ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
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abtl REPORT

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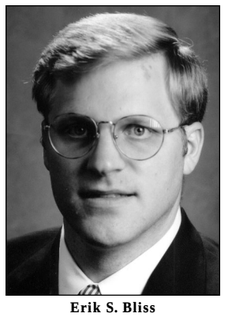
The Intersection of False Advertising and the First Amendment: Kasky v. Nike, Inc.

by Erik S. Bliss, Esq. of Latham & Watkins



Erik S. Bliss

You can ask Kathy Lee Gifford: being known as a sweatshop profiteer isn't particularly good for business. Nike found that out in October 1996, when CBS' newsmagazine "48 Hours" televised a piece on the athletic gear maker's Vietnamese shoe factory, revealing the allegedly abusive conditions under which Nike's employees worked. Other news media ran the story, including the New York Times and the San Francisco Chronicle. Michael Moore, famous for his documentary excoriation of General Motors in "Roger & Me," invited Nike CEO and President Phil Knight to fly to Indonesia on a moment's notice for a joint and documented tour of Nike's factories -- a trip for which Knight was of course unavailable.

Nike did as expected, and fought back with words. It issued press releases, ran advertisements in newspapers, wrote letters to newspapers and university officials, and spread pamphlets and other materials stating that Nike treated its workers humanely and protected them, complied with local labor laws, and that an investigation and report had found that Nike's Southeast Asian factories were legal and safe.

A Northern California activist, Mark Kasky, also did as expected, and sued Nike for false advertising.

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Hartwell: Are Courtroom Doors Open To Litigation Involving Regulated Industries?

by Alan M. Mansfield, Esq. of Rosner, Law & Mansfield

Alan M. Mansfield

To hear regulated companies tell it, if there is a regulatory body that provides for even a modicum of oversight, that company cannot be sued in court for wrongful conduct injuring citizens of this State – even if that regulatory body cannot award damages. This is particularly true for businesses operating under the jurisdiction of the Public Utilities Commission, which regulates in areas ranging from drinking water to moving companies.

California courts in the past have not spoken with clarity in this area. Compare *San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal. 4th 893, 918

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Inside

Renewed Pledge To Civility And Professionalism Targeted By Revised ABTL Guidelines

ABTL remains focused on its core objective of promoting ethics, civility and professionalism in our San Diego legal community. With that goal in mind, ABTL San Diego has revised and repromulgated its Ethics, Civility and Professionalism Guidelines for re-adoption by its members. These Guidelines were originally implemented in 1995, after the San Diego Chapter spent nearly a year investigating various issues governing ethics and civility in the practice of law. In the months that followed their 1995 issuance, member firms and practitioners were asked to commit themselves to adhering to the spirit and intent of their principles, and sign a pledge to that effect. More than 100 San Diego member lawyers and firms made that commitment.

Now, seven years later, it seems appropriate to revisit the importance of these Guidelines and to renew our collective commitment to their tenets. Since their initial implementation, many new members have joined ABTL, and our local legal community has grown and changed. Additionally, it appears to many, including our judiciary, that civility and professionalism in the community has frayed, and it is time to remind ourselves of our commitment to maintain the highest standards of professionalism.

The revised Guidelines will be sent shortly to all ABTL members with a pledge form for each practitioner or firm to execute and return to ABTL San Diego, reflecting that member's commitment to adhering to the aims and spirit of those Guidelines. They will also be published on the ABTL San Diego website. The chief substantive revision to the Guidelines was made to Section 12, which was enhanced to remind us all that the highest levels of civility and professionalism must be extended to the judiciary as well as fellow lawyers, and that attacks upon the judiciary tend to diminish public respect for our profession as well as the courts.

The Guidelines remain a code of conduct tailored to business litigation. They set forth fundamental principles of litigation practice consistent with recognized standards of ethics, civility and professionalism. Their tenets, however, address these principles in practical litigation contexts, like those often encountered in discovery and deposition practice. The message of the Guidelines is simple. Zealous representation of your client does not call for offensive, discourteous or unprofessional conduct. Such conduct not only damages our profession, it is adverse to your client's best interests.

Perhaps the most significant component of the ABTL Guidelines remains the dispute resolution provision, which establishes a means by which complaints of unprofessional behavior can be resolved informally. Under this provision, firms are to designate an experienced representative attorney, who would investigate and assist in the resolution of complaints of unprofessional or uncivil conduct. The complaint is presented by a disinterested member of the complaining law firm. The goal of the provision is to resolve differences by inter-firm discussion, and to prevent the escalation of abrasive behavior on both sides. Such conduct quickly leads to motions for sanctions and a considerable waste of client resources.

The repromulgation of these Guidelines is the product of the ABTL-San Diego's ongoing effort to increase the level of civility and professional ethics in the practice of litigation. Members of the bar and the judiciary remain focused on restoring the level of professionalism and courtesy once routinely practiced by counsel in San Diego.

Other bar organizations, including the Inns of Court, the San Diego County Bar Association, and courts, including the U.S.D.C. for the Southern District of California, have promulgated in one form or another well-crafted codes of conduct designed to heighten awareness of civility and ethics. The ABTL Guidelines constitute a meaningful supplement to these codes of conduct because of their detail and particular relevance to business litigation, and because they offer the "teeth" of the dispute resolution provision.

The purpose of this repromulgation and adoption effort by the ABTL is not to regenerate yet another set of ethics guidelines for attorneys to file away or discard. The objective is to confront these issues, inculcate principles of ethics and professionalism among our members, and make these Guidelines part of every member's practice. Hopefully, the content of these well-written Guidelines and the reminder to all of the existing dispute resolution mechanism will help achieve that objective.

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pursue all available avenues of defense. That they might eventually be successful was reasonably foreseeable as of the time the offer was made. We cannot say the trial court erred or abused its discretion in concluding this was not merely a nominal offer." *Carver*, supra, at 154.

