

Preparing Your Witness for Deposition

A deposition is like a battle. The examiner is a professional hired to weaken your case. You must prepare your witness for the battle. This article discusses ways to minimize the discomfort of your witness and control the information revealed.

Do not let the setting and mechanics make the witness uncomfortable.



Alice A. Seebach

Tell the witness where the deposition will be taken, and the names of all lawyers, parties, and others who will attend. If possible, show your witness the room where the deposition will be taken and describe the probable seating arrangement. Describe the individuals who will probably attend and their roles.

Tell the witness that the court reporter will take his oath. The attorneys may discuss stipulations. The examiner will give instructions about the deposition and then will begin to

ask questions, usually by asking for the witness's name and background.

Advise the witness to keep in mind that the purpose of a deposition is to create a written document.

A deposition is not an oral event. Testifying at a deposition is an artificial process. All that matters is the transcript created once the deposition is over. Therefore, the witness's job is to dictate a very important document.

The scope of a deposition is broad. The examiner is entitled to any information that is reasonably calculated to lead to the discovery of admissible evidence. If the witness is worried about anything related to this lawsuit, he or she should discuss it with counsel before the deposition to avoid surprises during the deposition.

Beware of the examiner.

Tell the witness that a deposition is one-sided. The examiner is a professional, paid to find weaknesses in your client's case. A deposition transcript can be used against your client, and cannot do your client much good. This is not the time to "tell your story."

Tell the witness not to be influenced by the examiner's friendly manner. He is your client's enemy. Do not let the examiner lull your client into a rhythm of giving him the answers he wants.

Tell the witness not to be concerned with whether the examiner understands his answers. If the witness is satisfied, leave it alone. In addition, the witness should think hard before accepting that the examiner has accurately summarized his testimony or a document.

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Tactical Disqualification of Attorneys

The client's right to select the attorney of his choice was dealt a significant blow by a recent, little noticed decision, *Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 6 Cal.App.4th 1050 (1992). There, the First District Court of Appeal held that an attorney could not represent clients with adverse interests although the representation was with respect to *unrelated cases*. Significantly, the court further held that the attorney was subject to a rule of automatic disqualification that could not be avoided—even by withdrawing from representing one of the clients. Given an automatic disqualification rule, motions to disqualify counsel with adverse interests are likely to take on greater significance as a litigation weapon.

Inequities that could arise from such an automatic disqualification rule are numerous. Consider, for example, the situation where manager John Smith and his corporate employer, the Widget Company, are both sued for wrongful termination by a former employee. Widget and Mr. Smith are both defended in the action by the XYZ law firm, which has represented Widget in all legal matters throughout its 20-year existence. A year and-a-half later, a dispute arises regarding Mr. Smith's compensation and he files suit. The dispute over Mr. Smith's compensation is completely unrelated to the wrongful termination action, which is still pending. The XYZ firm represents the Widget Corporation in the new action. Recognizing that Mr. Smith might be uncomfortable with this turn of events, Widget offers to pay for independent counsel to represent Mr. Smith in the wrongful termination suit, but he refuses. He insists that XYZ continue to represent him in the wrongful termination suit and moves to disqualify XYZ as counsel for Widget in his own action against Widget.

Under *Truck*, Mr. Smith's motion would succeed. He could preclude his employer from using the services of the attorneys who



Nelson E. Brestoff

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The witness should not be concerned with convincing the examiner of the merit or credibility of his testimony. What the examiner believes does not matter.

The examiner will try to get as much information as possible. Your client cannot help his case by volunteering information, arguing with the examiner, or explaining his answers. Tell the witness not to volunteer to look up information, obtain materials, or make calculations. Counsel will respond to all such requests.

Tell the witness to concentrate, listen, understand, and think before answering each question.

It is important to concentrate and remain alert. Answering questions is hard work. If a witness does it properly, he or she will be very tired by the end of the day. If he becomes tired and does not concentrate, a good examiner will try to take advantage of him. Tell your client to ask for a break if he needs one unless a question is pending.

The witness should listen to each question. If he cannot hear the question, he should tell the examiner to repeat it. He should do this even if he is almost certain that he knows the word or words that were missed. He should wait until he hears the last word of the question before starting his answer.

In ordinary conversation, we try to keep the conversation moving. The witness should be instructed not to do this at the deposition.

Tell your client to be sure that he understands the question. He may not know what he is being asked if the question is long or convoluted or because the lawyer uses inexact language or unfamiliar words. He should not give in to the temptation to answer the question anyway. He should just tell the examiner that he did not understand the question.

The witness should think before he answers any question. He should know precisely what he intends to say before he begins an answer. If he answers some questions quickly and others more slowly, the examiner may realize that some questions are more troublesome than others. Therefore, stay quiet for five seconds after each question before answering. Five seconds may seem like a long time. Do not be concerned. The written record does not reflect the length of pauses.

Tell the truth.

The witness should be advised to always tell the truth. He should not interpret anything else that counsel said to be at odds with that rule.

