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abtl REPORT

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Triggering Successor Liability: It's Not Limited to Product Liability Cases

by Douglas Kerner, Esq. of Alhadeff & Solar, LLP

When the eager home-improver ascends his ladder to self-install his new Direct-TV satellite dish and tumbles off, breaking several bones, because the ladder, of its own apparent will, collapses, we all know what's likely to follow: a trip to the hospital, a visit with a lawyer, and a lawsuit against the ladder manufacturer. And when the pre-filing investigation discloses that the ladder manufacturer has been out of business for ten years, the lawsuit names its alleged successor in interest.

Douglas Kerner

Under these circumstances, most of us know the California Supreme Court has held that, for public policy reasons, liability for product defects may be imposed on the successor corporation. The Supreme Court created a special exception 25 years ago, where before successor liability did not exist. So, where a party acquires a manufacturing business and continues the output of its line of products, it assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired. See *Ray v.*

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Lawyers as Storytellers

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

The old man stooped over the fire as it danced across the faces of a dozen, wide-eyed children, who called him "Grandfather." Their bodies seemed frozen by the night chill as they leaned forward to catch every word he spoke.

His voice was as firm as the giant oak silhouetted against the night sky behind him as he told the story of the wolf and the boy, just as he had heard it told almost a century earlier by an old man he too called "Grandfather." To the children, that weathered tree, the old man and the stories he told had been the center of their world for as long as they could remember.

Mark C. Mazzarella

"The wolf's eyes glowed like hot cinders as he stalked the young boy, who watched spellbound as the shimmering trout danced with the thin red worm the boy had threaded on his hook just minutes before. The

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Inside

Recent Changes to the California Appellate Rules

by Kendra J. Hall, Esq. of Klinedinst, Fliehman and McKillop

Rules 1 through 18 of the California Rules of Court have been rewritten and reorganized to facilitate their use by practitioners, parties and court personnel. These new rules became effective January 1, 2002. According to the Appellate Advisory Committee, many stylistic changes were made to remove ambiguities in the rules. Likewise, a number of substantive changes were made to cover gaps in rule coverage; to conform older rules to current statutory and case law, practice and technology; and to otherwise improve the appellate process. The new rules and Advisory Committee's comments are available at www.courtinfo.ca.gov/rules/amendments.htm. Some of the more significant substantive changes are addressed below.

Kendra J. Hall

Initiating An Appeal (Rules 1 and 2)

Rules 1 and 2 address the procedural and timing requirements for the filing of a notice of appeal and cross-appeal. Because the reviewing court lacks jurisdiction to excuse a late-filed notice of appeal, several of the revisions are aimed at ensuring timely filing. For example, the rules now include an explicit reference to the appeal of an appealable order, not just an appeal from a judgment, to ensure that litigants do not overlook the applicability of the mandatory notice requirement to appealable orders. Likewise, a notice of entry of judgment (or copy of judgment) must show the day on which the clerk mailed the document. This change is intended to establish with greater certainty the trigger date for the 60-day time limit for filing a notice of appeal.

Extensions of Time to Appeal (Rule 3)

Rule 3 governs the extensions of time available when a party serves and files a "valid" motion for new trial, motion to vacate judgment, motion for judgment notwithstanding the verdict (jnov) and/or motion to reconsider an appealable order. Several substantive changes were made to this rule to help litigants avoid missing filing deadlines. Under the former rule, the trigger date for a 30-day extension of time to appeal following a denial of one of these motions began to run from the date of the entry of the order of denial. The new rule provides that the 30-day extension runs from the date the superior court clerk mails, or a party serves, either the order of denial or a notice of entry of that order.

In addition, the former rule provided for an extension of time after an order denying a motion for jnov only if the moving party had also moved for a new trial and that motion had been denied. This restriction has now been deleted. A 30-day extension is available after the denial of a motion for jnov, consistent with the provision for an extension after the denial of a motion for new trial. Similarly, the former rule made provision for "the time for filing the notice of appeal from the judgment or from the denial of the motion to enter a judgment notwithstanding the verdict." [former subd. (d)] This language created confusion as to whether an appellant had 30 days [under rule 3] or 60 days [under rule 2 governing appealable orders] to appeal the denial of the motion for jnov. Construing the former rule to allow 30 days for filing avoided different time periods for appealing from the judgment and from the order denying jnov and therefore avoided the possibility of two successive notices of appeal. On the other hand, because an unwary litigant who followed a 60-day construction lost the right to appeal, the former 30-day construction has been rejected. The new rule makes clear that a party has 60 days to appeal the denial of a jnov as provided by rule 2.