The holding in *Carver* sends a clear message to plaintiff's counsel. Those plaintiffs who decline seemingly nominal section 998 offers which include offers to waive fees and costs do so at their peril. For it appears that in the context of business litigation where attorneys fees and costs are often extreme, and where those fees and costs amount to a substantial sum quite early in litigation, a waiver offer can take a seemingly nominal section 998 offer and make it quite reasonable in the eyes of both the trial judge and the reviewing court.

Carver's message to defense counsel is equally clear: Give serious consideration to a section 998 offer that includes a waiver of costs and fees. The purpose and effect of the statute will then act in your favor. If you ultimately prevail at trial it will be the plaintiff's attorney that must prove your offer was unreasonable.

Storytellers

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in unison at the picture that Gene created in their minds.

• Don't Stray from Your Storyline: Formidable Chicago lawyer, Phillip Corboy, once said that what makes a truly outstanding trial lawyer is the ability to learn everything there is to know about a case and then know the 95% to ignore, and the 5% to emphasize. True wisdom! But for a variety of reasons, most of us have a heck of a time paring down our cases to their bare essentials. We seem to throw everything into the pot for fear that whatever we leave out will turn out to be critical. But how many different spices can you put in one recipe without ruining the meal? How many different colors can you mix before you're left with only brown? And how much information can you expect a juror to absorb before your story becomes nothing more than (this time with apologies to William Shakespeare), "A tale told by an idiot full of sound and fury, signifying nothing."

By the time you arrive at trial, you either have a story to tell, or you don't. If you do, you should be able to place each fact, idea or argument into one of five categories: (1) Essential to your case; (2) Helpful to your case; (3) Possible relevant, but not necessary; (4) Damaging, but not fatal, to your case; or (5) Fatal to your case. What falls in the first two or last two categories is relatively simple to spot and handle. It is the third category, "Irrelevant or superfluous," that presents the challenge.

While you always want to include essential facts, almost always want to include helpful facts and always want to exclude or, if necessary, explain damaging or fatal facts, what to do with all of the facts that fall in the middle of the spectrum is not always easy. You have to ask yourself, "Just because I can get into this at trial, do I really want to?" To answer this question, you need to ask yourself whether whatever marginal benefits might exist are outweighed by the distraction from, or dilution of, the evidence that is clearly helpful or essential to the development of your storyline. In many respects, we lawyers need to think more like moviemakers as we pare down our cases to their fundamentals.

Hundreds of hours of film are shot to make a two-hour movie. Most of that ends up on the cutting room floor immediately. Perhaps three to four hours are bound together in the early editing of the film. At this point in the editing process, each scene would be appropriate for the movie, but the filmmaker knows that no matter how beautifully written, acted and photographed, a four-hour movie just won't have the same impact as one half that long. The audience will become bored, distracted and possibly even confused. So the filmmaker begins making some very tough decisions. Great lines get cut. Beautiful scenes that took weeks and hundreds of thousands of dollars to film are jettisoned. But in the end, if the job has been done well, the two hours that survive are crisp, well paced and coherent.

I doubt that many lawyers would question the wisdom that the two-hour product of the filmmakers' painstaking editing is more interesting and compelling than the four-hour version. Every judge with whom I have spoken has said the exact same concept applies in the courtroom. When they force lawyers to spend less time telling their stories (by, for example, running a clock), they find that the lawyers present better cases. The skeptics among us might suspect some judges say this because they are simply trying to shorten trials to clear their calendars (for any judges who read this, I would never suspect such a thing), but that does not account for the virtual unanimity of the bench on this topic. The fact is, every story is enhanced if it is well edited – even one told by lawyers.

When I set out to write about storytelling for The ABTL Report, I intended to write an article in two parts. But I too am a lawyer. So I failed to keep within my length estimate. Consequently, I must return next issue with a third, and final (I promise), installment of "Lawyers as Storytellers." In that final installment, I will identify specific ways you can use voir dire, opening statement, direct and cross-examination of witnesses, and closing argument to create a story that leads to but one conclusion – yours. Until next time . . . .

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the *Carver* court noted in that action the offer of a waiver of costs was deemed to have a significant monetary value: “Appellants overlook the fact that in offering to have judgment entered against him, respondent [defendant] was also waiving his considerable cost bill against which appellants’ likelihood of success in the case must have been weighed.” *Carver*, supra at 154, citing *Jones*, supra at 1263. (Of course, in *Jones*, the plaintiff’s argument was rejected on the additional ground that no factual basis was shown to support the claim the offer was unrealistic and unreasonable or made solely to gain a strategic advantage. *Jones*, supra at 1263.)

Turning to the facts before them, the *Carver* court found it was not an abuse of discretion for the trial court to find the offer of $100 per plaintiff and a waiver of costs and fees was reasonable and in good faith, in light of the circumstances at the time the offer was made, as evaluated from the perspective of the defendants. The court concludes: “Hindsight now shows the value of the proposed waiver of costs and fees was considerable, and it was no secret at any time that Chevron hired expensive lawyers who were expected to

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Lawyers as Storytellers, Part II

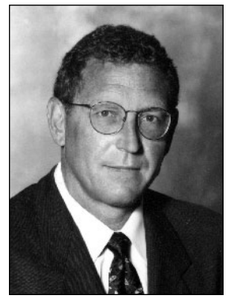
by Mark C. Mazzarella, Esq. of Mazzarella, Dunwoody & Caldarelli LLP