The witness should be advised that he is likely to be questioned about subjects for which he has not prepared answers. Even if a question is unexpected, he should focus on it and answer it as honestly as possible.

Answer only the question.

The witness should be admonished to be sure that he answers the question and only the question. Keep answers short and to the point. Speak slowly, clearly, and audibly, so the court reporter can take down every word. He should not mumble, or speak while the examiner or anyone else is speaking. After he responds to the question, he should keep quiet. He should not attempt to fill silence that may him feel uncomfortable.

If he does not know or remember the answer to a question, he should be advised to say so.

If a question irritates him or makes him angry, he should be advised to resist arguing with the examiner. If he gets into an argument with the examiner, he will lose. He should be courteous and open but mentally on guard at all times.

He should not answer a question by suggesting that he knows something that he does not. For example, he should not say "I don't know, but I've been told." He should only testify about what he has been told if the examiner asks what he has been told.

The witness should answer all questions unless counsel instructs him not to answer.

Stick to your answers.

The examiner may make the witness doubt himself — even about facts he knows well. If his first answer was right, stick to it. The witness should be advised in advance that, just because the examiner keeps coming back to a question does not mean he is answering improperly. He must give the facts as he knows them.

Of course, the witness should also be advised to correct any answer if he concludes that it was wrong or incomplete. The witness should be advised before the deposition that he may make some mistakes. That is normal. He should not be unnerved. He should interrupt if necessary to correct. He can ask at any time for an answer or a question to be read aloud. It is important if he has any doubt about an answer, however, that he confer with his attorney before speaking aloud.

The witness should qualify answers, if appropriate.

The witness should know that he can say, "to the best of my recollection" or "I believe." But he should not guess if he does not know. If asked about a date, he should not be more precise than his actual knowledge permits. He should not say January 1988 unless he knows *certainly* that the month was January.

The witness should control his answer.

If the examiner insists on a "yes" or "no" answer, but such an answer would be misleading, the witness should know he has a right to say so and to explain his or her answer. If the examiner interrupts before he finishes his answer, he should insist on completing his answer before turning to the next question. He should be sure to get his whole answer into the record. If he is cut off, he should say so, and continue. If the examiner asks a complicated or difficult question, he may state that he needs time to answer. Then take the time.

The witness should be advised to pay attention if his attorney addresses or argues with opposing counsel.

The attorney may object to a question, or say that he or she cannot understand a question. The witness should stop speaking immediately when his attorney starts talking; there may be a problem that the witness has not considered. Even though the attorney objects to a question, the witness must answer unless the attorney instructs him not to. If the attorney instructs the witness not to answer, he should not answer. He or she can consult with his or her attorney at any time. It is best, however, not to consult with counsel when a question is pending.

The examiner or the deponent's attorney may ask to go "off the record." The witness should not speak when they are "off the record." The court reporter may record the conversation even though counsel have requested a discussion "off the record," or the examiner may summarize what was said "off the record" when they are back on the record.

The deponent may not remember the question after an argument or discussion between the lawyers. If that is the case, he or she should ask for the question to be read aloud; he should not try to remember it.

The witness should read documents before answering questions about them.

The witness should be advised that he or she will be questioned about specific documents at the deposition. He or she should ask to see such documents. When he or she is shown a document, he should slow down and look at it even if he is familiar with it. He should take his time and read the entire document silently even if he is asked about just a part of it. He should be advised to use the same amount of time, if possible, with each document, so the examiner does not learn which documents he is very familiar with and which he is not. If he does not remember a document, he should say that he does not remember it and say nothing more.

— Alice A. Seebach

Tactical Disqualification of Attorneys

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have represented the company in all matters throughout the company's existence. XYZ may be permitted to withdraw from representing Mr. Smith, but could not continue defending Widget in the new action filed by Smith.

The *Truck* decision defies logic. Moreover, *Truck* conflicts with the reasoning of the decisions on which it is based, and cries out for the formulation of an alternative rule.

In *Truck*, the Truck Insurance Exchange filed suit against Fireman's Fund Insurance Company. Fireman's Fund Credit Union, an entity affiliated with Fireman's Fund Insurance Company, was being represented at the time by the firm of Crosby, Heafy, Roach & May in unrelated wrongful termination actions. Truck Insurance Exchange selected that same firm as its counsel of choice in the new litigation against Fireman's Fund Insurance Company.

Crosby, Heafy informed Fireman's Fund Insurance Company of Truck Insurance Exchange's desire for representation and asked if there was any objection. If there was any objection, Crosby, Heafy volunteered to withdraw from representing Fireman's Fund Credit Union and waive any fees for its past services. This offer was rejected.

Crosby, Heafy moved to withdraw as counsel for Fireman's Fund

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Economic Conflicts: A Fishy Proposition?