Lastly, the former rule 3 made no provision for an extension of time to appeal from an appealable order when a party files a valid motion to reconsider the order under Code of Civil Procedure section 1008. The case law differed on whether rule 3 should be construed to apply to such a motion. The new rule now establishes that a 30-day extension applies to the filing deadline following a valid motion to reconsider an appealable order. The extension applies only to the time to appeal "from that order" whether made before or after judgment. The revised rule takes no position on whether a judgment is subject to a motion to reconsider or

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Liar's Bane: Using Judicial Estoppel in Civil Litigation

by John T. Brooks, Esq. of Luce, Forward, Hamilton & Scripps LLP

It is unfortunately routine in litigation to encounter opponents who talk out of both sides of their mouths, take blatantly inconsistent positions, or outright lie. Because courts generally must leave credibility questions to the jury, attorneys must often await trial to get any mileage out of exposing their opponent's mendacity. The doctrine of judicial estoppel provides a welcome, but underused, exception.

Thus, where the court finds that a party succeeded on one position – for example, convincing a previous court to grant or deny relief based on the existence of fact X – then the party will be stuck with fact X in all future litigation. Sometimes, fact X will entitle your client to summary judgment.

Judicial estoppel, which is enforced by both federal and California courts, "is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State Farm Fire & Casualty Company* (9th Cir. 2001) 270 F.3d 778, 782.

Because it is an equitable rather than legal doctrine, the elements of judicial estoppel are not hard and fast. However, "several factors typically inform the decision whether to apply the doctrine in a particular case." *Hamilton*, 270 F.3d at 782. The three principal factors are as follows:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the impression that either the first or the second court was misled." . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Hamilton, 270 F.3d at 782-783 (quoting *New Hampshire v. Maine* (2001) 149 L.Ed.2d 968, 121 S.Ct. 1808, 1815). Significantly, because "the primary purpose of judicial estoppel is not to protect the litigants but to protect the integrity of the judiciary, the doctrine [unlike equitable estoppel] does not require reliance or prejudice before it may be invoked." *International Engine Parts v. Feddersen* (1998) 64 Cal.App.4th 345, 354.

John T. Brooks

Prior bankruptcies are a particularly fertile field in which to find grounds for judicial estoppel. An unscrupulous bankruptcy debtor has an incentive to conceal assets, including contemplated lawsuits. The place to look for contemplated lawsuits is the debtor's response to Question 20 of Schedule B, concerning "contingent and unliquidated claims." If the debtor failed to schedule a contemplated suit against your client, that concealment may entitle your client to summary judgment when the debtor later tries to sue on the concealed claim.

In *Hamilton v. State Farm*, for example, shortly after threatening litigation against State Farm, the plaintiff filed a Chapter 7 bankruptcy in which he failed to disclose his potential suit against State Farm. A year later, after the bankruptcy proceedings were dismissed, the debtor/plaintiff sued State Farm on the claim that he had concealed from creditors. The district court granted summary judgment for State Farm based on judicial estoppel. Because the plaintiff took the position in bankruptcy that no potential claim existed against State Farm, the court held that the plaintiff could not change tactics and later assert such a claim. The Ninth Circuit. *Hamilton*, 270 F.3d at 786.

Concealment of assets other than potential lawsuits can lead to similarly disastrous results for the debtor in later litigation. In *Thomas v. Gordon* (2000) 85 Cal.App.4th 114, for example, the plain-

(See "Estoppel" on page 13)

No Breaks For The Boss: Violations Of California's Meal And Rest Period Requirements Could Result In Significant Liability For Employers

by Michael G. Rhodes, Esq., Michelle C. Doolin, Esq., and Allison H. Goddard, Esq., of Cooley Godward LLP

The wave of wage and hour lawsuits filed against California's employers in recent years shows no signs of receding. The latest trend appears to focus on the meal and rest periods established by the Eight-Hour Day Restoration and Workplace Flexibility Act of 1999, also known as AB 60. Violation of these requirements can lead to significant liability for employers. Although these laws have yet to be reviewed by California's courts, the threat of liability -- on a class-wide or per employee basis -- should prompt employers to review their policies and practices for providing meal and rest periods to employees.

