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Overcoming Bad Evidence: Lessons From Waymo V. Uber Trial

By **Arturo González and Esther Kim Chang** (March 26, 2018, 1:03 PM EDT)

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One piece of "bad" evidence (or evidence that simply looks bad) can sink a client at trial. How do you neutralize the evidence before the judge and keep the jury sympathetic to your client when there is evidence that, at first glance, appears to implicate your client? This article addresses some of the bad evidence that we — Uber's counsel — encountered in the Waymo v. Uber battle involving autonomous vehicles, and explains how that evidence was neutralized in front of the court and at trial.

The Setting

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Waymo filed a federal lawsuit in the Northern District of California and immediately sought a preliminary injunction based on an allegation that a former employee had improperly downloaded 14,000 files prior to resigning. Waymo alleged that the files contained important trade secrets, that the former employee had taken the files to Uber, and that Uber was using that information in its development of autonomous vehicles. In support of its motion for preliminary injunction, Waymo included declarations that purported to show evidence of Waymo's internal forensic investigation that uncovered the downloading of the 14,000 files.

In response to this preliminary showing, U.S. District Judge William Alsup expressed very strong views about Waymo's case and stated in addressing Uber's counsel: "This is an extraordinary case. I have never seen a record this strong in 42 years. So you are up against it."

Uber's objective from the outset was to demonstrate that: (1) the 14,000 files were not as important as Waymo claimed they were and (2) the files never made it to Uber.

Are These Really "Trade Secrets"?

Discovery unearthed internal Waymo emails that discredited Waymo's argument that the 14,000 files

contained important information. Sasha Zbrozek, the Google employee tasked with the responsibility of determining where to store the 14,000 files at Google,[1] wrote to his boss' boss in March 2015, lamenting that Google had run out of space to store the 14,000 files and characterizing those files: "[I]t's not code, it's not user data, it's pretty low-value."[2] The phrase "low-value" is one most jurors would understand.

Those sentiments were confirmed a year and a half later when Zbrozek exchanged emails in October 2016 with Google's outside counsel, who were investigating the departure of employees from Google to Uber. In describing the repository that contained the 14,000 files, Zbrozek again used the same two words: "It was considered low-value enough that we had even considered hosting it off of Google infrastructure."[3] (Uber obtained this email after the magistrate ruled that Google waived privilege over its internal forensic investigation when it submitted a declaration from a Google employee in support of its motion for preliminary injunction that included some of the purported findings from that investigation.)

Thus, Uber's discovery efforts resulted in a pair of bookends that could be used to demonstrate that, prior to trial, Waymo had admitted that the 14,000 files were "low-value," in contrast to Waymo's argument at trial that the files contained valuable trade secrets.

The Automatic Downloading

In addition to Waymo's characterizations of the repository for the 14,000 files, Uber made another remarkable discovery as it dug into the facts. When Zbrozek set up the repository for the 14,000 files, he included instructions on how to log on to that repository. Following those instructions caused the entire repository containing the 14,000 files to be automatically downloaded. This discovery allowed Uber to argue that the fact that a former employee may have downloaded the 14,000 files was not necessarily nefarious. Uber used this fact during Zbrozek's cross-examination to drive home the theme that these documents were not valuable, much less trade secrets:

Q: Did anybody at Google say to you, "You know what, Sasha? That's not a good idea to have everything automatically downloaded because we've got some trade secrets in here"? Did anybody say that to you?

A: No.

The Files Never Made It to Uber

One of the more unsettling parts of the litigation allowed counsel for Waymo (and at times, Waymo's experts) to visit Uber to inspect Uber's facilities, servers, source code, design files, and prototypes. But the repeated inspections ultimately became a powerful fact for Uber because, after 12 inspections, Waymo found none of the 14,000 files at Uber.

Uber planned to introduce evidence of these inspections through simple and clean responses to

requests for admission, which contained Waymo's admissions regarding the dates, times, and locations of the inspections. (The case settled after four days of trial, and this evidence was never introduced.)