You already know that you cannot accept a representation adverse to another client or former client; but, are you sure you know just what an "adverse representation" is? Try this little test:

Your first big professional break is at hand. You are asked by McKelp's, the famous giant fast food seafood restaurant chain, to help it develop a unique international trade secret protection program for its most valuable trade secrets, including its famous secret tartar sauce recipe. Of course you accept; and, during the representation, which is fabulously successful, you have access to the recipe (but you never make a copy of it), and you discuss with McKelp's top executives its confidential international marketing plans as well.



Joel Mark

In the ensuing months, McKelp's international sales soar, along with your reputation in the industry. Soon, top executives of Gills Ahoy, arch rival and competitor of McKelp's, hear at an industry convention that the reason that McKelp's is doing so well, and the reason that their secret recipe stays so secret, is because of your legal work, particularly the air-tight international trade secret protection program which you helped McKelp's to implement.

Gills Ahoy quickly puts its best chefs to work day and night developing its own secret tartar sauce recipe, which they hope will help it to overhaul McKelp's in the international markets in which they both compete; and, its president, Mr. Gill, comes to you with a \$100,000 retainer check and asks you to provide legal services to Gills Ahoy, including helping it to implement an international trade secret protection program similar to the one you successfully developed and helped implement for McKelp's.

You accept the \$100,000 retainer check from Gills Ahoy in one hot second, pop the cork on that bottle of fancy French mineral water you keep in the lower desk drawer in your office and rock back in your chair secure in the knowledge that you finally have attained an international reputation as an expert in your chosen field, and that it is just a matter of time until all of the fast food seafood restaurants on at least four continents will beat a path to your shingle.

Well...before you cash that Gills Ahoy's retainer check, you might want to read the Pennsylvania Supreme Court's recent decision in the case entitled *Maritrans v. Pepper, Hamilton & Sheetz*, 602 A.2d 1277 (1992).

According to the majority opinion, the Maritrans Shipping Company had been prior to 1987 a long-time client of Pepper, Hamilton & Sheetz' Philadelphia office. Over the years, Pepper, Hamilton's labor lawyers allegedly had assisted Maritrans in developing a unique employee compensation strategy, and also helped Maritrans develop economic strategies for use against its competitors.

It also was alleged that, in the course of the representation, Pepper, Hamilton became privy to confidential information about Maritrans' goals, strategies and plans for future upcoming labor negotiations which, if all went well, would give Maritrans a signifi-

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cant competitive advantage over its numerous economic rivals.

Pepper, Hamilton over these years also had developed an expertise and reputation in the shipping industry, in some measure as a result of its long-standing representation of Maritrans. Thus, in 1987, Pepper, Hamilton was approached by four shipping firms from New York, who were economic competitors of Maritrans, and agreed to begin providing legal advice to the four competitors in certain labor and other matters. Maritrans' largest Philadelphia competitor, Bouchard, then also approached Pepper, Hamilton and asked it to represent Bouchard in certain upcoming labor negotiations as well.

Before Pepper, Hamilton actually began to represent Bouchard in the labor negotiations, however, Maritrans heard about Pepper, Hamilton's representation of the four New York competitors and their proposed representation of Bouchard. Maritrans complained to the Pepper, Hamilton partner in charge of the representation of the Maritrans competitors in the labor negotiations, Mr. Messina, and asked that Pepper, Hamilton withdraw immediately from all of its representations on behalf of Maritrans' economic competitors.

Mr. Messina and Pepper, Hamilton took the position that, while their activities in representing Maritrans' economic competitors might constitute a "business conflict," such conduct did not constitute a "legal conflict" with adversity between the various clients sufficient to require Pepper, Hamilton to withdraw under the applicable Pennsylvania rules of professional conduct.

After much discussion about whether Maritrans would continue to use Pepper, Hamilton's services at all, however, it was agreed that Pepper, Hamilton would continue to represent the four New York competitors, that Mr. Messina and the other attorneys representing the four New York competitors would be "walled off" from the Pepper, Hamilton attorneys who had been representing Maritrans, and that Pepper, Hamilton would decline to represent Maritrans' largest competitor, Bouchard, and another Philadelphia competitor of Maritrans, Eklof, in the labor negotiations.

Pepper, Hamilton then referred Bouchard and Eklof to another Philadelphia attorney, Mr. Pentima, a labor attorney at another law firm. Thereafter, however, representatives for Bouchard and Eklof were present during, and those companies directly benefitted from, the labor negotiations conducted by Pepper, Hamilton's attorneys, including Mr. Messina. Moreover, during this same time, and unbeknownst to Maritrans, Pepper, Hamilton also was in merger negotiations with Mr. Pentima's firm.

After the labor negotiations concluded, Mr. Pentima's firm merged with Pepper, Hamilton and brought with him to Pepper, Hamilton as clients Bouchard and Eklof.

Upon hearing this good news, Maritrans sued Pepper, Hamilton for breach of contract and breach of fiduciary duty, and prayed for an injunction prohibiting Pepper, Hamilton from representing any of Maritrans' competitors and for damages.

