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When Customer Service Hits an All-Time Low

A primer for commercial litigators seeking maintenance and/or recovery of their clients' intellectual property rights

By John D. Parsons & Justin D. Leonard, Parsons Farnell & Grein, LLP

Irrespective of the form in which our clients conduct their businesses in today's marketplace, they likely rely on one or more intellectual property licenses on a daily basis. Computer software represents one extremely broad example of such intellectual property licenses that receive special protections under the Bankruptcy Code.



John Parsons



Justin Leonard

Our clients do not typically "own" the computer software upon which they rely each day. Rather, whether straight out of the box or specifically customized for the end-user, the software is subject to a license. The license may be embedded in the software itself, attached to the shrink-wrap, or documented in accordance with negotiated terms. Licenses are not necessarily one-sided. End-users often require technical support, regular updates, and quick fixes should bugs arise. Licenses may provide



for such continued support. The software author, however, retains ultimate control over the copyrighted work. Such control can wreak havoc when the software licensor—or the licensor of any copyrighted or patented property upon which your clients' income relies—files for bankruptcy.

To illustrate the point, consider the

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Comments From the Editor

Unconscious Effective Practices

Dennis P. Rawlinson
Miller Nash LLP

Anyone who has prepared to run a marathon or has become a serious bicyclist knows that you tend to become introverted, introspective, and egocentric. For instance, you worry about whether you've placed sufficient oil between your toes to avoid chafing and whether you've been able to remove an additional two ounces of weight from your bicycle. So an effective trial practice requires great attention to detail and at times what must seem to be an introverted, intro-

spective, and egocentric approach to the practice.

Discussed below are a few effective practices that most of us regularly employ unconsciously. In an effort to improve our skills of persuasion and to enable us to pass those skills on to those who will follow us, it makes sense from time to time to stop and analyze what good trial practitioners do automatically.

1. Impact points in questions.

(a) Generally.

Impact points in questions can have a substantial effect on the persuasiveness of the presentation of evidence.

Clarity and emphasis are generally improved by placing your impact point near the end of a sentence. The impact point is the word or phrase that you

are trying to emphasize, the point the questioner is attempting to draw to the fact-finder's attention. For instance, if the questioner is trying to draw to the fact-finder's attention the time of day (perhaps because the witness was late for work, which begins at 8:30 a.m.), the questioner might ask:

"You didn't leave home that morning in your Ferrari until 8:28 a.m.?"

On the other hand, if the point to be emphasized is the kind of car the witness was driving, the question would be asked:

"The car you drove that morning to work was a Ferrari?"

The impact point belongs as close

to the end of the sentence as you can place it without twisting your syntax because once you have communicated your point of emphasis, the listener tends to stop listening. Put another way, the purpose of your sentence is to get to your impact point. Once you have gotten to it, end the sentence. Keeping impact points in mind generally assists the questioner in shortening his or her sentences and avoiding rambling, complex sentences that often obscure the very point that the questioner is attempting to make.

(b) On cross-examination.

Particularly on cross-examination the impact point should be at the end of the sentence, leaving the witness no time to think. Returning to the question:

"You didn't leave your home that morning until 8:28 a.m.?"

That phrasing leaves the witness no time to think before answering the question. The fact-finder will notice any unusual hesitation, and it will cause suspicion. In contrast, if the point of emphasis were placed in the middle of a longer complex sentence, the witness would have several seconds to think of a response before answering. A less effective question would be:

"You didn't leave your home until 8:28 a.m. that morning, and you know that is the case because as you got into your Ferrari you looked at the clock on

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Comments From the Editor

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the dashboard, which lights up when you close the driver's door?"

(c) Direct examination.

Just the opposite practice should be undertaken with your own witness on direct examination, particularly if the witness is nervous. You want to give the witness as much time as possible to answer questions and not present the impact point at the last second unless you are sure the witness is ready to handle the question. For instance, if you want to know what the witness saw on the morning of May 14, 1998, at the corner of the intersection, you might ask:

"What did you see when you arrived at the intersection after leaving your home and arranging with your wife to have her run the errands you had originally planned to run?"

(d) Greater emphasis for impact points.

Impact points can be further emphasized by a number of other speaking techniques, including:

- Change of pace
- A pregnant pause before the emphasis point
- Change in the tone of your voice
- A slight nod of your head
- Turning your body toward the fact-finder and pausing

The number of means available to draw emphasis to your impact point are limited only by your imagination. The lesson is to stop and consciously determine the "point" you are trying to make with each question and then deliberately structure the question to increase or decrease the "impact" of the point.

2. Use of the eyes.

One's eyes are often the most powerful means of communicating. Actors and actresses know that credibility and persuasion arise only when you put aside your script and look at the other actors and actresses with whom you are communicating. Similarly, seasoned practitioners use their notes to only a limited degree as they realize that looking at the witness or looking at the fact-finder is too powerful a technique to be lost by dependence on a script.

Impact points again can be emphasized with the use of the eyes. If a particularly important question is being asked of a witness being cross-examined, why not turn to the fact-finder and engage the judge's or jury's eyes as you ask the question and make your impact point. If necessary, ignore or turn your back on the cross-examined witness. Your eyes draw the fact-finder's attention to your point and subtly communicate that this is a point of importance and emphasis.

3. Images.

The most accomplished trial lawyers do not speak words; they paint images. They use the language to draw a word picture, which the fact-finder can easily imagine based on his or her experience. Often the specific technique is to use an analogy or a simile.

For instance, your expert witness should be prepared well enough to describe the "unanticipated outward vector of lateral stresses on the fission chamber's brittle ceramic containment wall" by an analogy that likens the action to a "rock smashing through a living room picture window." The fact-finder is able to cut through the scientific jargon and understand the analogy and the point. Each of us can easily imagine a rock smashing through the picture window of a home. Although each of us may be envisioning a different living room, a different picture window, or a different size of rock, the image is nonetheless vivid and allows

the witness and the witness's lawyer to have a private dialogue with each of the listeners.

During the course of a hearing or a trial, a memorable image can often be drawn or may even arise as a matter of happenstance. For instance, the witness whose cellular phone rang in his briefcase while he was testifying might provide a rare moment of comic relief. In closing argument, the image of that witness can best be resurrected not by describing the witness's background, but by simply reminding the fact-finder of the memorable incident:

"Remember Mr. Brown, the witness whose cell phone rang while he was on the stand?"

Immediately the fact-finder will have in mind the image of the witness to whom you are referring. Similarly, if you want to refer to the expert's testimony about the vector and stresses, don't repeat the technical analysis; simply remind the fact-finder of the expert who testified about the interaction of the stresses being like "a rock smashing through a living room picture window."

The beauty of images is that not only do they communicate powerfully in the first place, but also, once an image has been established, the repetition of that image can immediately bring to mind the witness, the result of the experiment, or the point to be made.

4. Conclusion.

All of us are faced with two challenges as we attempt to master the art of persuasion. First, finding the time to prepare with the sufficient detail to be sensitive to issues like impact points, use of the eyes, creating images, and using our passions. Second, stopping when we see an accomplished practitioner employing these methods and analyzing what was done, how it was done, and how it

Letter to the Editor

November 9, 2004

This is in the nature of an additional footnote to the excellent article by Stephen Bushong in the Fall 2004 issue of *Litigation Journal* (Vol. 23, No. 3, p. 27) entitled "Ninth Circuit Continues Injunction Against the Ashcroft Directive," which discussed the attempt by Attorney General Ashcroft to block Oregon's Death with Dignity Act.