Meal Periods

Labor Code section 512 requires employers to provide up to two 30-minute **unpaid** meal periods per day, depending on the hours worked:

- If an employee works more than five hours in a day, the employer must provide one 30-minute meal period. If the employee's shift is less than six hours, this meal period may be waived by mutual consent of the employer and the employee.
- If an employee works more than ten hours in a day, the employer must provide two 30-minute meal periods. If the employee's shift is less than twelve hours, one of the meal periods may be waived by mutual consent -- but only if the first meal period was not waived.

The wage orders issued by the California Industrial Welfare Commission ("IWC") include additional meal period regulations on an industry-specific basis. See Cal. Code Regs., tit. 8, §§ 11010-11170. Most of the IWC wage orders prohibit "on duty" meal periods. To qualify as a meal period, an employee must be relieved of all duties for a 30-minute period of time. Depending on the industry, an on duty meal period may be allowed upon written agreement of the employer and the employee. An employee can revoke any such agreement at any time without penalty.

Several of the IWC wage orders also require employers to provide separate facilities for meal periods if employees must eat on the employer's premises. An employer should consult the wage order governing its industry to confirm the applicable meal period requirements with which it must comply. The wage orders are available on the Internet at <www.dir.ca.gov/IWC/>.

Rest Periods

California's Labor Code does not mandate rest periods for employees. Most of the IWC wage orders, however, expressly require employers to provide rest periods to non-exempt employees. Although the rest period regulations vary depending on the industry, the basic rest period requirement is that employers must allow a 10-minute rest period for each four hours, or "major fraction thereof," worked. Unlike meal periods, employees must be paid during rest periods. If an employee's shift is less than 3.5 hours, no rest period is required. Rest periods should be taken in the middle of an employee's shift when practicable.

Potential Penalties

Employers are at risk to incur substantial civil penalties for failure to comply with these meal and rest period requirements. In recent class action cases filed against employers, plaintiffs have alleged that they are entitled to penalties based on three separate provisions of the Labor Code:

- Labor Code section 226.7, which states that an employer "shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided."
- Labor Code section 558, which provides for a civil penalty for any violation of Division 2, Part 2, Chapter 1 of the Labor Code or any wage order provision regulating hours and days

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of work. The penalty for an initial violation is $50 per employee for each pay period during which the employee was underpaid, in addition to any unpaid wages. The penalty for subsequent violations is $100 per employee per pay period.

- Labor Code section 203, which establishes a waiting time penalty of up to 30 days' wages for an employer's failure to timely pay wages upon termination of employment.

The potential liability for employers with a large number of employees is significant. For example, failure to provide the required meal and rest periods to a former employee earning $10 per hour on a full-time basis over an eight week period could potentially subject the employer to penalties up to $3,150:

- Assuming the employee worked five days per week, the employee could be entitled to $400 under Labor Code section 226.7 ($10 per hour for each day worked).
- Assuming the employee was paid on a biweekly basis, the employee could be entitled to $350 under Labor Code section 558 ($50 for the first pay period, $100 for each subsequent pay period).
- Assuming the employee earned $80.00 per day, the employee could be entitled to up to $2,400 under Labor Code section 203.

The potential liability for employers with a large number of employees is apparent, particularly in the face of a plaintiff seeking relief on a class-wide basis. A trend of class action lawsuits alleging meal and rest period violations has begun against nationwide retailers operating in California -- some of whom have already been targets of class action lawsuits alleging violations of California's overtime pay requirements. Whereas an individual employee may only be able to collect a few thousand dollars for violations of the meal and rest period requirements, this penalty quickly becomes overwhelming when multiplied by the total number of employees in California for many large employers.

Because the application of these penalties has not been tested by the courts with respect to the meal and rest period requirements, employers can challenge these penalties on a variety of bases, including, for example, their constitutionality, their applicability to specific situations, and a plaintiff's ability to collect more than one penalty for the same violation, among others. Due to the potentially devastating liability an employer could face, however, employers should focus on implementing and improving policies regarding meal and rest periods.

Recommendations

To avoid and/or limit liability, employers should establish a well-defined policy regarding meal and rest periods. A key element of such a policy is the creation and maintenance of records to document and ensure that meal and rest periods are taken. If an employee contends that meal and rest periods were not allowed, it will likely be the employer's burden to prove that the employee was in fact allowed the meal and rest periods required. *Hernandez v. Mendoza* (1988) 199 Cal. App. 3d 721, 727.