The trial court first denied but then reconsidered and granted an injunction against Pepper, Hamilton's continued representation of the competitors, based upon its finding that Pepper, Hamilton had violated Pennsylvania rules of professional conduct in representing interests adverse to its original client, Maritrans. The trial court refused to consider the question of damages.

The intermediate court of appeal reversed the trial court, holding that Maritrans had consented to the adverse representation in the first place and that, even if Pepper, Hamilton's conduct had violated Pennsylvania's rules of professional conduct, no action for injunction or damages could be based upon such a violation alone.

Enter the Pennsylvania Supreme Court, which was divided over what to do. In considering whether Pepper, Hamilton could be enjoined from representing any of Maritrans' competitors, the ma-

majority first discussed Pepper, Hamilton's attempt at a "Chinese Wall" and indicated its strong skepticism about the efficacy of such devices in general. Only one dissenter approved of the use of the "Chinese Wall" at all, but allowed that Pepper, Hamilton's "Chinese Wall" in this case may have been somewhat defective.

Next, the majority held that a violation of the Pennsylvania rules of professional conduct alone did not give rise to a private cause of action upon which the requested injunction could be based, but also held that the conduct of Pepper, Hamilton constituted a breach of its common law fiduciary duties of loyalty to its client, Maritrans, which breach was actionable.

Next, the majority dealt with the issue of whether the economic adversity among Pepper, Hamilton's competing clients alone, as opposed to an actual conflicting legal representation, could constitute an actionable breach of fiduciary duty by the law firm. On this issue, the majority held:

"We do not wish to establish a blanket rule that a law firm may not later represent the economic competitor of a former client in matters in which the former client is not also a party to a law suit. But situations may well exist where the danger of revelation of the confidences of a former client is so great that injunctive relief is warranted. This is one of those situations."

Finally, the majority held that the injunction alone would not be a sufficient deterrent to such conduct in the future and remanded the case for assessment of damages, including the disgorgement by Pepper, Hamilton of the fees it had earned as a result of the conflicting representations.

As to these last three holdings, the two dissenting justices would have denied all relief because Maritrans initially had consented to the representation of the four New York competitors and also had failed to prove at trial that there had been any actual disclosure of its confidential information to any of those Pepper, Hamilton clients.

Significantly, however, neither dissenting justice, nor either lower court, took issue with the conclusion of the majority that the economic adversity between Maritrans and its four New York competitors in that case was sufficient to trigger a duty for Pepper, Hamilton not to accept the representation of the competitors without Maritrans' informed written consent.

So now back to our quiz. What do you do now with the Gills Ahoy \$100,000 retainer check? Cash it, of course! This is California. Right?

Well...maybe yes, and maybe no. Last September, Rule 3-310 of the California Rules of Professional Conduct was amended. The new Rule 3-310(E) provides:

"A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

Literally read, it would appear that the new Rule 3-310(E) permits one to go so far as to sue one's own client, provided only that one is not in possession of confidential information about that client material to the subject matter of the action in which one is suing one's own client; but, that will have to be the subject of another article.

Regarding this article, however, Rule 3-310(E) and the legislative comments following it are silent about whether an economic conflict such as in *Maritrans* or in the McKelp's example alone is sufficient to trigger the prohibition against representing adverse interests. But, the prohibition in Rule 3-310(E) is virtually the same as in the rules of professional conduct at issue in *Maritrans*.

So now what do you do? Tear up the Gills Ahoy retainer check? Hardly! Not before reading one more case on the subject.

In *Curtis v. Radio Representatives, Inc.*, 696 F.Supp. 729 (D.D.C. 1988), a law firm sued a former client to recover outstanding legal

fees, which fees had been incurred in the representation of a radio station owned by the client in Santa Maria, California. The client based its defense, in part, on the fact that, throughout the time that the law firm had represented the defendant, it also had represented a competitor radio station in Santa Maria, California.

The client claimed that the two radio stations were economic competitors, and also made much of the fact that the two radio stations once had aired editorials favoring opposing sides of some local civic controversy. No "legal conflict" or other adverse representation of any kind was alleged.

The District Court in Washington, D.C., where the law firm had represented both clients at respective FCC licensing proceedings, held, at page 737:

"In fact, defendant fails to point to *any* matter with which its interest conflicted with these other stations except as general business competitors.... Accordingly, the Court holds, as a matter of law, that no violation of DR 5-105 existed with respect to plaintiffs' simultaneous representation of these clients [the other radio stations] and defendant."

So there you have it. Representing clients with adverse economic interests either is or is not a breach of professional duty depending upon where you do it, and depending upon the degree of economic adversity between the clients and the value to the competitor client of the confidential information of the former client to which the law firm may become privy.

And finally, while there may be no bright line answer to this test, we conclude by observing that there is little doubt that it is a poor business strategy to represent economic competitors, and let it go at that. Now, where did I put my copy of that secret tartar sauce recipe anyway?