The State of Missouri had a somewhat similar problem, which found its way to the United States Supreme Court in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 10 S.Ct. 2841 (1990). In that case a young lady, Nancy Cruzan, had severe brain injuries in an automobile accident, and after approximately three weeks in a coma, progressed to an unconscious state in which she was able to receive some nutrition and hydration by tube. She remained in a persistent vegetative state for several years, being cared for in a state hospital, with virtually no chance of ever regaining her mental faculties. Finally her parents requested that the feeding tube be withdrawn, basing the request partly on the fact that she had previously expressed (orally) the thought that "if sick or injured she would not wish to continue her life unless she could live at least halfway normally..." (497 U.S. 268).

The hospital staff refused to with-

draw nutrition and hydration without court approval, so the parents sought and obtained probate court approval; but this was reversed by the Missouri Supreme Court, in a divided opinion which held that the testimony adduced at trial did not amount to clear and convincing proof of the patient's desire to have hydration and nutrition withdrawn.



On *certiorari* the United States Supreme Court affirmed, in a divided opinion, on the rather narrow ground that it was not unconstitutional for a state to require clear and convincing evidence of a patient's desire not to live as a vegetable. So the problem was left with the states.

The *Cruzan* case was the subject of a



book written by William H. Colby, the attorney for the parents. *The Long Goodbye, The Deaths of Nancy Cruzan* (2002) relates the background and handling of the case in eloquent detail. From it we learn that on remand the standard of proof was met, and the tube was finally removed.

An interesting aspect of the Missouri case, in comparison with the Oregon case, was that John Ashcroft was Governor of Missouri at the time of the *Cruzan* case and apparently determined Missouri's position, which was that the state has the right to determine its own policy in such matters. But now, in the Oregon case, he claims a Federal right to override the state policy.

This issue of the *Litigation Journal* arrived on November 9, 2004, and the foregoing letter was written on that date. That evening the news reported that the Department of Justice has petitioned the Supreme Court for review of *Oregon v. Ashcroft*, and also that Ashcroft has tendered his resignation as Attorney General, effective on confirmation of his successor. One can't help wondering if his successor will be as vigorous in attempting to override Oregon's twice-voted policy on Death with Dignity.

—Randall B. Kester
Cosgrave Vergeer Kester LLP

Shareholder Derivative Litigation Update:

Delaware Clarifies Distinction Between “Direct” and “Derivative” Claims

By Erick J. Haynie, Perkins Coie LLP

I. Introduction

“A shareholder derivative suit is a uniquely equitable remedy in which a shareholder asserts on behalf of a corporation a claim belonging not to the shareholder, but to the corporation.”¹ It is often said that a derivative action is really two lawsuits in one—an action to compel the corporation to sue someone (i.e., a director or a third party), and the substantive action against that someone.

Like class action lawsuits, derivative actions are representative in nature. A derivative plaintiff represents not just his own interests, but also the interests of the corporation and his fellow shareholders. Because of their representative nature (and the public policy behind the business judgment rule), derivative actions are subject to a host of special procedural rules and limitations. These rules and limitations are woefully complicated and can generate expensive legal bills for all parties. The rules concern a number of topics, including, for example, the requirement of a pre-suit demand on the corporation’s board of directors, the potential appointment of a special litigation committee (generally with independent counsel), the adequacy of the representative shareholder, and equitable fee awards to a prevailing plaintiff.² Perhaps most significant of all, any judgment in a derivative action is payable to the corporation, not the plaintiff.³

In light of these special rules, one of the most important issues in any shareholder derivative action is whether it really is one. In many cases, this question is outcome determinative.

In a recent decision by its Supreme Court, Delaware clarified its test on this issue. See *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (2004). The law of Delaware will often govern in derivative cases filed in Oregon. This is the case for two reasons. First (and as discussed below), Delaware law will govern regardless of forum when the corporation is a Delaware corporation.⁴ Second, even in cases not involving Delaware corporations, Delaware law is often followed as persuasive given that it is relatively well developed.

In *Tooley*, the Delaware court abandoned its traditional “special injury” test in favor of a brighter-line test that focuses not on the nature of the alleged wrong to the plaintiff, but on whether the alleged wrong caused harm to the corporation.

Under the traditional test, an action was deemed to be a direct action (and not a derivative action) if the plaintiff could show that he experienced some “special injury” as a result of the subject transaction.⁵ A “special injury” was an injury that was “separate and distinct from that suffered by other shareholders,

... or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation.”⁶

An easy example of a special injury would be a breach of contract between the corporation and that particular shareholder. A more complicated (and less certain) example would be a merger or stock transaction that affected one group of stockholders differently than others.

In *Tooley*, the Delaware Supreme Court described the “special injury” test as “confusing jurisprudence” that is “not helpful” to the issue. In no uncertain language, the court cast that rule aside



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II. The Old “Special Injury” Test

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Shareholder Derivative Litigation Update

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as “erroneous” and adopted the “corporate injury” test described below.⁷

III. The New “Corporate Injury” Test

Under *Tooley*, the new test is as follows: “We set forth in this Opinion the law to be applied henceforth in determining whether a stockholder’s claim is derivative or direct. That issue must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholder, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?”⁸ Under this test, a shareholder wishing to bring a direct action “must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.”⁹

In other words, if the wrong alleged by the shareholder caused harm to the corporation, it is a derivative action. If the alleged wrong caused harm to the plaintiff, and the alleged wrong did *not* cause harm to the corporation, it is a direct action.

Delaware’s new test would seem to widen the definition of a derivative claim. This is because any action will be derivative so long as an injury to the corporation can be shown. This may be both good news and bad news for director defendants. The good news is that, if a director is more likely to be a derivative defendant, he is more likely to be able to raise a variety of procedural defenses that would not otherwise apply. The bad news, however, is that it is much more difficult to establish indemnity rights in a derivative action than a direct action.¹⁰

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IV. Choice of Law

Finally, and as hinted above, the *Tooley* test should apply to any derivative action involving any Delaware corporation, regardless of forum. Under the internal affairs doctrine (recognized in Oregon and Delaware), the law of the state of incorporation applies to all issues relating to the internal affairs of a corporation.¹¹ Shareholder lawsuits, which seize upon the power of the board to initiate litigation in the name of the corporation, are matters peculiar to the internal affairs of a corporation. ■

(Endnotes)

¹ *Levine v. Smith*, 591 A2d 194, 200 (Del. 1991), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).

² For a fairly comprehensive and practical overview of rules surrounding derivative actions, see Ferrara, Abikoff & Gansler, *Shareholder Derivative Litigation: Besieging the Board* (1997).

³ *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (2004).

⁴ See discussion below in Section IV (Choice of Law).

⁵ See *Lipton v. News Int’l*, 514 A.2d 1075, 1078-79 (Del. 1986).

⁶ *Moran v. Household Int’l. Inc.*, 490 A.2d 1059, 1070 (Del. Ch. 1985), *aff’d*, 500 A.2d 1346 (Del. 1986).

⁷ *Tooley*, 845 A.2d at 1033-34.

⁸ *Id.*

⁹ *Id.* at 1039.

¹⁰ See 8 Del. Code § 145(b).

¹¹ See ORS 60.714(3) (providing that Oregon’s corporate laws “do[] not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state”); see also *McDermott v. Lewis*, 531 A2d 206, 215 (Del 1987) (“The internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs”).