Record keeping for meal periods is relatively simple. Because meal periods are unpaid, employees should be required to clock in and out for a meal period. Employers must ensure, however, that employees do not take "on duty" meal periods unless a written agreement between the employee and the employer exists as is required by the wage orders. In addition, any agreement between an employer and an employee to waive a meal period (i.e., if the employee works more than ten hours and is entitled to two meal periods) should be in writing.

Rest periods, which must be paid, present more difficult record keeping issues. There are several ways an employer can tackle this issue. For example, an employer could monitor compliance by asking employees to sign or initial a rest period sheet to be checked by a manager on a daily basis. An employer could also require employees to acknowledge a rest period by signing or initialing his or her time card. Δ

Successor Liability

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Alad Corp. (1977) 19 Cal. 3d 22.

But this so-called "product-line successor" rule only applies in strict product liability cases. What about situations outside that arena? Can a corporation that acquires the assets of another be saddled with the other's liabilities, whether in tort or contract? You bet.

The General Rule and the Four (or Three) Exceptions

Ordinarily, a corporation purchasing the principal assets of another corporation does not assume the other's liabilities. This is known as the general rule of nonliability. California, however, like most jurisdictions, has long recognized four exceptions to this general rule. These exceptions include: (1) the buyer corporation expressly or impliedly agrees to assume liability; (2) the transaction amounts to a de facto consolidation or merger of the two corporations; (3) the buyer corporation is a mere continuation of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. If a court finds that any one of these exceptions applies, it will impose successor liability on the buyer corporation.

Express or Implied Assumption

The first exception is straightforward. If the parties' purchase agreement unambiguously provides that the purchasing corporation will assume the liabilities of the seller and the contract was expressly integrated, that's the end of the story. But where the purchase agreement is ambiguous, or even silent, about liabilities, the court may look to extrinsic evidence to decide whether there was an implied assumption. This evidence might include other transaction documents, contracts assumed as part of the purchase

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agreement, correspondence between the parties, or correspondence with third parties, such as vendors, suppliers, or other creditors. By referring to such evidence, a court might conclude the parties intended to shift liabilities to the purchasing corporation.

The key here is to scrutinize the purchase agreement. Those seeking to impose successor liability will look for ambiguity and attempt to persuade the court to consider extrinsic evidence. Those resisting successor liability will look for language which unambiguously shows that the buyer did not assume the liabilities of the seller.

De Facto Merger/Mere Continuation

The second and third exceptions are now, for all practical purposes, one. Although these two theories have been traditionally considered as separate bases for imposing successor liability, recent case law has collapsed them. The de facto merger exception is now perceived to be a subset of the mere continuation exception since once the two elements of the mere continuation theory are satisfied there is no need to further consider the additional elements of the de facto merger exception. Those two elements are: (1) no adequate consideration given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations.

Now, the crucial factor in determining whether a corporate acquisition constitutes either a de facto merger or a mere continuation is the same: whether adequate cash consideration was paid for the predecessor corporation's assets. Less importance is placed on whether the two corporations have substantially the same ownership. Thus, although other factors are relevant to both the de facto merger and mere continuation exceptions, the common denominator, which must be present in order to avoid the general rule of successor non-liability, is the payment of inadequate consideration. This, of course, is a factual question, which likely precludes a defendant's ability to obtain summary judgment. Expert testimony on the issue may also be warranted.

Fraudulent Transfers

The last exception recognizes the similarity between successor liability theory and the alter ego doctrine. If a corporation forms another corporation to carry on the same business as the first, both corporations have essentially the same stockholders and directors, and the first corporation transfers all of its assets to the other for no consideration, a fraudulent transfer has occurred. In this situation, successor liability (and probably alter ego liability) will be imposed.

Who Decides?

The court decides the issue of successor liability. Like the alter ego doctrine, successor liability is equitable in nature. A jury trial is not required. Whether it is fair to impose successor liability involves broad equitable considerations, thus the question is one exclusively for the trial court.

In some cases, then, the defendant would benefit from a motion to bifurcate. A prior, separate court trial on the issue of successor liability may obviate the need for a much longer jury trial on the underlying question of liability and damages. If the court finds there is no basis for imposing successor liability, the case is over.

Is the Doctrine Limited to Asset Sales?

Of course, the world of business transactions is not limited to asset sales for cash. There are statutory mergers and consolidations, stock purchases, and licensing transactions. If the acquisition is the result of a statutory merger or consolidation, the surviving corporation will usually be held to have assumed the liabilities of its predecessor, which ceases to exist. In a stock purchase, the acquiring corporation does not directly assume the liabilities of the acquired corporation.