— Joel Mark

La Quinta Resort Beckons ABTL '93 Annual Seminar

This year's annual ABTL Seminar, entitled "A Window on the Judiciary: The Bench Perspective on Business Litigation," is scheduled for October 15-17 at the La Quinta Resort in Palm Springs. The Annual Seminar, a combined effort of the Northern and Southern California branches of the ABTL, attracts many judges and the best legal talent in the state.

This year's program will focus on trials to the Court, with emphasis on the differences between state and federal approaches to case management. Panelists will also emphasize the effect of the judicial education process on a judge's approach to making critical decisions.

The hallmark of ABTL programs is the combination of active judicial participation with live demonstrations by respected practitioners. Numerous federal and state judges attend, participate in panel sessions and critique demonstrations. This fall, demonstrations based on an intellectual property hypothetical featuring parallel state and federal court actions are planned for preliminary injunctions, summary judgment motions, several elements of a bench trial and appellate argument.

The 1993 program will take place at La Quinta, offering golf, tennis, horseback riding, swimming and hiking. The ABTL has a limited number of rooms at the resort and reservations will be accepted soon. For further information, contact Kim Wardlaw, this year's Program Chair, at (213) 669-6380.

Court-Appointed Experts

In complex cases, courts often must rely on high-priced experts. In doing so, they need not be limited to conflicting testimony proffered by paid experts on all sides. With increasing frequency, they are turning to court-appointed experts, which are authorized under Federal and state procedure, even when the parties have their own experts. Rule 707, Fed. R. Evidence; Cal. Evid. Code §§ 730, *et. seq.*

Justification

The Advisory Committee Notes to Rule 706 of the Federal Rules of Evidence explain the justification for court-appointed experts.

"The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court-appointed experts acquire an aura of infallibility to which they are not entitled,...the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services."



Joseph S. Dzida

As the Second Circuit has said:

"(T)he trial judge is not a mere umpire at the trial; indeed, there may be circumstances in which he would have a duty to seek impartial assistance in order to enlighten the jury and himself on issues which have become confused because of partisanship in presentation." *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 931 (2d Cir. 1962).

Constitutionality

Arguments that the practice violates constitutional restrictions have been rejected. *In re Peterson*, 253 U.S. 300 (1919) (the practice does not violate the right to jury trial, nor can it be found to be unconstitutional "as unduly interfering with the jury's determination of issues of fact"); *People v. Strong*, 114 Cal.App. 522 (1931), and cases cited therein (the practice does not violate the principle of separation of powers or due process, nor is it "in effect an endorsement of the character, ability and impartiality of such a witness, which amounts to a deprivation of a 'fair and impartial trial'").

Procedure

The appointment may be made by the court on its own motion or upon the motion of any party. Rule 706(a) Fed. R. Evid.; Cal. Evid. Code § 730.

Federal Rule of Evidence 706(a) specifically requires the expert to disclose his or her findings and permits the parties to depose the expert. California Evidence Code § 730 states only that the court may order the expert to prepare a report. It has no specific provision permitting or forbidding depositions.

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Punitive Damages

Considering once again the issue of when punitive damage awards are valid, the Second District Court of Appeal held in *Lara v. Cadag*, 13 Cal.App.4th 1061 (1993), that, where a plaintiff has submitted evidence of nothing more than a defendant's income, such proof is insufficient to support an award of punitive damages. In *Lara*, the plaintiff was awarded punitive damages based on evidence of the defendant's monthly income. No evidence was submitted at trial to prove defendant's net worth, his assets or his liabilities. The Court of Appeal vacated the punitive damage award, holding that the plaintiff had not satisfied the California Supreme Court's requirement that any punitive damage award be preceded by presentation of "meaningful evidence" regarding the defendant's financial condition.



Mary Lee Wegner

Intellectual Property

In *Metro Publishing, Ltd. v. San Jose Mercury News*, 93 Daily Journal D.A.R. 3034 (Mar. 8, 1993), the Ninth Circuit Court of Appeals held, in what appears to be a case of first impression, that the name of a newspaper column can acquire trademark status and thus is entitled to protection under the Lanham Act. In *Metro Publishing*, the question was whether the publisher of a regular column entitled "Public Eye," was entitled to an injunction prohibiting

a competitor from publishing under the name "Eye." The Ninth Circuit held that newspaper columns are entitled to such protection under the Lanham Act.

In *Lindy Pen Co. v. Bic Pen Corporation*, 982 F.2d 1400 (9th Cir. 1993), the Ninth Circuit Court of Appeals held that an accounting for profits should not be awarded in a Lanham Act case unless the plaintiff can first prove that the infringement was "willful," as opposed to innocent.

Litigation

The Fourth District Court of Appeal has suggested that a timely, but incomplete description of an expert witness's contemplated testimony will suffice to preserve a party's right to use that expert at trial. *Martinez v. City of Poway*, 12 Cal.App.4th 425 (1993). The Court of Appeal reversed a trial court's decision to exclude at trial the testimony of the plaintiff's accident reconstruction expert, holding that even an inaccurate or inadequate disclosure of expert testimony pursuant to Section 2034 of the Civil Procedure Code, if timely, will preserve the expert's ability to appear at trial.