Uber's trial strategy also included a short cross-examination of Waymo's own forensics expert. Waymo's forensics expert provided detailed testimony about what the former employee allegedly did with the 14,000 files after he downloaded those files, even though that former employee was not a defendant in the case. The defendant that the jurors were to judge was Uber. Uber's cross-examination of Waymo's forensics expert lasted only three minutes. Uber first elicited testimony that the expert had worked very hard on the project, had a team of people helping him, and had collectively spent hundreds of hours working on the case before obtaining the main takeaway testimony:

Q: After spending hundreds of hours with three colleagues, do you have any evidence that the 14,000 files ever made it to an Uber computer?

A: I didn't examine any Uber computers.

Q: Is the answer no?

A: No, that wasn't my role in the investigation.

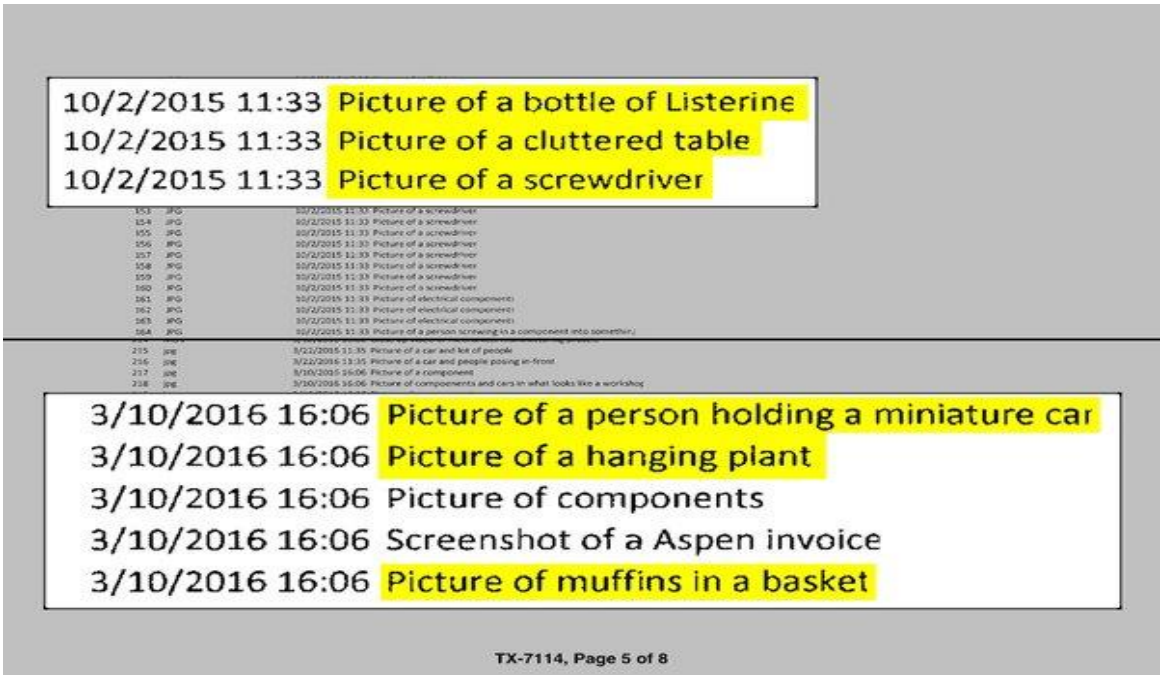
Q: Do you have any evidence that any of the 14,000 files ever made it to an Uber server?

A: Same answer.

It was not necessary to ask the follow-up question as to whose role it was to confirm whether any of the 14,000 files made it to Uber, because that was a rhetorical question that could be asked during closing argument.

The "Last Accessed" Files

At trial, Waymo argued that the former employee had "accessed" Google files from his personal laptop after he left Google and was no longer an employee. At first glance, the evidence seemed incriminating. Why would the former employee be "accessing" Google files after leaving Google? But further analysis revealed that computers frequently (and automatically) "access" files when there is a software update, or for other technical reasons. Thus, the fact that Google files were "accessed" did not necessarily mean that a user had logged into a computer to physically locate and open Google files. To demonstrate this, Uber used the following demonstrative at trial, which shows some of the files that were actually "accessed" by the former employee's laptop:



Two things stand out: (1) dozens of files were "accessed" at the exact same minute and (2) many of the files "accessed" were random files, like the pictures of the hanging plant and the muffins in a basket. (For closing argument, we planned to bring a basket of muffins into the courtroom.)