Okay, I admit it. I watched the movie *Legally Blonde* while on vacation a few weeks ago. I don't expect it to make anyone's list of classic cinema, but it was storytelling. In a *Sixteen Candles* / *The Breakfast Club* kind of way, the movie works. What I found myself wondering afterwards was, "Why?" The plot is simple. A stereotypical valley girl / sorority president / homecoming queen from LA, Elle Woods (played by Reese Witherspoon), is jilted by her snobbish wannabe-Senator boyfriend because he needs a more credible arm ornament if he is to become a Senator by the time he's 30. After he dumps our heroine, he heads off to Harvard Law School in search of fame and glory (apparently the fortune was already secure). She decides to spend a few days cramming for the LSAT, which she aces, and, you guessed it, is admitted to Harvard. There she (1) successfully defends a high profile murder case (ain't that certified law student program great!), (2) wins back and then rejects the arrogant sleaze she followed to Harvard in the first place, (3) humiliates the law professor / lawyer who makes unwanted advances, (4) graduates with honors, (5) receives an offer from one of the most prestigious law firms in Boston, (6) wins the friendship and respect of her previous detractors, (7) gets together with the good looking, brilliant nice guy and (8) gives the commencement address on behalf of her graduating class. Not bad for an hour and thirty-five minutes. I presume the sequel will take us from graduation to Elle's U.S. Supreme Court swearing in ceremony.

The movie holds together because the writers followed very basic "three-act" storytelling techniques to the letter. In the "three-act" story, which has been a favorite of great storytellers from the early Greeks to Shakespeare, there is a beginning (approximately 25 percent of the story in which the characters and background are developed), followed by a middle (about 50 percent of the story, during which the conflict between the characters evolves) and an ending (in which the conflict is resolved).

In *Legally Blonde*, the character of the valley girl protagonist, Elle Woods, her ditzy sorority sisters and the various antagonists that appear is clearly developed early in the movie. If the movie were a 20th century melodrama, playing to a crowded downtown movie house, the audience would have cheered and whistled each time Elle appeared on screen and would have hissed and howled when the snobbish boyfriend, sleazy law professor and arrogant fellow Harvard Law students took the stage.

The conflict also was developed clearly and consistently. Simply put, Elle was rejected by the love of her life because she was not good enough to be a Senator's wife. She must morph from valley girl to Harvard Law School standout if she is to succeed in her quest to win him over. The problem is she's a valley girl who is jeered, ridiculed and embarrassed by everyone she encounters at Harvard. They just don't appreciate how much she has to offer. Imagine that!



Mark C. Mazzarella

The conflict, like every good conflict, builds to a crescendo that is resolved as Elle calls upon her expertise on the proper care of newly permed hair to extract a Perry-Mason-like witness-stand confession from the true culprit. This of course earns her the friendship, respect and admiration of everyone within the kingdom.

The good guys ride off into the proverbial sunset, singing "Happy Trails to You," as the final credits scroll down the screen (I'm just kidding about the "Happy Trails" part, and the sunset part, and the riding off part too – but you get the picture), while the bad guys wipe cinematic egg off their faces. With apologies to Robert Browning, in the end, "God's in her heaven and all is right with the world."

About now you're probably wondering if you've mistakenly picked up the *Reader* and have been subjected to another of its insufferable movie reviews. Trust me, you have the right publication. And as I constantly find myself assuring judges, "I'll tie this in later."

The point is, people have always responded to stories that involve characters that arouse emotional responses, conflicts that pit good against evil and right against wrong, and resolutions that appeal to our inherent desire to avoid injustice. *Legally Blonde* did just that. Trial lawyers should too.

Amidst the silliness, there is one serious message in the movie for those of us who are "the legal system." In the first scene of the movie, the stereotypical Harvard professor (except for the fact that she's female) quotes Aristotle, "The law is reason without passion." In her commencement address, our valley girl heroine respectfully disagrees and observes that the law is all about passion, without which there is no law. While lacking the

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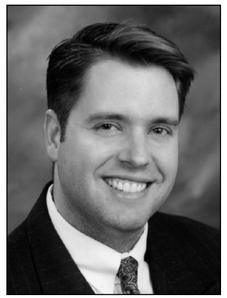
Carver v. Chevron: Does an Expensive Defense Lawyer Really Make a Nominal § 998 Offer Not Unreasonable?

by Robert M. Shaughnessy, Esq. of Duckor, Spradling & Metzger

Under California Code of Civil Procedure section 998, a court will award expert witness costs to a defendant - whose offer to compromise was denied - only after it determines the defendant's offer was reasonable. The statute encourages settlement without trial. And it punishes the plaintiff who fails to accept a defendant's reasonable offer. From the plaintiff's perspective, it is often quite difficult to discern what is a reasonable offer, especially where the statute offers little guidance.



Robert M. Shaughnessy

The plaintiff's problems in analyzing a section 998 offer are further compounded by the fact that a trial court's decision on the reasonableness of the defendant's offer is reviewed only for an abuse of discretion. The recently published opinion of *Carver v. Chevron U.S.A.*, 97 Cal. App. 4th 132 (2002) gives some assistance. There, the Fourth District, Division One, held a nominal offer to compromise for $100 per plaintiff that also included a waiver of attorneys fees and costs was reasonable and supported an award of $1.9 million in expert costs, where it was no secret the defendant had hired expensive and aggressive defense counsel.

In light of *Carver* it now appears incumbent upon plaintiff's counsel - when confronted with a similar offer - to evaluate not just the value of the plaintiff's case, but also the manner in which the offering defendant is conducting its defense. Stated another way, a plaintiff must evaluate the reasonableness of the defendant's offer in light of the circumstances existing at the time the offer is made, from the perspective of the defendants. A review of the *Carver* decision upholding an award of expert fees under section 998 follows.

In *Carver*, twenty-two Chevron service station dealers sued Chevron and several of its management employees, seeking damages for breach of lease agreements, fraud, and violation of the Cartwright Act (among other claims). The facts alleged by the dealers exposed Chevron to the potential of multimillion-dollar damages.