Video Depositions

By Tonya Van Walleggem

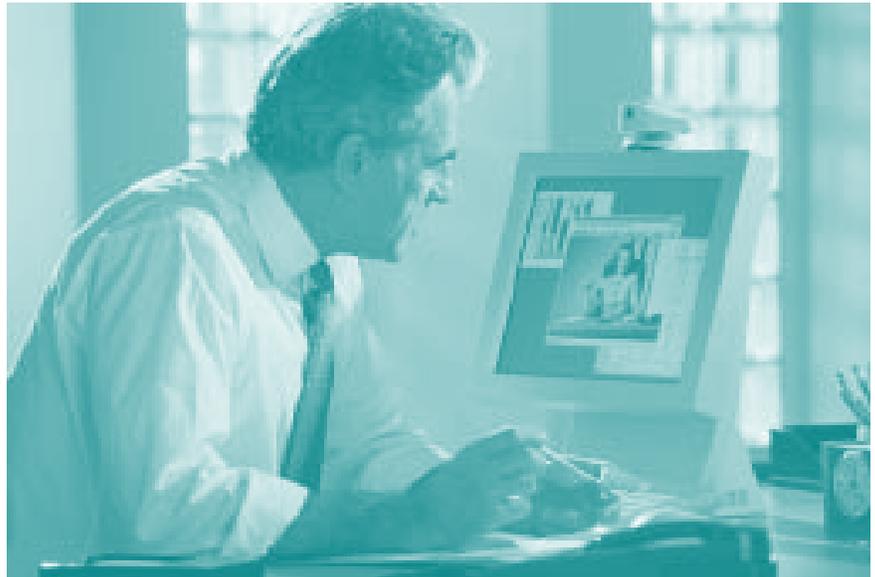
▲ *Statutory Authority for Video Depositions*

In Oregon, video depositions are permitted by Oregon Rule of Civil Procedure 39 C(4) and Federal Rule of Civil Procedure 30 (b)(2). Video depositions are most frequently used to preserve testimony when a witness will be unavailable for trial. However, given advances in technology video depositions can be used to present compelling evidence at trial regardless of witness availability.

▲ *Uses for Video Depositions*

Oregon Revised Statute 45.250(1)(b) permits the use of video depositions by an adverse party at trial "for any purpose." As such, portions of an adversary's video deposition can be used:

- (1) In opening statements to set the intended tone for trial, or;
- (2) To impeach a deponent's live testimony. Video depositions are also useful to present the testimony of foreign witnesses. For example, video depositions in combination with video conferencing can be used to obtain the testimony of voluntary (but unavailable) foreign witnesses to avoid the burdensome procedural requirements of foreign national and international law. Video depositions can also be used to simplify key testimony with the insertion of English subtitles for deponents requiring translation or other assisted speech.



▲ *Grounds for Opposing the Use of Video Depositions*

To avoid the potentially powerful effect that video depositions may have at trial, litigants often:

- (1) Oppose their opponent's ability to take a video deposition based on grounds of annoyance, embarrassment, oppression or undue burden. (See *State ex rel Anderson v. Miller*, 320 Or. 316, 882 P.2d 1109 (1994)) and/or;
- (2) Oppose the introduction of video depositions at trial based on prejudice (See *Travis v. Knappenberger*, 87 Fed. Appx. 24, 2003 WL 229 77 459 (9th Cir. Or.)) ■



Deposition of an Organization: What You Don't Know Can Hurt You

By Jeffrey J. Schick, Davis Wright Tremaine LLP

"If you don't know the answer, just say you don't know." It is one of the most fundamental – and seemingly obvious – preparatory instructions for a typical deposition. However, that generic instruction can cause headaches in the context of a deposition of an organizational deponent under ORCP 39 C(6) or FRCP 30(b)(6). Because those rules allow a designated individual to speak on behalf of an entire organization, the answer "I don't know" has potentially broad and unanticipated ramifications. At a Rule 39 C(6) or Rule 30(b)(6) deposition, "I don't know" does not simply mean that



the designee cannot answer the question; it means that the organization itself does not know the answer. Some courts have held that an organization cannot later contradict an "I don't know" answer

based on the knowledge of someone else in the organization. Therefore, counsel must use caution to ensure that the ignorance of a particular designee under Rule 39 C(6) or Rule 30(b)(6) is not confused with ignorance of the organization itself.

ORCP 39 C(6), and its federal counterpart, FRCP 30(b)(6), are underutilized procedural mechanisms that allow a party to take the deposition of an organization, such as a corporation, partnership, association, or government agency. Under both rules, a party may name the organization (by notice of deposition or subpoena) and "describe with reasonable particularity the matters on which ex-

amination is requested." The organization is then required to designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and must set forth, for each person designated, the matters on which that person will testify. Significantly, the designee testifies not only regarding that particular individual's knowledge, but as to "matters known or reasonably available to the organization."

Duty to Prepare

Courts have routinely held that the rules governing organizational depositions impose an affirmative obligation on the organization to prepare and educate the corporate designee. See e.g., *Starlight Intern. Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D.Kan. 1999) ("Corporations...have a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter.") (Emphasis added). That obligation can be particularly onerous if the organization does not have an individual who alone possesses personal knowledge of the matters on which ex-



amination is requested. In such a case, the organization has an obligation to effect a "brain dump" – i.e., the organization must transfer all of its organizational knowledge to its designee. *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation."). What also comes as a surprise to many is that "matters known or reasonably available to the organization" includes facts known by the organization's attorney. Courts have required designees to testify to facts learned from the organization's attorney, despite the assertion of the attorney-client privilege. See e.g., *Protective Nat. Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 278 (D.Neb. 1989).

Given the duties imposed by courts, complete preparation of an organizational deponent is a nearly impossible

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Deposition of an Organization

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task. Regardless of how well-prepared an individual is with regard to a particular topic, it is likely that a question will be posed during the course of a deposition that will exceed the designee's knowledge or, in the case of a "brain dump," the designee's memory. A few "I don't know" answers, therefore, are to be expected from an organization's designee during the course of a deposition.

However, as a practical matter, organizational deponents typically offer more than a few "I don't know's." The reason for this is simple: many attorneys and organizations shirk their responsibilities to prepare the designee. The attorneys either do not understand the scope of their obligation, or they are willing to gamble that any damage that occurs during the deposition is outweighed by the cost of preparation (which can be significant). In certain circumstances, the gamble may pay off. A designee's "I don't know" answer can be harmless if the organization truly does not have any knowledge with regard to the question (and it is not a central question in the case), or if the attorney taking the deposition does not seize on the significance of the "I don't know" answer. But suppose that the question involves a key evidentiary issue that the organization needs to oppose. Can the organization later contradict its "I don't know" deposition answer on summary judgment or at trial by offering additional testimony?

Evidence that contradicts the testimony of an organizational deponent excluded

Oregon appellate courts have yet to address the evidentiary effect of testimony by an organizational deponent. This issue has been addressed by a number of courts from other jurisdictions, and the answer provided by some of those courts will surprise many practitioners:

Regardless of how well-prepared an individual is with regard to a particular topic, it is likely that a question will be posed during the course of a deposition that will exceed the designee's knowledge or, in the case of a "brain dump," the designee's memory.

the designee's testimony is binding; if the designee doesn't know the answer, the organization doesn't know it either. Those courts that have excluded testimony inconsistent with prior answers have seized on the duty to prepare a designee. For example, in *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F.Supp.2d 82, 94 (D.D.C. 1998), the court relied on the fact that an organization has an obligation to prepare its designee to act as the "voice" of the organization. Accordingly, an organization cannot later offer new or different answers that could have been made at the time of the organizational deposition "[u]nless it can prove that the information was not known or was inaccessible." *Id.* *Rainey* also relied on the fact that the purpose of Rule 30(b)(6), as demonstrated by the advisory committee notes, was to "prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case." *Id.* at 95. District courts in Connecticut and Pennsylvania have similarly held that a designee who testifies that a corporation does not know an answer cannot effectively change that answer by introducing new evidence at trial or on summary judgment. In *Newport Electronics, Inc. v. Newport Corp.*, 157 F.Supp.2d 202, 219-220 (D.Conn. 2001), the court held that, because the corporation received notice of the topics on which the party wished to depose it, its designee "was not at liberty, therefore, to delay reviewing

information on those topics until after the deposition and, thereby, submitting information in his affidavit which contradicts statements in his deposition regarding his lack of knowledge on various topics." Similarly, in *Ierardi v. Lorillard, Inc.*, 1991 WL 158911 (E.D.Pa. 1991), the court held that a corporation was barred from introducing evidence at trial with respect to an issue on which its corporate designee lacked knowledge during his deposition.