But what about licensing transactions? Suppose a corporation holds a single valuable asset, such as a patent, a copyrighted piece of software, or some sort of trade secret. And suppose that corporation then grants an exclusive license to another corporate to develop, manufacture, and sell that asset in exchange for a royalty payment. Does the licensee assume the liabilities of the licensor? Has there been a de facto merger or mere continuation? Does the law of successor liability even apply to these transactions? No California case has addressed this issue.

On the one hand, there is a strong argument

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that the law of successor liability does not apply in these circumstances. Unlike an asset sale, in a licensing transaction, there is no transfer of title to the asset, merely the grant of a right to use. Should the licensee default on the license agreement, the right to use terminates and the licensor, who retains ownership of the asset, is free to license it elsewhere. Thus, it may be unfair to impose successor liability on the licensee who may not control the predecessor's asset in the future. In addition, because the licensor does not dissolve, but remains viable to collect royalty payments, the licensor's creditors may remain protected.

On the other hand, it may be equitable to impose successor liability on a licensee where the terms of the license agreement make the transaction substantially similar to an asset sale. This might occur where the grant of the license is exclusive and broad, of long duration, and involves the licensor's sole asset. And if the royalty payments are inadequate to satisfy the licensor's creditors, successor liability might be imposed.

Conclusion

Successor liability can be triggered in a variety of situations. The doctrine is not limited to the familiar area of strict products liability. Except where there is an express assumption of liabilities, the focus of most successor liability claims will be on the adequacy of the consideration. Regardless of the type of transaction involved, lawyers who represent alleged successors-in-interest should look to see whether the seller has received sufficient consideration to meet the claims of its unsecured creditors. If so, the court is unlikely to impose successor liability. Δ

Storytellers

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meadow was as still as midnight except for the gurgling of the brook as it squeezed through the gaps in the dam that a family of beavers built just upstream earlier that spring."

> "The wolf floated over the short grass as quietly as the wind. His eyes were set on the boy with the deadly aim of a great warrior's arrow. At each step, his leathered paws, as if guided by the eyes of his ancestors, found the sun-hardened earth between the dry leaves and twigs. One step after another, the wolf crept forward until he could hear the young boy's breath and almost taste his soft flesh. Each muscle tensed as the wolf plotted every detail of that one last lunge. Suddenly, all his power was released like the jaws of a trap set free from their clasps as he exploded in a gray blur. The boy faintly heard the whistle of the wind as it scraped against the airborne wolf's thick coat. As he turned his head, the boy saw only the face of the wolf, eyes blazing, teeth bared. 'It is my time,' the boy thought quietly as he closed his eyes. But just then . . . ."

Storytelling, it dates back to the time when man first formed communities and with communities, created memories to be passed from generation to generation, lessons to be taught, and culture to be preserved. Long before the Brothers Grimm, Aesop or Moses, tens of thousands of years before history was preserved by the first written word or symbol scratched on a cave wall, there were stories, and there were storytellers. Then, as now, the best of them were revered, and the worst were . . . well, boring.

The stories that were remembered and retold around the evening fire were those that painted vivid pictures and touched the listener in a way that triggered an emotional response from which memories were fashioned. Compelling stories, told by captivating storytellers that created memorable messages, were preserved, in some cases, for thousands of years.

In the days before the printed word, radio, television, books and the myriad of other substitutes for the skillful storyteller, those who possessed the ability to breathe life into the words from which they fashioned their stories must have been commonplace, at least when compared to our time. But today, just as the oratory skills of the great lawyers and statesmen of past generations have atrophied from neglect, the art of effective storytelling teeters on the brink of extinction, at least in the courtroom. And yet no skill a trial lawyer can master is more fundamental to successful persuasion than the ability to tell his client's story - and tell it well.

As lawyers, we are trained to think and communicate facts rationally. Without question, we have the ability to present mountains of information logically and argue its legal implications intelligently. These skills are important, even essential to great lawyering. But without a sense of what makes a story compelling and memorable, and the desire and ability to incorporate this knowledge into our trial presentations, we are left with the courtroom equivalent of a car with a powerful engine but no transmission.