About one and one-half years before trial, while discovery was still ongoing and the issues in the case were still being developed, Chevron offered to compromise the action under section 998, by paying $100 per dealer, and by agreeing to waive attorney fees and costs. The plaintiff dealers did not accept the offer.

Initially, the dealers prevailed on some of their claims at trial, but the judgment was reversed on appeal with directions to enter judgment in favor of Chevron. On remand, Chevron obtained an award in excess of $1.9 million in expert costs under subdivision (c) of section 998, based upon the dealers' refusal of Chevron's settlement offer. On appeal, the dealers claimed that the award of expert costs was an abuse of discretion because the offer of $100 plus a waiver of attorney fees was unreasonable in its terms. The reviewing court disagreed with the dealers.

Setting forth the standard for review, the court first stated their obligation was to "examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal." *Carver*, supra, 97 Cal. App. 4th at 152, citing *Pineda v. Los Angeles Turf Club, Inc.*, 112 Cal. App. 3d 53, 63 (1980); and *Jones v. Dumrichob*, 63 Cal. App. 4th 1258, 1262 (1998). The court then described the purpose and effect of section 998. The statute's purpose is to encourage the settlement of litigation without trial. *Carver*, supra. Its effect is to punish the plaintiff who fails to accept a reasonable offer from a defendant. Id.

Carver states the rule developed to implement the purpose and effect of the statute: "Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998. The burden is therefore properly on the plaintiff, as offeree, to prove otherwise." *Carver*, supra, citing *Elrod v. Oregon Cummins Diesel, Inc.*, 195 Cal. App. 3d 692, 700 (1987).

The dealers contended that the trial court abused its discretion by failing to make an appropriate evaluation of the circumstances at the time the offer was made, from the perspective of the defendants. The dealers pointed to facts showing the offer was made: (1) one and one-half years before trial; (2) while discovery was still ongoing; (3) before the issues were fully developed. In addition, the dealers pointed out that before trial, summary judgment was denied, and of the eight causes of action that went to trial the dealers prevailed on three, exposing Chevron to a potential for multimillion-dollar damages. The court disagreed.

Citing to *Jones*, supra, 63 Cal. App. 4th at 1262-1263,

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believed it was essential for me to bring the character of the engineer who designed the allegedly defective component to life. The plaintiff's case could almost always be summarized: "The defendant manufacturer chose to save a few pennies at the cost of my client's lifelong misery." There is never any direct evidence of such a callous cost-benefit analysis, but there is always a plaintiff's expert who will testify that the manufacturer should have known – must have known – that unless it improved the product, an accident would happen, and people would be killed or maimed. If that is believed, it doesn't take anything more for the jury to write into their storyline that the manufacturer is a callous, good-for-nothing demon who deserves nothing less than contempt and, of course, a large adverse judgment.

But in reality, with remarkably few exceptions, the engineers who designed the products at issue in my cases were good, solid citizens and loving family members. In many cases, they even drove the very product that the plaintiff's attorney would have the jury believe was a known deathtrap. Experts could argue ad nauseam about whether a component should be thicker, made of more resilient material or designed in a different fashion. But any suggestion that a car knowingly was designed in a way that made it dangerous just won't make sense if the jury hears an exchange like this:

Question: "Do you drive a car that has the very same brake design that is at issue in this case?"

Answer: "Yes."

Question: "Does your wife (or husband) also drive a car that incorporates the same exact brake design that was in the plaintiff's vehicle?"

Answer: "Yes."

Question: "When your wife (or husband) drives your little girl, Ashley, to her ballet lessons, does she drive her in a car with that same brake design?" (You already will have asked the witness about his or her spouse, children, passions, dreams, motivations, etc.) "And does your boy, John, also ride in these cars everyday to and from school and little league practice?"

Answer: "Of course."

Question: "Do you love your wife (or husband) and children?" (And anticipate an objection here.)

Answer: "More than life itself. More that Romeo loved Juliet. More than Momma Cass loved ham sandwiches." (Okay, so you don't have to go quite that far.)

Question: "Even after you learned of plaintiff's accident and investigated his claims thoroughly, do you, your wife and your little boy and girl continue to drive or ride in cars with exactly the same brake design that plaintiff claims is a deathtrap?"

Answer: "Absolutely, I know that brake design better than anyone, and I know it's as safe as any in the world."

If the plaintiff's case / story makes sense only if the jury believes that the defendant knew its car's design was defective, good luck. Examination such as this highlights the protective instincts shared by any normal parent. It would be impossible for a jury to believe that anyone but a monster would expose his or her own children to death or serious injury just to save the manufacturer a few cents or to get a raise or promotion. This testimony "fits" the defense storyline. But is antithetical to the story the plaintiff wants the jury to adopt.

• Put Facts in Context: One of the most brilliant, and effective, efforts to put events in true perspective that I have witnessed was by San Francisco attorney Eugene J. Majeski. In the mock trial of a products liability case, the plaintiff's star witness was an engineer formerly employed by the defendant manufacturer. The engineer, who believed the manufacturer's design was defective, conducted a series of tests in his garage that he claimed proved the flaw in the manufacturer's design. During the opening statement for the defendant manufacturer, Gene described all of the equipment that was available at the manufacturer's facility to conduct tests similar to those which the former employee performed at home. The size, versatility, precision and cost of the manufacturer's equipment was detailed. Likewise, the process of research, development and testing was outlined, with particular emphasis on the number of years that it took to complete the design. The makeup of the team of engineers in the design group that was responsible for the design at issue, and the checks and balances, peer review and critique, and enumerable brainstorming sessions that were an integral part of the process were designed by Gene. Then, in stark contrast, Gene described the comparatively primitive equipment at the ex-employee's home. Gene explained that the plaintiff's case depended upon tests that took hours – not years – to complete, that no one ever looked over the witness's shoulder, double-checked his work or added invaluable input.