Professional Liability

The United States Supreme Court held that accountants, attorneys and other professionals cannot be sued for damages under Section 1962 of RICO unless such professionals actually participated in the operation or management of the enterprise allegedly engaged in racketeering activity. *Reves v. Ernst & Young*, 93 Daily Journal D.A.R. 2750 (Mar. 3, 1993).

Tortious Breach of Contract

The Fifth District Court of Appeal rejected the notion that a cause of action for breach of contract in violation of public policy exists outside the employment context. *Harris v. Atlantic Richfield Co.*, 14 Cal.App.4th 70 (1993). In *Harris*, the plaintiff, an ARCO

franchisee, filed suit against ARCO, claiming that its mistreatment of him amounted to, among other things, tortious breach of a written contract in violation of public policy, and bad-faith denial of the contract. After trial on the merits, the jury awarded compensatory and punitive damages on these and other causes of action alleged by the plaintiff. The court subsequently struck the punitive damages award and granted ARCO's motion for judgment notwithstanding the verdict on the cause of action for tortious breach of the written contract.

In the published portion of its opinion, the Court of Appeal upheld the trial court's ruling on ARCO's JNOV motion, holding that a claim for tortious breach of a written contract under *Tameny v. Atlantic Richfield Co.* does not exist outside the scope of an employment context, and that case law generally does not recognize a claim for breach of a commercial contract in violation of public policy. The Court expressed a reluctance to expand remedies available for breach of contract, and expressly declined to recognize a new tort of breach of commercial contract in violation of public policy.

Libel

The Fourth District Court of Appeal held that an employee cannot pursue a claim for libel based upon an employer's performance evaluation absent proof that the evaluation falsely accused the employee of criminal conduct, lack of integrity, dishonesty, incompetence or "reprehensible personal characteristics or behavior." *Jensen v. Hewlett-Packard Co.*, 93 Daily Journal D.A.R. 4074 (March 30, 1993). The plaintiff, Jensen, brought suit against the company, alleging that his manager's insertion into Jensen's personal file of a negative written performance evaluation amounted to libel. Even after filing suit, Jensen remained an employee of Hewlett-Packard.

At trial, Hewlett-Packard moved for, and was granted, a non-suit after plaintiff's opening statement (and a supplemental opening statement, intended to cure deficiencies in the first attempt). The Court of Appeal affirmed the judgment of the trial court, and focused on the plaintiff's inability to prove that the disputed performance evaluation was a "false statement of fact." The Court noted that the evaluation was, by its very nature, a statement of *opinion*, rather than fact, and held that such statements are not actionable when legitimately made in the context of a performance review. The Court further stated that such expressions of opinion would not provide the basis for a libel claim against an employer, even if made in bad faith.

Contracts

Reaffirming the viability of contractual forum selection clauses, the First District Court of Appeal held in *Lu v. Dryclean-U.S.A. of California*, 11 Cal.App.4th 1490 (1992), that a franchise agreement which required a California franchisee to litigate its disputes with the franchisor in Florida was enforceable, despite the fact that neither the franchisee nor the franchisor was domiciled in Florida. The plaintiffs were California residents and they brought suit in California state court under a franchise agreement. Although the defendants were California residents, they moved for dismissal of the case pursuant to C.C.P. § 410.30(a) on the ground that the franchise agreement's forum selection clause required that all disputes arising from the agreement be litigated in Florida, the situs of defendants' corporate parent. Attempting to defeat the motion, the plaintiffs argued that their complete lack of contact with Florida, and the fact that two of the defendants had not signed the agreement in which the forum selection clause appeared, rendered the clause unreasonable and unenforceable.

The Court of Appeal rejected these arguments, noting that both

the United States Supreme Court and the California Supreme Court have placed a "heavy burden" on plaintiffs seeking to avoid the effect of forum selection clauses by proving that the clause is "unreasonable under the circumstances of the case." The Court then went on to find that, even though the plaintiffs would be seriously inconvenienced by having to litigate in a forum with which they had no contacts, mere inconvenience is not sufficient to invalidate a forum selection clause.

Litigation Privilege

In *Rubin v. Green*, 92 Daily Journal D.A.R. 4338 (April 5, 1993), the California Supreme Court reinforced the broad applicability of the litigation privilege under Civil Code Section 47(b), by holding that the privilege bars a defendant from filing a retaliatory lawsuit against the law firm which filed the civil action against the defendant.

Arbitration

An arbitration agreement may bind a person who did not sign it, even if he or she was not born when the agreement was made. *Pietrelli v. Peacock*, 13 Cal.App.4th 943 (1993). The plaintiff, a minor, sued a doctor for damages based upon the doctor's alleged malpractice at the time of the plaintiff's birth. Prior to the plaintiff's birth and indeed, his conception, the plaintiff's mother signed an agreement which provided that any dispute relating to the doctor's services would be resolved by arbitration. The Court of Appeal held that the plaintiff was bound by his mother's agreement to arbitrate.