We have all watched beautifully written, acted and directed movies that leave even the most detached members of the audience rooting for the good guy and loathing the villain. And we've also seen poorly written, acted and directed movies that produce little, if any, emotional response and leave us struggling to remember even the name of the movie a week later. The hero dies — yawn. The heroine's longing for the love of her life is never quenched — "Oh really, I didn't notice." After what was intended to be a tragedy, there is not a wet eye in the house.

Something was missing. Chances are, what was missing were the fundamental qualities of good storytelling.

Just how tense would the children have been as the old man told the story of the wolf and the little boy if the old man told it like a typical lawyer all too frequently delivers a closing argument?

"The wolf, canis lupus, weighing approximately 128 pounds and standing 24´ inches at the shoulders, was proceeding quietly westbound at a distance of 120 feet from the juvenile Homo sapien.

The juvenile was fishing with a ten-foot pole made from Arundinaria, also known as bamboo, with a line woven from the hairs from a horse's

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tail and manufactured by defendant, Hook Co. . . . "

If you're honest with yourself, you may reach the same conclusion I did about my approach to case presentation when I returned full-time to my law practice after I stretched a six-month sabbatical into a three-year quest to better understand how we absorb and process the information from which we make decisions. My search led me to read more than 30,000 pages of both popular and scientific literature on the subject. I worked closely with a behavioral psychologist and a neuropsychologist and learned as much as I could from marketing experts who understand as well as anyone what motivates us to think and act as we do. Perhaps most importantly, I benefitted from the phenomenal experience and insights of Jo-Ellan Dimitrius, the jury consultant of O.J. Simpson, Rodney King, Reginald Denney, McMartin Preschool, Richard Ramirez (the Night Stalker) and John DuPont fame, who has selected nearly 800 juries and debriefed over 10,000 jurors. Somewhere in the process, I had an epiphany; and it was one that I tried my best to suppress.

I did not want to admit that I had any fundamental shortcomings as a trial lawyer, let alone a huge hole at the very core of effective advocacy. And I certainly didn't want to accept that if I were to become the best trial lawyer possible, given my particular mix of gifts and limitations, I would have to completely rethink how I approached virtually every phase of a case, from my first meeting with the client until final settlement or unappealable judgment. But try as I might, the evidence was so overpowering that I had to, and did, yield to it.

The fact is, after years of believing I had to "think like a lawyer" to be effective, I realized I had to quit thinking so much like a lawyer and start thinking more like public relations, marketing, media and advertising professionals. In many respects, I had to start thinking like the preacher whose impassioned message can move even the most hardened sinner to repentance.

Since my "conversion," I have preached the message to many attorneys, with mixed success, that we must quit relying so heavily on our rational brain and pull our emotional brain out of the mothballs where it was packed away in law school. I have found some are willing students, open to new ways of thinking and ready to act upon them. Others, mostly those who are most in need of conversion, are extremely skeptical of anything but the way of linear thinking with which they have become so comfortable and at which they are so adept.

I have discovered that my ability to persuade lawyers to reject their old approach in favor of an abiding respect for the awesome power of the human mind to distort data beyond recognition if necessary to suit our psychological needs depends upon my ability to create what those in the "self-help" book business call an "aha moment." That is the instant when the reader leans back in his chair, raises his eyes in a blank stare and says to himself, "Yeah!" If light bulbs really lit up above people's heads, it would be at such "aha moments."

The "aha moment" that I hope to create is the realization, followed immediately by the acceptance, of the notion that we need to supplement, and hopefully complement, our lawyer-like approach to persuasion with a healthy measure of the techniques that are the bread and butter of every other profession that relies on its ability to influence others' opinions and actions. And where can we lawyers look for guidance? The answer should appeal to the most linear thinkers among us — we should look to those professions that have spent the most money studying the art of communication and persuasion — the news media and the ad industry.

The news media has spent a fortune to learn how their six o'clock news can capture our interest. A larger audience for their nightly news drives up the ratings not just for the news; it also increases ratings for their programming during the balance of the evening. It seems many of us are too lazy to change channels.

Billions more have been spent by marketeers, who constantly search for new and better ways to persuade us to buy their particular brand when we are in need of a product and to motivate us to buy products that we don't need in the first place. What conclusions have they reached after this enormous investment of time and money? And as

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lawyers, what can we learn from their experience? If we are open-minded, we will learn the critical importance of communicating emotional brain to emotional brain, and we can learn how to do it and how not to.