Early on, I could see where Gene was heading and was impressed with the way Gene developed the story in a way that brought it to life. But it wasn't until the very end that it became obvious why Gene is among the handful of trial lawyers selected by the California State Bar Litigation Section as "Trial Lawyer of the Year." "So basically," Gene concluded with a slow nod of his head, "he decided all my client's engineers got it wrong while he was puttering out in his garage with his tool set, and his wife was cooking pot roast for dinner."

The image created by that last simple comment was so powerful, so easy to grasp, that I cannot imagine it was missed by a single member of the audience who chuckled

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pedigree of Aristotle, Elle is right. In every case, the law is applied in a unique context, involving different characters, different conflicts and different possible resolutions. It is interpreted and enforced by human beings, two-thirds of whom acknowledge that when forced to choose, they will do what is right, not what the black-letter law commands. What is "right" in the eyes of a juror often has little to do with the law and everything to do with the juror's emotional reaction to the story told by the lawyers. A story well told need not involve passion in the sense of unbridled emotion. The emotional appeal may be subtle. But if a story, any story, is to be compelling, it must touch the jury on both a rational and emotional level.

You may recall from Part I of this article, which appeared in the last addition of The ABTL Report, the hippocampus, which is the part of the brain that controls memory, resides in that portion of the brain known as the limbic system. The limbic system is incapable of cognitive thought. Therefore, without emotional stimulus, whatever facts, ideas and arguments you convey are about as memorable as . . . well, all those things you can't remember. That is why, after a long trial, jurors almost always remember the emotional parts of the witnesses' testimony, even though they may recall nothing about the substance of the testimony. As jurors deliberate, they refer to witnesses with comments like, "She's the one who cried when she talked about the accident; he couldn't give a straight answer to a question to save his life; you know, the arrogant jerk." Or my personal favorite, "Remember, he's the guy with the great ties."

This may not be very comforting to those of you who believe that jurors can, and will, understand and remember the 4,512 individual facts with which they may be bombarded over the course of six weeks of testimony, but they can't, and won't. Just ask anyone who has watched a significant number of juries deliberate, and you'll be surprised to learn what really occurs in the deliberation room. The process, much like the making of sausage, is not nearly as attractive as the end product. Jurors often have the facts backwards. They speculate about matters that were never introduced at trial usually because the lawyers correctly concluded that logically they were totally irrelevant, not withstanding how relevant they were emotionally. They may spend more time talking about the lawyer's mannerisms or wardrobe than the substance of his closing argument. Each time I watch, I can't help but wonder how in the world they almost always arrive at the right result. But they do. And the reason is because 95% of us organize facts in a story format in order to better understand them. If you have strong facts, the jury will tend to write a story that ends well for you. But without your "guidance," the risk is that the story they write may not have a happy ending from your client's perspective.

How then can you tell a story that compels but one conclusion – yours? Here are three generally foolproof techniques. As you read through them, think about a case or two with which you are currently involved. Ask yourself how you can apply this to your case. Then question why a jury should be upset if your client loses. If you can't answer that question, I strongly suggest you settle. If you can, your answer should become the theme of your client's story. As you tell that story, keep the following in mind:

• Personalize Each Witness: If you don't let the jury get to know the important witnesses, how can you expect them to know if they're one of the good guys or one of the bad guys? For example, when I represented automobile manufacturers in products liabilities cases, I always

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Regulated Industries

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argument that, since the regulatory agency has the authority to issue some form of relief, the court proceeding is preempted. *Hartwell* suggests that such assertions require a more detailed analysis of what the parties seek and what the regulatory agencies can actually impose if they decide to take action.

Hartwell also suggests that litigants addressing this preemption issue focus on whether the challenged conduct implicates an agency's rulemaking, as compared to enforcement, capacity, as the former may be more appropriately addressed at the administrative level. Where the challenged conduct appears to fall into the area of an enforcement proceeding requiring application to specific facts, at least insofar as a claim seeking monetary relief, courts may appropriately assert jurisdiction over such claims. This is particularly true where the administrative agency may not have the authority to award the remedies otherwise available to plaintiffs under state common and statutory law.

Whether *Hartwell* ultimately has a wide ranging impact regarding the interplay between courts and regulatory agencies generally, or is instead limited to the scope of the PUC's jurisdiction, will likely be the subject of future proceedings. This fall, the Supreme Court will hear oral argument in *People ex rel. Orloff v. Superior Court*, which may provide further illumination on the impact of *Hartwell*, albeit from a government litigant perspective. For now, *Hartwell* provides both litigants and courts helpful guidance in the murky area of what claims and relief are appropriately sought in the courts or presented to regulatory agencies.

The Re-Engineering of Achieving Justice, or "Coming Soon To A Courtroom Near You"

by Bonnie M. Simonek, Esq. of Klinedinst, Fliehman & McKillop

The wheels of justice are known for turning slowly. The process by which we achieve justice has often been seen as cumbersome, frustrating and, at times, archaic. Now, in the age of email, cellular phones and the internet, the wheels of justice can appear not only to be slow, but to be square and made of stone. Technology has always out-paced the law. This article details the ongoing attempt of the San Diego Superior Court to catch up.

Where We Are

Take Traffic Court for example. Currently, traffic tickets and the cases that result therefrom are processed using three different systems, none of which "speak" to each other without "human interface." One system keeps track of the case itself using a computer system while another computer system keeps track of what the violator has paid, if anything. The third "system," people driven and known as the "convelope," holds the citation, correspondence and any other pieces of paper associated with the case. As the two computer systems do not work together or even speak to each other, the traffic court personnel in possession of the convelope often keep track of the financial information and other pertinent case information simply by writing it on the outside of the convelope.