Evidence contradicting the testimony of an organizational deponent admitted

More recently, courts have declined to take such a hard stance on the testimony of organizational deponents. The Seventh Circuit has rejected the argument that the testimony of an organizational deponent is absolutely binding. In *A.I. Credit Corporation v. Legion Ins., Co.*, 265 F.3d 630, 637 (7th Cir. 2001), the court held that "[n]othing in the advisory committee notes indicates that the Rule goes so far[.]" and stated that "testimony given at [a deposition of an organization] is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes[.]" *Id.* (quoting *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F.Supp.2d 786, 791 (N.D.Ill. 2000)). Other courts, recognizing the daunting task of preparing a designee, have similarly held that an organizational deponent is no more bound by deposition testimony than any other witness, and that the organization is simply subject to impeachment. See *R & B Appliance Parts, Inc. v. Amana Co., L.P.*, 258 F.3d 783, 786-87 (8th Cir. 2001) (corporate deponent is no more bound by deposition testimony than other witnesses, "albeit at the risk of having his or her credibility impeached by the introduction of the deposition"); *Interstate Narrow Fabrics, Inc. v. Century USA, Inc.*, 218 F.R.D. 455, 462 (M.D.N.C.

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2003) (company may supplement or contradict its designee's deposition testimony on summary judgment); *W.R. Grace & Co. v. Viskase Corp.*, 1991 WL 211647 (N.D.Ill. 1991) ("It is true that a corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be 'bound' by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue.").

Exclusion of contradictory testimony as a discovery sanction

Even assuming that the testimony of an organizational deponent is not binding as a judicial admission, repeated "I don't know" answers can run an organization into another problem: discovery sanctions. In Oregon and in federal court, the rules governing organizational depositions have teeth. ORCP 46 and FRCP 37 provide for sanctions in the event that an organization's designee fails "to appear" for the deposition. Courts have expanded the reach of those sanctions by liberally interpreting the term "appear," and have held that the failure to produce a prepared Rule 30(b)(6) designee is "tantamount to failing to appear and is sanctionable under [FRCP] 37(d)." *Casper v. Esteb Enterprises, Inc.*, 119 Wash. App. 759, 768, 82 P.3d 1223 (2004), citing *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3rd Cir. 2000).

In most cases, the logical remedy for failing to appear (either in the traditional sense or as that term has been expanded by courts) is to award expenses to the deposing party and to order the designee to adequately prepare and appear. But that is not the only remedy available under Rule 46 and Rule 37. Courts also have

Even assuming that the testimony of an organizational deponent is not binding as a judicial admission, repeated "I don't know" answers can run an organization into another problem: discovery sanctions.

authority to enter orders "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." ORCP 46 B(2)(b); FRCP 37(b)(2)(B). That is exactly how a trial court in Washington handled an organization's evasive answers, excluding any evidence at trial that contradicted answers by the organization's Rule 30(b)(6) designee.

In *Casper v. Esteb Enterprises, Inc.*, 119 Wash. App. 759, 767-68, 82 P.3d 1223 (2004), the Washington Court of Appeals upheld the trial court's exclusion of evidence contradicting the testimony of the organization's designee. The Court of Appeals noted the split of authority on the "binding" effect of Rule 30(b)(6) testimony, but ultimately declined to decide the issue. Rather, the court held that the trial judge acted within his discretion by imposing one of the harsher discovery sanctions based on the organization's designee's repeated "I don't know" answers.

Uncertainty in Oregon

While Oregon appellate courts have not yet addressed the evidentiary effect of testimony by an organization's designee, the issue was addressed last fall in Marion County Circuit Court in *Oregonians for Sound Economic Policy v. State Accident Insurance Fund Corporation*, Case No. 00C 15769. During the proceedings, the

defendant's organizational designee took the stand to testify in his personal capacity. Plaintiff's counsel objected when it became apparent that the witness intended to contradict certain testimony that he had provided as the defendant's designee pursuant to an ORCP 39 C(6) deposition. The court indicated that it had never encountered the issue before, and invited briefing from the parties. After hearing argument on the issue, the court – which was sitting

without a jury – elected to treat the issue of contradictory testimony as a matter of weight, not admissibility.

While the court in *Oregonians for Sound Economic Policy* followed the modern trend and allowed the introduction of contradictory evidence, there is no guarantee that other Oregon courts would decide the issue the same way. The exclusion of contradictory evidence is harsh, but there are persuasive arguments for requiring an organization to stick with its "I don't know" answers (particularly, in the context of a jury trial). Most notably, impeachment is an entirely inadequate remedy in the case of an ill-prepared organizational deponent. Although an individual's credibility may be successfully attacked if he or she later recalls information that was previously forgotten, an organization can easily explain away contradictory answers by asserting that the designee was not as informed as the individuals with personal knowledge of the matters at issue. In extreme circumstances, it is also possible that an Oregon court would follow the lead of the court in *Casper*, excluding contradictory testimony as a discovery sanction. Considering the uncertainty that surrounds testimony pursuant to ORCP 39 C(6) and Rule 30(b)(6), organizations and their counsel take serious risks by failing to adequately prepare their designees.

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Deposition of an Organization

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Strategies for avoiding a motion to strike evidence contradicting Rule 39 C(6) and Rule 30(b)(6) testimony

While human fallibility will always add an element of uncertainty to the deposition of an organization, there are a number of things attorneys can do to eliminate or rectify many of the more dangerous "I don't know" answers:

1. Narrow the field of inquiry

The first step in responding to an ORCP 39 C(6) or Rule 30(b)(6) designation is to narrow the field of potential testimony. Counsel should object to subjects of inquiry that are overly broad, and should carefully and specifically set forth the subjects on which each designee will testify. By winnowing the scope of the organizational deposition, counsel can (1) ensure that the designee understands the areas on which knowledge is required; and (2) provide a basis for objection to the scope of the questions if the examination begins to drift beyond the areas on which the designee has been prepared.

2. Find the persons "most knowledgeable"

Second, counsel should not hesitate to designate multiple deponents if the requests involve areas that are too diverse for preparation of a single designee. While there is a temptation to expose as few individuals as possible to deposition, a designee will perform better on topics on which the individual has personal knowledge. For example, a corporation's president may seem best equipped to withstand the pressure of a tense deposition, but a calm demeanor cannot cover up gaping holes in a deposition transcript with respect to issues with which the president has only passing knowledge. In addition to providing clear divisions among topic areas, multiple designees

While human fallibility will always add an element of uncertainty to the deposition of an organization, there are a number of things attorneys can do to eliminate or rectify many of the more dangerous "I don't know" answers.

demonstrate an organization's willingness to provide its most knowledgeable individuals, and suggest to opposing counsel and the court that the organization is cooperating in good faith.

3. Adequately prepare the designee

The single best way to avoid problems with "I don't know" answers is to spend the resources to adequately prepare the designee. It is not only necessary to avoid surprise answers or incomplete testimony, it is an affirmative obligation on organizations and their counsel. At the very least, counsel must assure himself or herself that the designee's knowledge is as broad as counsel's knowledge. One of the first questions posed to a designee is "What did you do to prepare for this deposition?" If the designee answers "nothing," a motion for sanctions may not be far behind.