It would be surprising if any of the jurors believed that Google's proffer established that the former employee had purposely "accessed" Google files. More likely, had the case gone into deliberations, any suggestion that this evidence showed proof of misappropriation would have likely been met with a simple retort: "Are you kidding me? Do you really think he purposefully accessed a picture of muffins in a basket?"

Happy Thanksgiving — The Jacobs Letter

The evening before Thanksgiving 2017, a week before trial, Judge Alsup issued a notice advising the parties that he had received a letter "from the United States Attorney regarding this case."[4] The letter was not attached. The notice notified the parties that the letter would "be kept under seal until further order of the Court."[5] It was a virtual certainty that the letter was anything but good news for Uber.

Later that evening, the parties received a copy of the letter from the United States attorney. In short, it stated that the government had interviewed a former Uber employee, Richard Jacobs, who advised the government that "Uber employees routinely use[d] non-attributable electronic devices to store and transmit information that they wished to separate from Uber's official systems. He surmised that any wrongfully-obtained intellectual property could be stored on such devices, and that such action would prevent the intellectual property from being discovered in a review of Uber's systems." This testimony created an inference that Uber may have stolen Waymo's documents and hidden them in secret "non-attributable electronic devices."

As if that were not bad enough, the letter from the U.S. attorney went on to say that counsel for Jacobs had shared this information with Uber's in-house counsel in a letter written several months earlier, in May 2017. Up to this point in the litigation, no such letter had been produced and there had been no mention of "non-attributable" devices.

Judge Alsup reacted swiftly to the letter from the U.S. attorney. On Thanksgiving Day, Judge Alsup issued an order requiring Uber to advise the court at the final pretrial conference the following Tuesday of "the precise extent to which the information provided by Richard Jacobs [was] accurate" and "the precise extent to which the devices referred to by Jacobs [had] been searched by Uber for responsive materials in discovery."[6] Judge Alsup required that Uber "fully investigate[] the matter and be prepared to testify under oath."[7] In addition, Judge Alsup ordered Uber to produce three fact witnesses to testify at the final pretrial conference regarding these issues, including Jacobs (who lived out-of-state) and the Uber in-house counsel who received the May 2017 letter from counsel for Jacobs.

Judge Alsup was on a mission to get to the bottom of this issue, and quickly. Our team scrambled over Thanksgiving weekend to get to the bottom of the allegations to be able to explain the situation to Judge Alsup (and to the throng of media that followed the case very closely).

On Nov. 28 and 29, 2017, Uber presented five witnesses for examination by opposing counsel (and, to some extent, by Judge Alsup himself). We successfully neutralized the Jacobs letter during its examination of the witnesses, at least with respect to the limited assertions relevant to this case, by having Jacobs admit that he had no personal knowledge of any of the 14,000 files making it to Uber and no knowledge of anyone working on autonomous vehicles ever using "non-attributable devices."

Our other goal was to explain to Judge Alsup the limited number of Uber employees who used "non-attributable devices," and for what purpose they used them. On cross-examination, we asked all the fact witnesses to explain the threats and physical violence that Uber drivers face in certain regions of the world, beginning with Jacobs himself:

Q: When your team is investigating potential threats of violence against the company, do you want the people that you're investigating to know who you are?

A: No.

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Q: Is it your understanding that that is why these folks were using these non-Uber machines?

A: Yes, yes.[8]

Having demonstrated Uber's legitimate need for such devices, we then introduced evidence that use of these devices was limited to a few individuals on the securities team — and not anyone working on

autonomous vehicles. This persuaded Judge Alsup that the entire "non-attributable" device issue was more prejudicial than probative. After extensive briefing, he ruled that there would be no evidence of "non-attributable" devices at trial. And indeed, after four days of trial, there was no mention at all of the infamous Jacobs letter.

In sum, through careful and thoughtful planning, we were able to neutralize some of Waymo's best evidence at trial, which likely contributed to the resolution of this important matter.

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Disclosure: Arturo González was Morrison & Foerster's lead trial counsel for Uber in the case discussed in this article, and Esther Kim Chang was the lead associate on the Uber trial team.

[1] Waymo did not exist at the time of the downloading; it was spun out of Google in December 2016.

[2] Trial Ex. 2216.

[3] Trial Ex. 2217.

[4] Dkt. 2260.

[5] Id.

[6] Dkt. 2261.

[7] Id.

[8] Tr. at 101:23-102:7.