Traffic Court is only one example of the inefficient filing and document and case management systems currently in place in our court system. Current systems are often so inefficient that, at any given moment in any given work-day, approximately 17% of court employees are looking for a case document or pleading or case file.

Perhaps you or someone you work with are familiar with "e-filing." For those of you who are fortunate to practice construction defect law, you may already know that you can file documents and pleadings electronically without the hassle of mailing or delivering paper to the court. However, did you know that once the email documents or pleadings are received, they are simply printed out and placed in files along with all the other paper?

Where We Are Going

One man is working so that justice, and the process by which we achieve it, will keep pace with technology. Bill E. Wiehl, Director of Re-Engineering for the Superior Court of California, County of San Diego, is working to implement various technologies that will make the justice system move quickly, accurately and be accessible to anyone who has access to a computer. In addition, Mr. Wiehl is working to bring digital recording, electronic document evidence presentation and other computer technology to the courtrooms of San Diego.

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Mr. Wiehl has already designed and will implement a state-of-the art system to manage Traffic Court and replace the disconnected three-part system currently in place. Mr. Wiehl estimates that the Traffic Court system could be up and running by January, 2003. The technology being used in Traffic Court did not come without a price. However, Mr. Wiehl estimates that any technology procured and implemented will pay for itself in two calendar years.

The Future: Paper On Demand

The filing, case and document management system in the civil courts in San Diego is a work in progress as well. Mr. Wiehl predicts that in the very near future - Summer, 2004 - any and all pleadings and documents will be filed, managed and retrieved electronically. Although the system will not be, as some fear, "paperless," it will be "paper on demand."

"The difference between being paperless and being paper on demand is that those attorneys who still want to file paper, have paper, find paper, touch paper and retrieve paper will still be able to use paper. Those attorneys who do not want to use paper will be able to use the entire system electronically. The word "paperless" scares some people and that's not technically what the system is. Technically, the system will be "paper on demand."

Entire cases will be kept on CD Rom so that attorneys, litigants, court personnel and judges will be able to call-up any document and/or pleading in any case at any time from any computer. This will lead to an increase in efficiency for everyone involved and will cut down on the amount of time we all spend looking for a copy of the complaint or of some other pleading we have misplaced.

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Re-Engineering

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Filing A Motion

Currently, when you file and serve a motion, you must stand in one line to file the motion and another line to pay for the filing of the motion. Once the motion is filed, the paper is copied and at least one copy should make it to the clerk of the court in which your motion will be heard.

When Mr. Wiehl is finished, the system will work very differently. You will not be required to stand in line to pay or to file your motion. Your motion will be filed, via computer, and a payment could be made from an existing credit card account to which you have given the court permission to debit.

A copy of your emailed motion will be added to the electronic file as it exists for your case and an automatic notice will be sent to the clerk of the court, along with your motion and associated documents. Even more exciting, Mr.Wiehl even promises that the case and statutory cites within your motion will be linked, if you so choose, to the actual case or statute via LexisNexis. That means that the court staff attorney, when reviewing your memorandum of points and authorities, will be able to double-click on your cite and read the cited case while reading your motion.

Technology in the Court Room

Perhaps the most exciting developments will be those we find in the court room. Technology such as image scanning and digital recording will allow proceedings in limited jurisdiction cases to be recorded on computers and then replayed from remote locations, i.e. computers in your office, after the hearing has concluded. Evidence will be recorded on CD Roms and replayed on big screens for the judge and the jury. One court room in Florida has already begun experimenting with hologram witnesses in lieu of reading bland deposition testimony when witnesses are unable to appear at trial. Although this use of holograms in the courtroom is a good distance off for San Diego, the other technology mentioned is just around the corner.

Regulated Industries

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ever, that claims for injunctive relief involving current water quality violations would interfere with the PUC's performance of its official duties because "a court injunction, predicated on a contrary finding of utility noncompliance, would clearly conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs." Id. at 278.

In rejecting the argument that an award of damages based upon a finding that drinking water violated state standards would directly contravene a PUC finding, and thus allegedly run afoul of *Covalt*, the Court explained that the lawsuit would not "frustrate" or "hinder" the PUC's authority because:

"Although a jury award supported by a finding that a public water utility violated DHS and PUC standards would be contrary to a single PUC decision, it would not hinder or frustrate the PUC's declared supervisory and regulatory policies. . . Under the provision of Section 1759, it would also not constitute a direct review, reversal, correction or annulment of the decision itself. Accordingly, such a jury verdict would not be barred by the statute." Id. at 278.

At the end of his lone concurrence discussing the interplay between the two regulatory agencies involved in the controversy, Justice Kline noted in passing that there might be circumstances where a court award of damages could theoretically interfere with the PUC performance of its official duties, such as where a claim for damages for violations of specific PUC sections could also be brought before the PUC and had previously been presented to and rejected by the PUC. However, he agreed those facts were not presented in this case. Id. at 286, n.4.

C. The Potential Impact of *Hartwell*

While the impact of Hartwell might appear to be limited, the decision addresses several important issues for many practitioners. Increasingly, issues regarding the scope of jurisdiction between courts and federal or state agencies create the potential for independent proceedings involving the same practices. This gives rise to the

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(plaintiffs' claims involving injuries attributable to electromagnetic fields from power lines preempted, where award could have effect of "undermining a general supervisory or regulatory policy of the commission" regarding safety of such lines) with *Vila v. Tahoe Southside Water Utility* (1965) 233 Cal. App. 2d 469, 479-80 (litigation seeking damages arising out of failure to comply with tariff filed with PUC not preempted, as litigation could act in aid of, rather than in derogation of, PUC's jurisdiction).