4. Be prepared to object

If counsel has properly narrowed the scope of examination and adequately prepared the witness, it will be much easier to identify questions that exceed the scope of the examination. If a question seeks information that is beyond the areas prepared by the designee, counsel should immediately object to the question and state that the designee's answers are not intended as the answers of the organization. The organization's counsel

then faces a more difficult issue: should the designee be instructed not to answer the question?

Even if counsel is confident that a question is well beyond the scope of the examination, an instruction not to answer is risky business. Under FRCP 30(d)(1), an instruction not to answer a deposition question is appropriate only (1) to preserve a privilege; (2) to enforce a limitation on examination ordered by the court; or (3) to present or preserve

a motion for a protective order.¹ There is no recognized privilege for questions that exceed the scope of examination of the organization. Thus, in federal court, counsel should not instruct a designee not to answer based on such an objection unless counsel is prepared to seek a protective order. See *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727, 730 (D.Mass. 1985). However, there is no guarantee that a protective order will be granted. District courts are split as to whether a party may inquire into matters beyond the scope of a Rule 30(b)(6) deposition notice. Some courts have held that examination is limited to matters within the scope of the notice, see e.g., *Paparelli*, 108 F.R.D. at 730, but a number of courts have refused to similarly limit the scope of organizational depositions, citing the liberal discovery requirements of the Federal Rules of Civil Procedure. See *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-67 (N.D.Cal. 2000) ("Limiting the scope of a 30(b)(6) deposition frustrates the objectives of Rule 26(b)(1) whenever the deposing party seeks information relevant to the subject matter of the pending litigation that was not specified."); See also *Cabot Corp. v. Yamulla Enterprises, Inc.*, 194 F.R.D. 499, 500 (M.D.Pa. 2000); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995).

The uncertainty surrounding instructions not to answer makes it imperative

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that counsel adequately and clearly state on the record his or her objections to the scope of the examination, and indicate that the designee is not authorized to speak on behalf of the corporation with respect to questions outside the scope of the notice. Even if the court allows examination beyond the scope of the notice, proper objections will provide the framework for a motion in limine to exclude portions of the designee's testimony, or jury instructions to the effect that certain answers or omissions are those of individual witnesses and not the organization itself. See *Detoy*, 196 F.R.D. at 367 (suggesting that the proper course of action is to note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not binding on the organization, and then to seek "jury instructions that such answers were merely the answers or opinions of individual fact witnesses, not admissions of the party").

5. Offer another witness

An equally challenging situation arises when a question is arguably within the scope of the examination but concerns a topic on which the designee is not prepared. In that case, counsel may be able to defuse the situation by objecting on the grounds that the subject matter is outside the scope of the examination, but, at the same time, offering to produce another witness or provide an answer at a later date. In most cases, an offer to provide an answer at a later date will eliminate a potential motion to compel.

6. Change the language

Counsel also should be cautious when instructing the witness on how to answer a question that exceeds the scope of that individual's knowledge. Rather than answering "I don't know" to such a question, the designee should state that the question seeks information beyond

As in any deposition, counsel must be flexible. If (or, more aptly, when) a designee answers "I don't know" to a question that is clearly within the scope of the examination, counsel should immediately intervene.

the scope of the designee's preparation. Such an answer will avoid any confusion as to whether the organization itself or only the designee lacks the requisite knowledge.

By stating that the information is beyond the scope of the designee's preparation, the burden falls on opposing counsel to press for an answer, request another designee, or seek a motion to compel. The organization then will have an opportunity to rectify the problem (either by providing another designee or more fully preparing the initial designee) before the "I don't know" answer is before the court.

7. Be flexible

As in any deposition, counsel must be flexible. If (or, more aptly, *when*) a designee answers "I don't know" to a question that is clearly within the scope of the examination, counsel should immediately intervene. At that point, counsel should interrupt the deposition and clarify that the designee does not know the answer, but that the organization will provide an answer, either through another designee or by other means. By responding quickly and assertively, counsel generally can avoid any future disputes about what an organization does or does not know.

8. Correct the transcript

Finally, counsel should be aware of the opportunity to make substantive changes to the testimony *after* the depo-

sition. Both Oregon and federal rules of procedure allow a witness, upon request of the party at the time the deposition is taken, to examine the transcript and make changes to the testimony. ORCP 39 F; FRCP 30(e). If a witness desires to make changes to the form or substance of the testimony, the witness may submit a statement of such changes and the reasons for the changes. In a typical deposition, the prospect of impeachment limits the effective-

ness of substantive changes to testimony. However, in the context of a deposition of an organizational deponent, the cited reason for the change in testimony simply can be that the information was not known to the organization's designee at the time of the deposition, despite the organization's good faith efforts to prepare the designee. Essentially, through the procedures authorized by ORCP 39 F and FRCP 30(e), an organization has an opportunity to correct any mistakes made by its designee, and can do so with little risk of impeachment. ■

(Endnotes)

- 1 The Oregon Rules of Civil Procedure provide potentially broader support for an instruction not to answer. ORCP 39 D(3) provides that, in addition to the grounds for an instruction not to answer provided in the Federal Rules, counsel may instruct a witness not to answer to preserve a "constitutional or statutory right." Arguably, the requirement set forth in ORCP 39 C(6) that a party "describe with reasonable particularity the matters on which examination is requested" creates a statutory right regarding the scope of examination. Oregon courts have yet to address the scope of an ORCP 39 C(6) deposition or the propriety of an instruction not to answer based on that Rule.

Does a Discovery Standard Postpone the Running of Limitations Against a Contract Action?

By Charles F. Adams, Stoel Rives

As noted in the April 2002 Litigation Journal, an action for breach of contract accrues immediately upon breach.¹ The subject of the present article is a corollary to that principle. Where an action accrues immediately upon breach, does the limitation period for bringing a contract claim run from breach or from when the breach was or reasonably should have been discovered?

Summary Answer

It is highly likely that the six-year limitation period of ORS 12.080 begins to run immediately upon breach of a contract, without regard to whether (1) actual damage has occurred or (2), absent fraudulent concealment by the breaching party, whether the wronged party knows or reasonably should know that a breach has occurred. There is an Oregon federal district court case announcing this very holding. There is, however, one 35 year old Oregon Supreme Court medical malpractice case which defines "accrual" broadly enough to possibly extend a discovery rule to initiating the limitation period for *all* causes of action, including actions for breach of contract. This 1966 case employs, however, a liberal approach to statutory interpretation which is today rejected in Oregon. Additionally, there are three subsequent Oregon Supreme Court cases which either treat the 1966 case as strictly a medical malpractice case or ignore it entirely in tolling a breach of contract claim only upon proof of fraudulent concealment. Consequently, Oregon Supreme Court is today not likely

to extend the reasoning of this earlier medical malpractice case to breach of contract claims.

Discussion

Two statutes establish the limitation period governing when an action must be brought for breach of contract. First, ORS 12.010 provides:

"Actions shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute."

The phrase "after the cause of action shall have accrued" has been in effect continuously since 1862. General Laws of Oregon, Oct. 11, 1862, § 3 (Deady 1845-1864); D § 3; Hill's Ann Laws § 3 (1887); II Codes and Statutes of Oregon, § 3 (Bellinger & Cotton 1902); Lord's Oregon Laws § 3 (1910); Oregon Laws § 3 (Olson 1920); OL § 3; OCA § 1-201 (1930); OCLA § 1-201 (1940); ORS 12.010.

Second, ORS 12.080 provides:

"An action upon a contract
*** express or implied ***

"shall be commenced within six years."

This provision also is ancient. General Laws of Oregon, Oct. 20, 1870, § 9 (Deady & Lane 1843-1872); Hill's Ann Laws § 6 (1887); II Codes and Statutes of Oregon (Bellinger & Cotton 1902); Lord's Oregon Laws § 6 (1910); Oregon Laws § 6 (Olson 1910); OCA § 1-204 (1930); OCLA § 1-204 (1940); ORS 12.080.

