evidentiary objections; and (5) the statutory directive that "objections not made at the hearing are deemed waived." No matter how the California Supreme Court rules, however, presenting evidentiary objections effectively in motion proceedings will remain an art that counsel will need to refine.

The Supreme Court may affirm the current rule. Even if it does not, whether the rule it announces will apply outside of the summary judgment context is not clear. Evidentiary objections and rulings come up in other types of motion proceedings, from anti-SLAPP motions, to preliminary injunctions, to motions to plead or seek discovery as to punitive damages. And *Reid* will not affect the federal rule that objections not ruled upon at the motions stage are deemed waived. So, how should counsel raise evidentiary objections in a motion context?

### OBJECT WHERE NECESSARY

First and foremost, keep in mind what is not at issue in *Reid*. Neither *Reid* nor any of the disparate case law leading up to it suggests that a party need not object to inadmissible evidence. To the contrary, a party must do so or any evidentiary objection is waived, at least for the proceeding at issue.

### BE SELECTIVE

One mark of an accomplished lawyer is the ability to focus on the critical aspects of a case and not to wage unnecessary battles. If a piece of evidence is unnecessary or tangential to the issue, why object? Objections to the peripheral distract attention and focus from the crucial. Avoid pursuing evidentiary issues that are not central to the motion and think about the grounds. Make sure that they are reasonable. Excessive and ill-premised objections undercut credibility, not only on evidentiary issues, but on the merits as well. They make it much more likely that the court will miss important, relevant and well-made objections.

*Nazir v. United Airlines, Inc.*, 178 Cal. App.4th 243 (2009), illustrates what not to do. In *Nazir*, a party filed 764 objections (324 pages' worth). The trial court overruled one objection and generically "sustained" the remaining 763 in toto. The court of appeal was appalled. Reversing summary judgment, it observed that some objections failed to assert a ground, and others were plainly unfounded, e.g., "to plaintiff's testimony about his dates of employment, his religion, his skin color, and his national origin," and foundation and hearsay objections to plaintiff's testimony about various derogatory names he was called. In the appellate court's words, "[n]o adjective is adequate to describe an objection that one who is called names lacks 'foundation' to testify about them. And one does not need to be Wigmore to know that plaintiff was not introducing the names for their truth."

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Other objections were in a similar vein. The court of appeal was incredulous: "Can this be serious? Can counsel see themselves rising at trial with those objections while plaintiff is testifying before a jury?" That's a good standard. If the same objection during trial, before a jury would do more harm than good, it probably should not be made in a motion proceeding. The court in *Nazir* went on to apply a particularly harsh standard that objections are waived if not individually ruled upon. That holding may be a product of the excessive and frivolous objections there, and while it may not survive *Reid*, it remains a strong warning against the dangers of overkill.

The bottom line is be judicious, smart and focused. For an evidentiary ruling to justify reversal on appeal, there has to be prejudice, that is, a substantial probability that the challenged evidence would have made a difference in the overall outcome. If the objectionable evidence does not meet that standard, an objection may do more harm than good.

### MAKE IT EASY FOR THE COURT

Not surprisingly, courts are more likely to rule favorably where the parties make it easy for them to do so. It helps to object selectively. So, too, do mechanical methods. First, identify precisely what evidence is being objected to and state on what grounds. California Rules of Court require just that — typically requiring quoting the objectionable language — in summary judgment motions. That is good practice in all motion evidentiary objections. Second, provide a proposed order form where the court can check off rulings on objections. Again, this is required for summary judgment evidentiary objections and is good practice for others. Third, discuss related objections together. For example, discuss "the expert objections, e.g., objections 1, 5, 6 & 7" and "the objections to hearsay reports, e.g., objections 2, 8-12" all in one fell swoop.

### ASK FOR A RULING

The simplest way to avoid any waiver contention is to make sure that the trial court rules upon your objections. Regardless of how *Reid* comes out, make it a habit to ask at the outset of a motion hearing what the court's evidentiary rulings are. That will define the motion's evidentiary context, and you will go a long way to preserving objections if the trial court fails to rule. If a trial court takes a motion under submission — either with or, as is often the case in federal court, without a hearing — write to remind the court that there are evidentiary objections and to ask for a ruling.

### STAY TUNED FOR 'REID V. GOOGLE'

At least some of the above advice may need to be tailored in light of the Supreme Court's decision in *Reid v. Google*. The opinion should issue in the next 60 days or so. Keep an eye out for it. *Reid* will govern evidentiary objections in California state court summary judgment or summary adjudication motions and may well be influential with regard to other California state court evidentiary motions. *Reid* will not alter the federal court rules. Nonetheless, it should be required reading for any California lawyer who brings or opposes summary judgment or summary adjudication motions.

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