In a decision that received little attention at the time but could have wide ranging impact, the California Supreme Court ruled this past February in *Hartwell v. Superior Court* (2002) 27 Cal. 4th 256, that courts of this State possess jurisdiction to adjudicate common and statutory law claims against regulated companies and award certain types of relief, even where the PUC has initiated or resolved certain proceedings involving the same conduct. In so ruling, the Court attempted to reconcile the seemingly conflicting line of cases regarding the scope of the PUC's jurisdiction by permitting certain types of injunctive claims to be resolved at the administrative level but allowing courts to award monetary relief. While at first glance this decision might seem to have only limited application, increasingly parties and courts are wrestling over what claims are properly brought before an administrative agency and what claims should be litigated in the courts. *Hartwell* provides both litigants and the courts increased guidance for resolving such disputes.

A. The Background of *Hartwell*

Hartwell arose out of a series of lawsuits alleging that certain water companies provided residents of the San Gabriel Valley drinking water that failed to comply with both state and federal drinking water standards. Plaintiffs brought actions against several water companies under various theories, and sought both injunctive and monetary relief. *Hartwell*, 27 Cal.4th at 260. The PUC had previously undertaken regulatory proceedings and promulgated regulations regarding the levels of permitted chemicals in ground water, as had the Department of Health Services.

In response to the lawsuits, the PUC instituted an investigation of various water companies throughout California, including the defendants in the litigation, including an investigation into the adequacy of current drinking water standards. Id. at 262. After close to three years of investigation as part of an enforcement proceeding, the PUC concluded that existing drinking water quality standards adequately protected public health and safety, and that over the past 25 years the utilities had complied with the state's drinking water requirements. Id. at 263. The PUC also indicated its intention to engage in future investigations or rule-making proceedings over such practices. Id.

B. The Court's Ruling In *Hartwell*

Writing for the majority, Justice Chin focused on the differences between an enforcement action and the remedies available to the administrative agency and a rulemaking proceeding that provides general parameters on a particular subject matter. Whereas in rulemaking proceedings (such as at issue in *Covalt*), the PUC essentially had asserted its jurisdiction and occupied the field, the same is not true in a PUC enforcement action that does not provide for damages:

"Although a PUC factual finding of past compliance or noncompliance may be part of a future remedial program, a lawsuit for damages based on past violations of water quality standards would not interfere with such a prospective regulatory program. As noted, the PUC can redress violations of the law or its orders by suit. . . by mandamus or injunction. . ., by actions to recover penalties . . . and by contempt proceedings. . ., but these remedies are essentially prospective in nature. They are designed to stop the utilities from engaging in current and ongoing violations and do not redress injuries for past wrongs. Here, plaintiffs alleged injuries caused by water that failed to meet state and federal drinking water standards 'for many years'. Because the PUC cannot provide for such relief for past violations, those damage actions would not interfere with the PUC in implementing its supervisory and regulatory policies to prevent future harm." Id. at 277. The Court did find, how-

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According to Kasky's complaint, filed on behalf of the general public, Nike made several untrue factual statements in its defensive campaign, including "that workers who make Nike products are protected from physical and sexual abuse, that they are paid in accordance with applicable local laws and regulations governing wages and hours, that they are paid on average double the applicable local minimum wage, that they receive a 'living wage,' that they receive free meals and health care, and that their working conditions are in compliance with applicable local laws and regulations governing occupational health and safety." Kasky alleged that Nike made these statements "for the purpose of maintaining and increasing its sales and profits."

Nike demurred on the ground that the statements at issue were protected by the First Amendment. The trial court agreed and sustained the demurrer, apparently because it found that Nike's speech was noncommercial, and entitled to greater protection than the usual commercial speech that is attacked in false advertising claims. The Court of Appeal agreed, and, "like the superior court . . . concluded that Nike's statements were noncommercial speech and therefore subject to the greatest measure of protection under the constitutional free speech provisions."

In May, the California Supreme Court reversed, and held that Kasky had stated a viable unfair competition law claim. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002). The opinion is perhaps the most comprehensive (and obviously the most recent) statement by our state's highest court on the intersection of false advertising and the First Amendment, and should be read by all who counsel companies on their advertising and public "political" statements.

False advertising laws can exist largely because speech is classified as either commercial or noncommercial, and commercial speech "is not entitled to the same level of protection as noncommercial speech." *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980). Specifically, commercial speech can be more readily regulated, and false and misleading commercial speech can be banned completely. The classification of the speech is key, then, and the Supreme Court in *Kasky* saw the crucial question as whether Nike's statements about its labor practices "are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions."

The court first surveyed the United States Supreme Court's history of commercial speech decisions and found those decisions less than clear and uniform (and noted that the United States Supreme Court has acknowledged as much, and that "'ambiguities may exist at the margins of the category of commercial speech'"). Importantly, the *Kasky* court observed that "statements may properly be categorized as commercial 'notwithstanding the fact that they contain discussions of important public issues,' and that 'advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech.'"

The court proceeded to analyze Nike's statements for three factors indicative of commercial speech: "the speaker, the intended audience, and the content of the message." The first of these was easily resolved in favor of commerciality, because Nike and it officers "engage[] in commerce," and "[s]pecifically, manufacture, import, distribute, and sell consumer goods in the form of athletic shoes and apparel." The second factor went quickly to commerciality, too, where *Kasky* had "alleged that Nike made [its] statements about its labor policies and practices 'to maintain and/or increase its sales and profits'" (and that allegation was taken as true on Nike's demurrer). Observing that university officials were large consumers of Nike's athletic goods, and that Nike's various public statements made reference to possible consumer reaction to its labor practices, the court found that Nike's statements were "intended to reach and influence actual and potential purchasers of Nike's products."