There originally was, and still is today, no express discovery provision concerning accrual of contract claims. The comprehensive 1862 enactment did contain an express, but narrow, provision adopting a statutory discovery rule that was applicable only in equity and which, even in equity, applied only to "a suit upon a new promise, fraud, or mistake." General Laws of Oregon, Oct. 11, 1962, § 391. The limitation period for suing in equity was "deemed to commence from the making of the new promise or the *discovery* of the fraud or mistake." Lord's Oregon Laws § 391 (1910) (emphasis added). Even as to fraud claims, however, the running of the statutory limitation period was not postponed until discovery of the fraud in actions at law, as distinguished from suits in equity. *Hood v. Seachrest*, 89 Or 457, 174 P 734 (1918). (This case was decided before the enactment of a 1919 amendment that expressly extended the statutory discovery rule to "an action at law based upon fraud or deceit." General Laws of Oregon, ch 122, § 1 (1919).)

In reaching this conclusion, the court in *Hood* directly addressed the objective intentions of the 1862 legislature in providing that

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"Actions at law shall only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; except where, in special cases, a different limitation is preserved by statute." 90 Or at 461, citing Lord's Oregon Laws § 3.

The court observed that the 1862 legislature had provided several specific exceptions to various actions at law "but no mention is made of cases involving fraud or deceit." Concluding that the legislature had not enacted a discovery provision for actions at law involving fraud, the court noted that "[w]hile exceptions to the general effect of Section 3 [dating limitation periods from accrual] was considered by the legislature, the Code is *silent* as to any exception in the cause of fraud or deceit." (Emphasis added) 89 Or at 462. The same can be said of actions for breach of contract.

In the context of contract actions, a cause of action for breach "accrues" upon breach. *Kantor v. Boise Cascade Corp.*, 75 Or App 698, 703, 708 P2d 356 (1985) ("A cause of action for breach of contract accrues when the contract is breached. A breach of contract is nonperformance of a duty due under the contract." (citation omitted)); *Vega v. Farmers Ins. Co.*, 134 Or App 372, 376, 895 P2d 337 (1995) ("An action on a contract accrues when there is a breach."). In *Hollin v. Libby, McNeill & Libby*, 253 Or 8, 13, 452 P2d 555 (1969), the Oregon Supreme Court explained, "[a]s soon as a party to a contract breaks any promise he has made, he is liable to an action." (Emphasis added; citation and internal quotation marks omitted.) The court also made clear that an action for breach accrues immediately upon breach, even "[i]f that breach is a trifling one [for which] damages cannot well be more than the direct injury caused by that trifling breach." *Id.* (citation omitted).

A corollary to this is that a plaintiff who has provided evidence sufficient to show a breach of contract is entitled to have its case submitted to a jury, even without evidence of actual damages. *Western Feed Co. v. Heidloff*, 230 Or 324, 334, 370 P2d 612 (1962); *Smith v. Abel*, 211 Or 571, 589, 316 P2d 793 (1957); *Schafer v. Fraser*, 206 Or 446, 486-87, 290 P2d 190, 294 P2d 609 (1955). Contra, *Moini v. Hewis*, 93 Or App 598, 602-03, 763 P2d 414 (1988) ("[d]amage is an essential element of any breach of contract").

Schafer, *Western Feed*, and *Smith* also match the state of the law throughout the country.

"Although a breach of contract by a party against whom it is enforceable *always* gives rise to a claim for damages, there are instances in which the breach causes no loss. *** In *all* these instances the injured party will nevertheless get judgment for nominal damages, a small sum usually fixed by judicial practice ***." Restatement (Second) of Contracts §346 cmt b (emphasis added).

This general declaration matches *precisely* the holdings of *Schafer*, *Smith*, and *Western Feed*.

It is, then, the law in Oregon that once a breach occurs, the cause of action has accrued. The limitation period consequently begins to run and will be tolled only upon proof of fraudulent concealment. This has been recognized as recently as *Bruns v. Walters*, 175 Or App 360, 28 P3d 646 (2001). The plaintiff brought suit more than seven years after the contract had been breached. Because the case was brought in equity, the court analyzed whether the claim was timely under the doctrine of laches, in which time "does not start to run until a plaintiff knew or reasonably should have

known he had an interest which was being threatened." In the course of finding unreasonable delay even under laches, the court also addressed the analogous statute of limitations:

"Plaintiff brought his claim in May 1999, nearly seven years after the contract was breached. Ordinarily, the six-year statute of limitations for breach of contract claims runs from the date of the breach, although the limitations period will be tolled *if* the defendant fraudulently conceals the breach. See *Chaney v. Fields Chevrolet Co.*, 264 Or 21, 27, 503 P2d 1239 (1972); see also *Frevach Land Company v. Multnomah County, Department of Environmental Services*, No. CV-99-1295-HU, 2000 WL 1875839, (D Or Dec. 21, 2000) (distinguishing *Chaney*). Plaintiff does not argue that defendants fraudulently concealed the 1992 breach." 175 Or App at 366 n9 (emphasis added).

If a "discovery" rule applies to contract actions, there would have been no need to consider fraudulent concealment in *Bruns*. Similarly, in *Chaney v. Fields Chevrolet*, 264 Or 21, 503 P2d 1239 (1972), which *Bruns* cites, a buyer brought in 1971 an action for a 1964 breach of contract, alleging that he did not discover the breach until 1965. The trial court sustained a demurrer to plaintiff's complaint on the basis that the action had not been brought within the period allowed by the statute of limitations. On appeal, the Supreme Court noted that "The vehicle was resold in 1964; this case was filed June 28, 1971. *Therefore*, the six-year statute *would have run* *** unless the statute was tolled for a period of time." 264 Or at 26 (emphasis added).

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The court then quoted at length from an annotation entitled "What constitutes concealment which will prevent running of a statute of limitations," 173 ALR 376 (1948). The language cited with approval by the court includes the following:

"[F]raudulent concealment of a cause of action from the one in whom it resides by the one against whom it lies constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action. Under this rule, one who wrongfully conceals material facts and *thereby prevents discovery* of his wrong or of the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, *thus taking advantage of his own wrong*, until the expiration of the full statutory period from the time when the facts were discovered or should, with reasonable diligence, have been discovered. * * * 264 Or at 27.

Reviewing the complaint, the Court then found that facts had been alleged sufficient to survive demurrer because the complaint alleged active concealment of facts by the defendant. If it was sufficient to toll the limitations period for a plaintiff to show simply that it did not, or reasonably could not have known, of the facts comprising its claims, no proof of wrongful concealment by the defendant would have been necessary.

Consistent with the reasoning of *Chaney, Bruns, Fraser, Western Feed*, and

Smith, the court in *Kitchen Krafters v. Eastside Bank*, 789 P2d 567, 571-72 (Mont 1990), explained:

"A breach of contract is a legal wrong independent of actual damage. A failure to show actual damages and the resulting inference that none were sustained does not defeat the cause of action. Sutherland on Damages Vol. I § 11 (3rd Edition 1903). An action for breach of contract, then does not require that the plaintiff sustain any damages. In light of these principles, it has long been recognized that the statute of limitations runs from the time of the breach and not from the time of injury, or *in the case of fraudulent concealment*, from the time of discovery. Williston on Contracts at § 2025C." (Emphasis added.) (Citation omitted.)