Have you seen any beer commercials lately? Beautiful young people, sunny beaches and smiling faces fill the screen. We make the association between the brand of beer on the TV and the desirable people and activities depicted in the ad. That makes us want a beer, and that beer in particular, so we too can enjoy the experience. This process is not driven by any information intended for our rational brain. In fact, the process is entirely irrational.

How much of a 60-second beer commercial communicates details about the grade of hops or the scientific brewing techniques the company uses? And if you watch the typical advertisement for an automobile, clothing or virtually any other product, you will find that the marketing approach seldom changes.

Yet, if advertisements were produced by lawyers using the same approach most lawyers favor for closing arguments, instead of seeking emotional responses that will overcome the listener's rational brain, the opposite probably would be true. The lawyers' 60-second advertisement for a pickup truck would not show a shiny new 4x4 winding its way along a beautiful, heavily forested mountain road or perched atop a bluff above the ocean. No, a lawyer would describe in excruciating detail the truck's wheelbase, curb weight, towing capacity and every other statistic that could be crammed into the allotted time. Then a lawyer would conclude with a summary of all of the logical reasons we should buy the truck. And you know what? The ad wouldn't sell many trucks, because as marketeers say, "People buy with emotion, and justify with facts," not the other way around. Or as Herman Wheeler wrote 65 years ago, "You don't sell the steak, you sell the sizzle." We lawyers are great at selling the steak, but we make little effort to sell the sizzle.

Watch the evening news and you'll learn a lot about selling sizzle, even in an information-laden context. We have become a visual society. We are bombarded by multimedia presentations. The news anchor no longer sits at a desk in the newsroom against a backdrop of nothing more than a blank screen and the network logo. Today almost no time passes between an almost constant stream of photographic images, whether still or video, that dominate the screen, while we are further entertained by a variety of audio stimuli. Information about the latest conflict could be conveyed verbally by the news anchor from the TV studio, but instead, it is beamed to us via satellite from as close to the war zone as possible. We can hear the thunder of bombs exploding in the background, and see the flash of gunfire. We are addicted to constant, entertaining sensual stimulation. Anything less leaves us as satisfied as a hardcore coffee drinker who is served up a warm cup of decaf for breakfast.

Everyone wants to be entertained. Few truly want to be challenged intellectually. Jurors do not enter a courtroom obsessed with every detail of your case. They are curious. And even after spending countless, boring hours in the jury lounge reading out-of-date magazines, filling out crossword puzzles or trying their best to keep things moving at the office via cell phone, they want to do the right thing. Most jurors take their job very seriously. They are generally intelligent and often have considerably more commonsense than the lawyers who appear before them. But even so, they want to be stimulated and like it best when they are entertained; and they don't want to have to work any harder than necessary to understand your case. If we don't deliver what they want and expect, we create an unnecessary challenge for ourselves. But if we do, we gain the advantage. What is difficult to understand is why we lawyers, with all our education and intellect, cannot, or will not, understand and act upon such a simple concept.

Hopefully, I've made a few converts already, and the rest of you are at least curious about how to communicate emotional brain to emotional brain as you present your case. In the next issue of the ABTL Report, I'll discuss the techniques the best storytellers use to tell an emotionally compelling and memorable story. The approach is, as we lawyers would say, "As easy as dropping vertically from an arboreal protuberance." Or as everyone else would say, "Falling off a log." Δ

Changes

Continued from page 2

whether an order denying a motion to reconsider is itself appealable. These are deemed to be issues for the Legislature.

The Record on Appeal (Rules 4, 5, and 5.1)

Rule 4, 5 and 5.1 govern the reporter's transcript, the clerk's transcript and appendices instead of clerk's transcript. With regard to the reporter's transcript, the appellant must notify the superior court either of a decision to designate or a decision not to designate within 10 days after filing the notice of appeal. When designating a particular oral proceeding, the appellant should identify the date(s) on which the proceedings took place, and if the appellant does not want a portion of the proceedings to be included, the notice should identify that portion by means of a descriptive reference.

Similarly, when designating the clerk's transcript, the parties are now permitted to designate different portions of documents that are not to be included because they are duplicates or are otherwise not necessary for the proper consideration of the issues raised in the appeal. The new rule now obligates the appellant to pay not only for the portions of the transcript it designates, but also for the portions of the transcript the respondent counter-designates. A party in custody of exhibits (admitted, refused, or lodged) is required to deliver the exhibits to the clerk if they are designated for copying into the clerk's transcript.