The third factor -- the content of the message -- required a little more work by the *Kasky* court, but was also found to indicate the commercial nature of Nike's speech. The Court noted that, "[i]n speaking to consumers about working conditions and labor practices in the factories where its products are made, Nike addressed matters within its own knowledge." Also, "Nike's purpose in making these statements, at least as alleged in the first amended complaint, was to maintain its sales and profits." Nike's statements were, the court found, "representations of fact of a commercial nature."

Thus, the court concluded that, "[b]ecause in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." Anticipating the critique of the dissents in the case -- *Kasky* was a 4-3 decision -- the majority acknowledged that Nike's speech was on topics that had entered the public debate, but that that did not immunize Nike's statements regarding "facts material to commercial transactions -- here, factual statements about how

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Nike makes its products."

In dissent, Justice Chin noted the dichotomous regulation of speech that the majority created on a single issue: "[w]hen Nike tries to defend itself from . . . attacks, the majority denies it the same First Amendment protection Nike's critics enjoy." Justice Chin explained that, although "48 Hours" could presumably make statements, and even false statements, about Nike's labor practices, the same sort of statements by Nike would be tested in litigation. In Justice Chin's view, "Nike, which came to the forefront of the international labor abuse debate, provided relevant information about its labor practices in its overseas plants," and that speech was protected noncommercial speech on an issue of public interest.

Justice Brown also wrote a dissenting opinion (which, with references to Harry Potter and other notorious wizards, makes the *Kasky* decision not only significant reading for commercial litigators, but also one that might entertain their children). In her opinion, "Nike's statements are more like noncommercial speech than commercial speech. Nike's commercial statements about its labor practices cannot be separated from its noncommercial statements about a public issue, because its labor practices are the public issue."

Justice Brown took issue with the majority's use of the identity of the speaker and audience in its test for commercial speech, where the United States Supreme Court had instructed that, "'[i]f commercial speech is to be distinguished, it "must be distinguished by its content."' Like Justice Chin, Justice Brown found that the majority's test and opinion "violates the First Amendment by stifling the ability of speakers engaged in commerce, such as corporations, to participate in debates over public issues." She opined that "Nike's overseas labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore 'entitled to special protection'" under the First Amendment.

The *Kasky* decision may, for corporate citizens, present more tough questions than it answers. And, after *Kasky*, the test of whether a corporation's speech is commercial, and therefore subject to false advertising lawsuits, may well be a trio of truisms that are consis-

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tently resolved against the corporate speaker (or, at least, which can easily be pled by any reasonably sophisticated consumer advocate, rendering a demurrer nearly impossible).

The question of source will presumably each time be answered against the company, at least at the demurrer stage -- a company is always typically a commercial speaker if it is engaged in any retail or other public-interaction business by which it might falsely advertise. The basic mission of the corporation and its executives is to maximize profit; profit is maximized by increasing sales; sales can be influenced by information; so all corporate statements, on some level, contemplate and propose a commercial transaction.

Also, unless the company's representative is testifying in a legislative or judicial proceeding (and maybe even then), aren't all public corporate statements, by their nature, designed to influence the buying (or investing) public? That was Nike's assumption, Kasky's allegation, and the *Kasky* Court's conclusion: that there is a group of consumers who will forgo Nike's sneakers because they don't want to support a company that holds or operates under certain views or practices. In a world of politically conscious consumers, a seller's comments on political issues, and particularly issues germane to the seller's particular business, might always affect sales. (Interestingly, this assumption, allegation, and conclusion may be wrong. The Financial Times reported that, in a survey of European 22-year-olds, allegations of Nike using sweatshop labor would not affect the majority's decision to buy Nike products, "'because they saw the company and its products as quite different things. So as long as they regarded Nike's training shoes as the best, they would carry on buying them.'" Richard Tomkins, Comment & Analysis, Fin. Times, June 28, 2002, at P19.)

The most thorny of the majority's factors in determining commercial speech, though, may be the content of the message. The *Kasky* Court allowed that the content of a message is commercial not just when discussing price or quality, but also when the statement is "about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product." As Justice Brown interpreted the majority's opinion, "[t]he third element is satisfied whenever 'the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services."

What if Nike's premier NBA-player endorser is arrested for drug possession, and Nike's spokesman says that that player "is a good man, is innocent, and will be exonerated?" The public image of Nike's endorsers surely has an impact on sales. If the player is convicted, has Nike made a false statement of fact designed to influence consumers for which it might be sued? Or, if the news reports that Nike's most senior female executive filed for divorce on the ground that she has been abused by her husband, the company might announce that "Nike stands 100% against the abuse and exploitation of women, and will not tolerate it on any level or in any circumstance." It is not hard to believe that female athletes (and hopefully men as well) would respond favorably, in the marketplace, to Nike's stated position. But if Nike's shoes are sewn by women in third-world sweatshops, is Nike's statement unprotected false advertising?

The *Kasky* majority said that "[t]o the extent Nike's press releases and letters discuss policy questions such as the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic 'globalization' generally, Nike's statements are noncommercial speech." That leaves a little wiggle room perhaps, but not much, where corporations are not usually motivated to make detached statements of policy with little appreciable connection to their business or products. But for now, and in *Kasky*, that is where the line has been drawn. "Speech is commercial in its content if it is likely to influence consumers in their commercial decisions," and that specifically includes statements regarding the seller's business and operations.

That the *Kasky* court based its decision so heavily on federal precedent (although it quickly held that the same result would obtain under the California Constitution), and that the issues it tackled are in an area where the United States Supreme Court has conceded that the law is confused, may mean that the latter of these courts will soon have the final word on the subject. Unless and until that happens, though, California's corporate citizens had better fact-check their press releases on the hot topics of the day. But the lesson of *Kasky* -- and perhaps also the real shame of that decision -- is that companies, when their business practices are attacked in the press, might be better off just keeping their mouths shut.