Butting in on appeal

Benjamin G. Shatz

Partner, Manatt, Phelps & Phillips LLP

In its purest form, litigation is an intimate dance for two -- a tango, let's say. Pricilla and Domingo square off, passion boiling in their souls; heartfelt emotion borne not of desire, but driven by anger, recrimination, and a thirst for justice. They circle and then embrace tightly. P and D weave, twist, contort, bend, stretch, strain, push and pull, seeking position, advantage and

leverage. Their eyes lock in an intense concentration known only to those thrust into a relationship of unwanted circumstances and crushing disappointment.

In the heat of the struggle, suddenly comes a shocking tap on the shoulder. Can it be? No! The dastardly Ignacio stands coyly, smiling. Why is he here? Who invited him? What does he want? And how dare he disturb the natural order of the entwined litigants! Yet the rules of the ballroom allow just such obtrusive intervention. Unbidden, unwelcome, it is I, Ignacio the Intervener (note the "er" ending used in California practice, as opposed to the "or" used by Intervenors in federal practice). See Cal. Style Manual, Section 4:65[B]. Three's a crowd, and this tangled triad of a party just got a lot more intriguing.

Code of Civil Procedure Section 387 governs intervention in California. As originally enacted in 1872, Section 387 specified that "any person may,*before trial*, intervene" which courts interpreted to mean that intervention was not permitted at the appellate stage.*E.g.*,*Carey v. Brown*, 58 Cal. 180, 182 (1881) (intervention not allowed after a final judgment);*Leonis v. Biscailuz*, 101 Cal. 330, 331 (1894) (intervention not allowed during appeal);*Braun v. Brown*, 13 Cal. 2d 130, 132-33 (1939) (noting that intervention would be timely if a new trial were granted);*Allen v. Cal. Water & Tel. Co.*, 31 Cal. 2d 104, 107-08 (1947).

Then something interesting happened in the mid-1970s. Social debate and litigation hotly raged on the topic of affirmative action. In key cases like*Bakke v. Regents of the University of California*and*DeRonde v. Regents*, civil rights groups, women's groups, and advocates representing various ethnic groups wanted a seat at the table -- and a place in the important appellate litigation that was affecting their interests. But intervention was being denied, relegating interested third parties to amicus participation only.*See DeRonde v. Regents of Univ. of Cal.*, 28 Cal. 3d 875, 879 (1981) (noting "various unsuccessful interveners have appeared herein as amici curiae"). Filing amicus briefs is certainly one way to inject oneself into the dance. But it rests heavily on court discretion and significantly limits participation (e.g., assuming one makes it into the ballroom, at best one dance/brief is allowed, and there's no right to take center stage/present oral argument, or change the tune/raise entirely new arguments, or win a trophy/collect attorney fees).

Thus, vitally interested third parties argued that under then-existing law they could not adequately protect their interests in public interest appeals. These complaints resonated in Sacramento, and as a result, in 1977, Section 387's "before trial" language was rephrased to allow intervention "upon timely application," thereby permitting intervention even trial -- and even on appeal -- if appropriate and timely.*See Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 267 (2018) ("The fact that section 387 allows for a 'timely' application means that intervention after a judgment is possible.");*Mallick v. Superior Court*, 89 Cal. App. 3d 434, 437 (1979) (section 387 "formerly limited intervention to a time before trial, but [now] ... intervention is possible, if otherwise appropriate, at any time, even after judgment").

Section 387 is modeled after Rule 24 of the Federal Rules of Civil Procedure, which addresses both mandatory and permissive intervention, stating that: "On timely motion, the court must [or "the court may"] permit anyone to intervene ...." Thus, federal precedent guides California's interpretation of timeliness under Section 387.*Ziani Homeowners Ass'n v. Brookfield Ziani LLC*, 243 Cal. App. 4th 274, 280-81 (2015);*Carlsbad Police Officers Ass'n v. City of Carlsbad*, 49

Cal. App. 5th 135, 148 (2020). This is useful, given that intervention on appeal is exceedingly rare -- hence hitting the mark as a topic for this column. How rare? Only about 20 California cases have addressed it in any way since 1977.

Like FRCP 24, Section 387 provides for two types of intervention: permissive intervention and mandatory intervention as a matter of right. (Interesting digression: In addition to permissive and mandatory interveners, California has also recognized "de facto interveners."*See Vosburg v. Cnty. of Fresno*, 54 Cal. App. 5th 439, 461 (2020);*Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal. App. 4th 588, 602 (2007). But that's a story for another day, and raises no particular appellate issues.) Courts should liberally construe Section 387 in favor of intervention.*Simpson Redwood Co. v. California*, 196 Cal. App. 3d 1192, 1200 (1987).