— Mary Lee Wegner

Court-Appointed Experts

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The fact of court-appointment may be disclosed to the jury. Rule 706(c), Fed. R. Evid.; Cal. Evid. Code § 722; and see Advisory Committee's Note to Rule 706(c), Fed. R. Evid., stating that the ability to disclose court-appointment to the jury "seems to be essential if the use of court-appointed experts is to be fully effective."

The direct examination of the court-appointed expert may be conducted by the court or any of the parties. The court-appointed expert is subject to cross-examination like any other expert. Rule 706(a), Fed. R. Evid. 706(a); Cal. Evid. Code § 732.

With limited exceptions, the fees of these experts may be apportioned among the parties according to the court's discretion. Rule 706(b), Fed. R. Evid.; Cal. Evid. Code § 731. The parties may still call their own experts. Rule 706(d), Fed. R. Evid.; Cal. Evid. Code § 733.

Practical and Tactical Consideration

When are experts appointed? Experts may be appointed in any case where especially demanding, technical evidence will be presented which forms the basis of widely varying expert testimony from the parties' own experts. For example, in the business litigation context, courts have appointed experts in all types of cases involving valuation, and in patent, antitrust, trademark and securities cases. 4 Fed. Jud. Center *Directions* (Aug. 1992) at pp. 6, 9, "Defining a Role for Court-Appointed Experts."

Should the business litigator ask the court to appoint an expert? The Federal Judicial Center has found that parties are rarely enthusiastic about court-appointment and judges are reluctant to interfere in the adversary process by making such appointments. Nevertheless, it should be recognized that, in some cases,

seeking court-appointment might be a good strategic move. Although it is not unusual for both parties to take extreme positions through their own experts, in some cases only one party takes such an extreme position. The extreme position could be countered by reasonable, conservative testimony from opposing experts that is buttressed by reasonable, conservative testimony from a court-appointed expert.

When should the court appoint an expert? Again, there is no set rule. Unfortunately, in many cases, this question is not taken up until trial. Judges often do not have sufficient information to determine whether court appointment of an expert will be helpful until a case comes before them for trial or final settlement conference. Parties often are reluctant to deal with the potential appointment of a court expert at pretrial conferences because they do not want to give the judge the idea of making such an appointment. Others may deliberately wait to raise the issue because they want trial to be delayed further while the court-appointed expert prepares his or her report and is deposed.

Counsel should discuss these tactical considerations thoroughly with their clients well in advance. Such discussion should perhaps begin as early as the fee agreement, where clients should be informed that they may face the expense of court-appointed experts, in addition to the expense of their own experts.

Where does the court find its expert? There is no set practice. The Federal Judicial Center has found varying practices. Fed. Jud. Center Staff Paper, "Court-Appointed Experts," 1986. A judge may request nominations from the parties (some court rules require judges to accept experts nominated by all parties), consult with professional organizations or academic groups, or simply select someone he or she knows for the job. The judge and the parties should work out a procedure for the nomination of the expert which will allow the parties to obtain sufficient information about the expert's background, qualifications and fees to make objections meaningful and which will allow any potential conflicts to be fully explored.

Who can communicate with the expert? The judge and the parties should agree on whether (a) the judge may consult ex parte with the expert; (b) the parties can provide information to the court-appointed expert, including data or conclusions from their own expert's reports; and (c) the expert will render preliminary or tentative findings which may be changed after comment by the parties.

Recognizing that disclosure of court-appointment to the jury is authorized as discussed above, are there any limits? The Federal Judicial Center has found, not surprisingly, that juries "tend to follow the advice and testimony of court-appointed experts." 4 Fed. Jud. Center *Directions* (August 1992) 6, 14, "Defining a Role for Court-Appointed Experts." Parties should propose jury instructions to ensure that the jury is instructed that it need not accept the opinions of a court-appointed expert wholesale. Parties should also review the testimony of their own experts in order to ensure that it will not be perceived as extreme or irresponsible in light of any differing testimony expected from the court-appointed expert.

Conclusion

Is the practice of court-appointment of experts a better way to get at the truth, or a stab in the back to our adversary system of justice? The answer perhaps is that, while the governing cases, statutes and rules see it as a better way, most trial attorneys perceive it as a stab in the back, and most trial judges fall somewhere in between (using the procedure only rarely). Since experts will, however (even if rarely), be appointed by the court, the prudent business litigator should be prepared for that eventuality and incorporate it into his or her tactical arsenal.

— Joseph S. Dzida

Tactical Disqualification of Attorneys

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Credit Union in the wrongful termination cases. On the same date, Fireman's Fund Insurance Company filed a motion to disqualify Crosby, Heafy from representing Truck Insurance Exchange. Crosby, Heafy's motion was granted. Nevertheless, Fireman's Fund's motion to disqualify Crosby, Heafy was also granted under Rule 3-310(B) of the California Rules of Professional Conduct.