For parties proceeding by an appendix instead of clerk's transcript, the notice of election is now filed with the superior court and transmitted to the court of appeal by the superior court clerk instead of by the party serving the notice. Like the clerk's transcript, the appendix may not include documents or portions of documents that are not necessary for proper consideration of issues raised on appeal. The rule also explicitly prohibits the inclusion of transcripts of oral proceedings that may be part of a reporter's transcript. Filed-stamped or conformed copies are no longer required except if they show dates that determine the timeliness of the appeal. The timeframe for filing has likewise been changed from no later than the filing of respondents' brief to requiring the appendix to be filed with the appellant's opening brief in order to improve the briefing process by enabling the appellant's opening brief to include citations to the record.

Form of Briefs (Rule 14)

Similar to the practice of the Ninth Circuit Court of Appeals, the parties are now required to file a certification of word count when a brief is produced on a computer. This rule imposes a limit of 14,000 words.

Requests for Extension for Service and Filing of Briefs (Rule 15)

The new rule clarifies that the parties may stipulate to an extension for the filing of their briefs up to 60 days. The reviewing court cannot deny or shorten the requested extension, and the extension is effective upon filing. Further, a party seeking an extension on application (rule 43) must show good cause and either that it has been unable for any reason to obtain an extension by stipulation or that the parties have stipulated to the 60-day maximum extension but the applicant seeks additional time. This change is intended to reduce the burden on reviewing courts by encouraging parties to proceed by stipulation when possible.

Transmission of Exhibits (Rule 18)

Under the former rule, parties wanting original exhibits transmitted to the reviewing court did not request transmittal until the reviewing court sent formal notice that the appeal had been set for hearing. The revised rule requires that within 10 days after the last respondent's brief is filed or could be filed (under rule 17), a party wanting the reviewing court to consider any original exhibits that were admitted, refused or lodged in evidence must serve and file a notice in the superior court designating such exhibits. As a result, when the reviewing court begins its work on appeal, it will have before it exhibits the parties believe are necessary to support their position. The procedure requires that the parties file a notice of designation with the superior court identifying original exhibits that were admitted into evidence, refused, or lodged. Within 20 days thereafter, the superior court in possession of the exhibits, or any party in possession of the designated exhibits returned by the superior court, must put them into numerical or alphabetical order and send them to the reviewing court along with two copies of the list of exhibits.

The next set of revisions to the Rules of Court affecting appeals will be effective July 1, 2002. To review the proposed amendments, check out the website identified above. Δ

Estoppel

Continued from page 3

tiff/debtor failed to disclose in her bankruptcy schedules her financial interest in a corporation. The plaintiff later sued her accountant, claiming breach of the duty of care to keep her advised about the financial affairs of the corporation. The court granted summary judgment for the accountant, holding that the plaintiff was judicially estopped from pursuing any claim that presupposed that she had an interest in the corporation.

Note: in some circumstances, facts similar to those in *Hamilton* and *Thomas* may also give rise to a demurrer or summary judgment based on the plaintiff's lack of standing. In Chapter 7 bankruptcies, assets concealed from creditors remain the property of the bankruptcy estate even after the bankruptcy is closed. Consequently, only the Trustee has standing to pursue claims related to such assets. See, e.g., *Rosenshein v. Kleban* (S.D.N.Y. 1996) 918 F.Supp. 98, 102.

Bankruptcies are not the only types of litigation that can provide grounds for judicial estoppel. Any type of litigation, including litigation before quasi-judicial tribunals such as the Workers Compensation Appeals Board, may give rise to judicial estoppel, as long as there is at least some overlap in legal or factual issues between the past and current suit. For example, in *Rissetto v. Plumbers & Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, a litigant who successfully asserted "total disability" to the Worker's Compensation Appeals Board was held to be judicially estopped from claiming she could perform her job adequately in a later age discrimination suit. See also *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171 (workers compensation award that included a work restriction estopped litigant from claiming, in later ADA litigation, that he was able to perform the essential functions of his job). Judicial estoppel was also successfully asserted to bar a legal malpractice action in which the plaintiff asserted a position as to a decedent's testamentary intent that was contrary to a position she asserted in a prior suit. *Helfand v. Gerson* (9th Cir. 1997) 105 F.3d 530.

The moral of the story is simple: be on the lookout for your opponent's past litigation. Your opponent's past success may spell doom for his claims against your client. And you, as the lawyer, will have the pleasure of watching an unscrupulous opponent hoisted on his own petard. Δ

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