The cited treatise in turn explains that "[i]gnorance of the plaintiff of his rights or of the facts on which his rights are based, when such ignorance is not due to fraudulent concealment by the defendant, is not generally held to prevent the running of the Statute." Walter H.E. Jaeger, 18 *Williston on Contracts* § 2025C at 779 (3d ed 1978). Accord, *North Coast v. Factoria Partnership*, 974 P2d 1257 (Wash App 1999) (the discovery rule does not apply to an action for breach of a construction contract); *CII Assoc. Ltd. Partnership v. Arrowhead Pac. Corp.*, 497 NW2d 115 (Wis 1993) (cause of action for breach of construction contract accrues when breach occurs, regardless of when breach is discovered); *Richardson Ass'n v. Lincoln-Devore*, 806 P2d 790 (Wyo 1991) (same); *Ft. Oglethorpe Assoc. II Ltd. v. Hails Constr. Co.*, 396 SE2d 585 (Ga 1990)

(same); *Brigham Young Univ. v. Paulsen Constr. Co.*, 744 P2d 1370 (Utah 1987) (same); *Bangor Water Dist. v. Malcolm Pirnie Engineers*, 534 A2d 1326 (Me 1988) (same).

In applying ORS 12.010 and 12.080 to a breach-of-contract claim, Oregon's federal district court also has expressly rejected application of a discovery standard. In *Northwest Administrators, Inc. v. Eugene Sand & Gravel, Inc.*, No. 77-148, 1977 WL 1715 at *1 (D Or Mar. 29, 1977), the plaintiff argued that the six-year period specified in ORS 12.080 for breach of contract claims did not begin to run "until plaintiff obtained knowledge of the facts upon which its cause of action is based." Judge Leavy ruled:

"ORS 12.010, *et seq.*, provides for the tolling of the statute of limitations pending the discovery of certain facts in a limited number of situations, such as fraud and malpractice. To adopt plaintiff's position and hold the statute of limitations to be tolled in the instant breach of contract case would be a substantial departure from the Oregon statutory scheme.

"For the reasons given above, I find that Oregon's six-year statute of limitations bars recovery for that part of plaintiff's claim accruing prior to January 13, 1971." *Id.* at *1-*2.

This brings us, then, to *Berry v. Branner*, 245 Or 307, 312, 421 P2d 996 (1966). The trial court in *Berry* had sustained a demurrer to plaintiff's medical malpractice claim, relying on *Vaughn v. Langmack*, 236 Or 542, 390 P2d 142. In *Vaughn*, the court had held that a cause of action for medical malpractice accrues upon the happening of the event which

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caused the injury and not upon discovery by the patient. In *Berry*, the court overruled *Vaughn*, reasoning

“That in the prevailing opinion in the *Vaughn* case too much emphasis was put upon the legislative intent as deduced from statutory history and not enough was placed upon legislative intent as determined from the ordinary meaning of the word ‘accrued.’” 245 Or at 309-16.

The court then declared broadly under ORS 12.010 that

“[t]o say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, ‘You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,’ makes a mockery of the law. In the absence of an expressed statutory direction to that effect, to ascribe to the legislature any such intention by their use of the word ‘accrue’ seems to us unreasonable.” (Emphasis added; citation omitted.)

The *Berry* court prefaces this broad declaration with the acknowledgment that “[w]hen used with reference to a cause of action [‘accrue’] means when an action may be maintained thereon.” *Id.* (emphasis omitted). In the instance

of breaches of contract, abundant Oregon precedent, including cases decided after *Berry*, holds that a cause of action for breach accrues immediately upon breach. In particular, the Supreme Court held in *Hollin*, that a party is liable to an action “as soon as a party to a contract breaks any promise he has made.” 253 Or at 13.

Justices Perry, McAllister, O’Connell, Holman, and Denecke each participated in both *Hollin* and, only three years earlier, *Berry*. Additionally, *Berry* justices O’Connell, McAllister, Holman, and Denecke also sat in deciding *Chaney v. Fields Chevrolet Co., supra*. As detailed above, the Court in *Chaney* approved the use of fraudulent concealment as grounds to toll the running of the six year breach of contract limitation period of ORS 12.080. If *Berry* reads a discovery standard into the accrual of a breach claim, there would not be need for a plaintiff to ever additionally prove that its lack of discovery was the result of wrongful concealment by the defendant. Rather, all the plaintiff would need to show is that it did not discover, and reasonably could not have discovered, its claim. Finally, despite participation in *Chaney* of four of the justices who decided *Berry*, the *Chaney* court does not even cite *Berry* and further declares that “we have found no Oregon cases directly in point nor have any been cited to us.” 264 Or at 26. If *Berry* establishes a discovery rule for the accrual of all causes of action, including breach of contract claims, then *Berry* moots any need to analyze fraudulent concealment. That would make *Berry* decidedly “a case in point” for the matters at issue in *Chaney*. The court’s contrary declaration that there was no “case in point” preceding evaluation of its fraudulent concealment is irreconcilable with reading *Berry* to have established a discovery standard for the accrual of an action for breach of contract.

The *Berry* court’s evaluation of what

“seems to us reasonable,” and its criticism of “too much emphasis” on textual and contextual statutory history, also is patently improper under today’s approach to statutory interpretation. The only proper focus is on the objective intention manifested by the legislators in 1862 and 1870 when adopting the predecessor enactments to today’s ORS 12.010 and 12.080. See *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). That original legislative intention was, and should remain controlling today, that absent proof of fraudulent concealment, the limitation period for breach of contract runs from the date of breach and without regard to whether actual damage has occurred or been discovered. *Schaefer v. Fraser*, 206 Or at 486-87; *Smith v. Abel*, 211 Or at 589; *Western Feed*, 230 Or at 334; *Hollin*, 253 Or at 13; *Chaney*, 264 Or at 26; *Kantor*, 75 Or App at 703; *Vega*, 134 Or App at 372; *Bruns*, 175 Or App at 366 n 9.

While the broad language of *Berry* literally can be read to include discovery within the definition of “accrual” for any and all causes of action, *Berry* does not expressly address breach of contract claims. Moreover, *U.S. Nat’l Bank v. Davies*, 274 Or 663, 548 P2d 966 (1976), joins *Chaney* in demonstrating that *Berry* does not establish a universal definition of accrual and *Davies* further demonstrates that, for purposes of accrual, breach of contract claims differ from negligence claims.

The precise issue before the court in *Davies* was whether a discovery of damage rule applies to a legal malpractice action. If *Berry* had in fact established universally that a discovery rule applies to “accrual” of any and all causes of action, there would have been no need whatsoever in *Davies* to engage in any detailed analysis of the precise nature of legal malpractice claims. Rather, the court simply would have cited *Berry* as establishing discovery as a global element

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of "accrual", regardless of the particular cause of action. That is not, however, what the court did in *Davies*.

First, while the court cited with approval to *Berry*, it described the express holding of *Berry* narrowly:

"We have held that it was the intention of the legislature that a cause of action for *medical malpractice* not accrue under ORS 12.010 until the patient becomes aware or should have become aware of the malpractice. *Berry v. Branner*, 245 Or 207, 421 P2d 996 (1966). By *similar reasoning* we have come to the same conclusion in this case." 274 Or at 669, n 1.

Secondly, while employing "similar reasoning" the court supported its application of a discovery of damages rule to a legal malpractice claim by expressly distinguishing negligence claims from claims for breach of contract:

"The statutory period may begin either when the defendant commits his wrong or when substantial harm matures. This choice, unnecessary where the two events are simultaneous, becomes complex where considerable time intervenes; here the courts have generally looked to the substantive elements of the cause of action on which the suit is based. *If the defendant's conduct in itself invades the plaintiff's rights, so that suit could be maintained regardless of damage—as with a breach of contract and most intentional torts—the statute commences upon completion of the conduct. But if harm is deemed the gist of the action, the occurrence of harm marks the beginning of the period.*"

As detailed above, proof of actual loss is not an element of a cause of action for breach of contract and a cause of action for breach accrues immediately upon that breach. *Berry* consequently cannot be viewed as having established a discovery standard for breach of contract in light of: (1) *Davies'* treatment of *Berry* as a medical malpractice case, and not as authority establishing universally that "accrual" always includes a discovery standard, (2) *Hollin's* holding that a cause of action for breach accrues "as soon as a party to a contract breaks any promise he has made", and (3) *Chaney's* adoption of fraudulent concealment as the means to toll the limitations period for a breach of contract claim.