That rule expressly applies only to concurrent representations—that is, where a firm represents a client in one case and also represents an interest adverse to that client in another case at the same time. It forbids an attorney's concurrent representation of clients whose interests conflict except with their informed written consent."

In so holding, the court rejected Truck Insurance Exchange's argument that the matter should be governed by the standard



Vivian R. Bloomberg

applicable to former—not concurrent—representations. With the rule applicable to a former representation, there would be a conflict only if the old and new cases were substantially related. If that standard had applied, there would have been no conflict because there was no relationship between the wrongful termination actions against Fireman's Fund Credit Union and the action brought by Truck Insurance Exchange.

Notwithstanding the fact that Crosby, Heafy had withdrawn from its representation of Fireman's Fund Credit Union, the trial court held that the applicable standard was set by Rule 3-310(B). The Court of Appeal affirmed, announcing a rule requiring automatic disqualification. 6 Cal.App.4th at 1056.

The court reasoned that a lawyer cannot eliminate a conflict by choosing a favored client. The court held that each client is entitled to counsel's undivided loyalty, and that an attorney cannot withdraw from representation of that client after breaching his duty of loyalty in order to escape mandatory disqualification under Rule 3-310(B).

In justifying the automatic disqualification rule, the *Truck* court referred to, but did not thoroughly discuss, a number of out-of-state authorities: *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio 1990); *Ex Parte AmSouth Bank v. Drummond*, 589 So. 2d 715 (Ala. 1991); and *Florida Ins. Guaranty Assoc. v. Carey Canada*, 749 F. Supp. 255 (S.D. Fla. 1990). However, these cases do not support the rule of automatic disqualification announced in *Truck*. Instead, those cases held that it may be necessary to fashion exceptions to an automatic disqualification rule to avoid unjust results.

In *Gould*, concurrent representation arose *inadvertently* as a result of a corporate acquisition. The law firm (Jones, Day, Reavis & Pogue) found itself representing both sides of a dispute after a corporate acquisition. Based on an exception to the "per se" disqualification rule, the court refused to disqualify Jones, Day, relying in part on the fact that the law firm did not affirmatively create the conflict. *Gould, supra*, 738 F. Supp. at 1127.

In *Gould*, the court said that "disqualification is a drastic measure which should not be imposed unless absolutely necessary. Such motions are often made as tactical attempts to divest opposing parties of their counsel of choice." *Id.* at 1126 [emphasis added]. Thus, "[a] delicate balance must be struck between two competing considerations: the prerogative of a party to proceed with counsel of its choice and the need to uphold ethical conduct in courts of law." *Id.*

Faced with these competing considerations, *Gould* adopted a balancing test. The factors considered by the court in *Gould* to deny the disqualification motion were: (1) the absence of prejudice or disclosure of confidential information, (2) the time delay and cost considerations related to obtaining new counsel in a complex case, and (3) the fact that the conflict was not the result of affirmative action by the law firm. *Id.* at 1126-1127. Because these factors weighed against disqualification, the court held that Jones, Day was required to withdraw from representing one of its clients.

Drummond and *Carey Canada* also reached decisions more flexible than *Truck*. Those courts held that a law firm could eliminate a conflict by, in effect, firing one of its clients, provided the unwanted attorney-client relationship was inadvertently created and terminated quickly with a prompt motion to withdraw. In *Carey Canada*, the court held that the conflict rule applicable to former representations would apply if a lawyer *immediately* sought to withdraw as counsel upon discovery of a conflict where there was no consent.

Under *Truck*, however, there are no exceptions. Thus, the door is open for invoking the automatic disqualification rule to unfair tactical advantage. Even where no confidential information could be disclosed through concurrent representations on *unrelated* matters, as in the hypothetical discussed above, an attorney *must* be disqualified.

Clearly, *Truck* shows that Rule 3-310(B) has the potential for being abused and misapplied. This potential was underscored recently in *Santa Clara County Counsel Attorneys Ass'n v. Woodside*, 12 Cal. App. 4th 1543 (1993), review granted, 93 Daily Journal D.A.R. 6129 (May 13, 1993). There, the court ruled that employees, who happened to be attorneys, were barred from suing their employers under *Truck*, even if this precluded them from effectively enforcing a collective bargaining agreement. The court ruled that an attorney-employee could not sue his employer without violating the duty of loyalty rule pronounced in *Truck*.

One solution to the dilemma posed by *Truck* would be to foreclose most potential conflicts by anticipating them. In the hypothetical involving the Widget Corporation, for example, the law firm could avoid a future conflict by refusing to represent Mr. Smith from the start and advising the Widget Corporation to hire independent counsel for all employees and officers. Given the added costs that would be involved for the client, this solution is probably untenable.

In any event, it probably would not be possible to anticipate and avoid all possible future conflict situations. A more realistic solution would be a revision of Rule 3-310(B) to permit a balancing of the competing interests involved.

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