Courts may permit intervention when "(1) the nonparty has a direct and immediate interest in the action; (2) the intervention will not enlarge the issues in the litigation, and (3) the reasons for intervention outweigh any opposition by the parties presently in the action."*Noya v. A.W. Coulter Trucking*, 143 Cal. App. 4th 838, 842 (2006). This leaves much room for judicial discretion.

As in federal practice, an order denying intervention is "directly appealable because it finally and adversely determines the right of the ... party to proceed in the action."*Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1363 (2001);*League of United Am. Latin Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997);*but see Sander v. State Bar of Cal.*, A124884 (Nov. 30, 2009) (order denying intervention not appealable because the order was not final, expressly allowing for a renewed motion later in the proceedings).

A trial court's denial of a motion for permissive intervention is reviewed for abuse of discretion.*Simpson Redwood*, 196 Cal. App. 3d at 1199. That standard may also apply to denials of motions to intervene as a matter of right, though that is not completely clear.*See Siena Court Homeowners Ass'n v. Green Valley Corp.*, 164 Cal. App. 4th 1416, 1425 (2008) (noting several courts have implicitly applied de novo review, but at least one court applied the abuse of discretion standard);*Moniz v. Adecco USA, Inc.*, A155474, 2020 (Feb. 11, 2020) ("cases are not settled on whether we review the denial of a request for mandatory intervention under section 387 de novo or for abuse of discretion"). What is clear is that, if intervention is granted by a trial court, then the intervener gains "all rights of a party ... , including the right to appeal."*Gray v. Begeley*, 182 Cal. App. 4th 1509, 1521.

Timeliness is a key consideration. Although no statutory time limit exists for intervention, courts may consider factors such as: (1) the stage of proceedings/procedural posture; (2) how long the proposed intervener knew of the litigation; (3) the intervener's reasons for, and length of, the delay; (4) whether allowing intervention would delay proceedings or prejudice the parties; and (5) whether intervention might inject additional issues into the litigation. As set forth in*Truck Ins. Exchange v. Superior Court*, 60 Cal. App. 4th 342, 351 (1997), "timeliness is hardly a reason to bar intervention when a direct interest is demonstrated and the real parties in interest have not shown any prejudice other than being required to prove their case."

Interested third parties often do not realize that their interests were not adequately addressed or protected until either a judgment is entered or a settlement is reached -- i.e., when litigation is most likely to be covered by the press. Of course, at that point, trial courts are naturally disinclined to allow intervention.

In evaluating timeliness, the question is less about when third parties knew about the litigation generally, and more about when they should have been aware that their interests were no longer protected.*See Ziani*, 243 Cal. App. 4th at 282. Interestingly, one case found that participating as an amicus in the trial court was a factor*against*later intervention.*Northern Cal. Psych. Soc'y v. City of Berkeley*, 178 Cal. App. 3d 90, 109 (1986) (reasoning that intervention motion was untimely since third party obvious felt the need to weigh in much earlier).

Regarding intervention on appeal, presumably waiting until after briefing -- indeed, even waiting until after the filing of the opening brief -- is likely to be deemed a fatal delay, because allowing intervention at that point will disrupt the ordinary flow of the appellate process and prejudice the parties. Thus, intervention should always be sought as soon as possible and as early as possible in the appellate process.

The 9th Circuit has stated that intervention at the appellate stage is "unusual and should ordinarily be allowed only for imperative reasons."*Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) (allowing groups to intervene on opposite sides of an appeal involving the constitutionality of California's Proposition 140 initiative imposing legislative term limits because of the "fundamental nature of the right at stake" and the "public interest" implicated in the case);*see also Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir. 1984) (denying motion to intervene on appeal because "no imperative reason" was offered to allow intervention "at this late stage"). Although no published California case has expressly said this, the sentiment presumably carries through. In other words, successful intervention on appeal is highly exceptional.

Proving the maxim that every rule has an exception, note that regardless of any participation in the trial court, the attorney general has the right "to intervene and participate in any appeal" from an order or judgment in which a statute or regulation was found unconstitutional. Code Civ. Proc. Section 902.1. Thus, when it comes to butting in on appeal, nobody does it better than the AG. ν

Exceptional research assistance by Manatt summer associate Patrice Ruane.