Further evidence that *Berry* does not universally establish a discovery standard for all causes of action is found in the enactment of ORS 12.135 in 1971, five years after *Berry* consequently was decided. This statute adopts, "regardless of legal theory," an express discovery standard for actions against engineers or architects for injury arising from construction of an improvement. If ORS 12.010 itself imports a universal discovery standard into the definition of accrual, then the express discovery standard of ORS 12.135 is surplusage. On the other hand, if there is, at least in a breach of contract context, no discovery rule, then the express discovery language of ORS 12.135 becomes meaningful. While reducing the contract limitation period from six years to two years for contracts with architects and engineers, the legislature added through a discovery standard a tolling provision causing the two year limitation period not to begin to run until the defect is, or reasonably should have been, discovered.

Conclusion

Despite the legislature's adoption of ORS 19.135, and the Supreme Court's subsequent decisions in *Hollin, Chaney,*

Davies, the expansive language of *Berry* cannot entirely be ignored. Additionally, there is, according to one recent source, a trend among states to read a discovery standard into claims for breach of contract generally, and for breach of construction contract specifically. Annotation, "Modern Status of the Application of 'Discovery Rule' to Postpone Running of Limitations Against Actions Relating to Breach of Building and Construction Contracts," 33 ALR5th 1 (1995).

Consequently, while *Hollin, Chaney,* and *Davies* very strongly suggest otherwise, we cannot say with absolute certainty that *Berry* could never be read by an Oregon court to support inclusion of a discovery standard within the "accrual" of a breach of contract claim. The most that can be said with absolute certitude is that (1) Oregon's federal district court, albeit without addressing *Berry*, has expressly rejected application of a discovery rule to a breach of contract claim, and (2) that Oregon's appellate courts have yet to address expressly in a published opinion whether *Berry* reads a discovery rule into the accrual of actions for breach of contract.

It can, however, be argued that such a reading of *Berry* is expressly rejected by *Chaney*. In deciding whether to apply fraudulent concealment to contract claims, *Chaney's* declaration that there was "no case in point" sharply conflicts with reading *Berry* to have established a discovery standard for breach claims. ■

(Endnote)

¹ Adams, "Is Proof of Damages Essential to Establish A Triable Issue of Contract Breach? No!", OSB *Litigation Journal*, Vol 21, no. 1, p. 3-4 (April 2002).

The Privilege Against Self-Incrimination in Civil Proceedings

By Janet Lee Hoffman,
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With special thanks to Joe O'Leary and
Brandon Williams for their assistance

Introduction

Recent years have shown an increase in civil proceedings and attending parallel criminal prosecutions. This arrangement can occur in a variety of contexts, for example: (1) the Securities and Exchange Commission investigates improprieties on the part of a corporation and initiates an investigation and civil enforcement action that ultimately result in the federal government charging officers and directors with various crimes based largely upon the same illicit conduct the SEC has alleged; (2) the Department of Labor initiates an investigation that results in a finding of both civil and criminal ERISA violations; or (3) employment litigation arises where an employee sues the employer for the conduct that could potentially form the basis of a criminal matter. Manifold other examples come to mind, such as allegations of civil fraud, civil RICO complaints, and state bar investigations involving an attorney's conduct that might also be criminal in nature.

Parallel civil and criminal proceedings become even more complicated when a lawyer is jointly defending a corporation and an individual employee, officer, or director of the corporation. In that instance, the lawyer may face the dilemma of advising the corporation to comply with all discovery requests while also advising the individual employee, officer, or director to invoke the Fifth Amendment right against self-incrimination to avoid potential criminal liability.



The following discussion addresses this legal quandary.

1. *The Ubiquitous Doctrine of the Right against Self-Incrimination*

Lawyers and non-lawyers alike typically think of the right against self-incrimination as a principle that arises only in criminal proceedings. The reality, however, is that the decision about whether to invoke the privilege in a civil proceeding may be equally important. Periodically, both in-house counsel and attorneys representing individuals or corporations come to a critical fork in the road in a civil proceeding where serious consideration is required as to whether an individual client should invoke the privilege against self-incrimination. This issue arises in civil matters where criminal liability might also manifest, such as claims of fraudulent conduct, negli-

gence, or administrative enforcement actions. In some cases, state or federal prosecutors may be closely monitoring the developments in a civil matter in contemplating the possibility of seeking criminal charges, which, if known to the prospective criminal defendant, makes the decision about whether to invoke the right against self-incrimination even more critical. In other circumstances, unbeknownst to the client or his counsel, there may already be a criminal case underway involving the same client in the parallel civil matter.

In a situation where the client faces the possibility of providing information in a civil proceeding that could later be used against them in a separate criminal case, the government is in a unique position of taking full advantage of the fruits of the civil discovery process to obtain potentially incriminating information to be used against the client in a criminal

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matter. Therefore, when responding to civil discovery requests, both documentary and testimonial in nature, counsel should undertake a careful analysis of areas of possible criminal exposure. If the potential for criminal exposure is significant, it may be in the client's best interest to invoke the right against self-incrimination in response to civil discovery requests. This decision, of course, must weigh the impact the invocation will have in the civil matter, such as the possibility that an adverse inference will be drawn against the client. However, that consequence may be avoided in certain circumstances by seeking a stay of the civil discovery or even of the entire civil proceeding until conclusion of the parallel criminal matter.

As the Supreme Court observed, "[i]n civil proceedings, there are costs when a party asserts the privilege against self-incrimination; '[i]t will, for example, always disadvantage opposing parties... since it keeps them from obtaining information they could otherwise get.'" *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), quoting *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 82 (2d Cir.1995). "Consequently, 'the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.'" *Baxter*, 425 U.S. at 318. Accord *United States v. Solano-Godines*, 120 F.3d 957, 962 (9th Cir. 1997) ("In civil proceedings. . .the Fifth Amendment does not forbid fact finders from drawing adverse inferences against a party who refuses to testify.").

This poses a certain predicament for counsel in that the negative inferences the civil jury may permissibly infer arising from the refusal to testify might jeopardize an otherwise winnable case, yet on the other hand, by invoking the Fifth, the litigant might avoid serious criminal consequences.

"Consequently, 'the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.'"

2. *An Individual's Privilege Against Self-Incrimination May Be Asserted In Civil And Criminal Proceedings Alike.*

Under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, section 12 of the Oregon Constitution, a person may not be compelled to give self-incriminating testimony in any stage of a criminal proceeding. This privilege, however, is not limited to circumstances where there is a pending criminal action. A person may not be compelled to give testimony in any proceeding, civil or criminal, formal or informal, before administrative, legislative or judicial bodies, when that person's answers may tend to incriminate him in future criminal proceedings. See *Lefkowitz v. Cunningham*, 431 US 801, 804-805 (1977) (Fifth Amendment privilege available in criminal as well as civil proceedings where the testimony might later subject the witness to criminal prosecution); *State v. Langan*, 301 Or 1, 5 (1986) (Article I, section 12 privilege against self-incrimination applies in any judicial or non-judicial setting where compelled testimony is sought that might be used against the witness in a criminal prosecution). As the United States Supreme Court affirmed in *United States v. Balsys*:

[The privilege against self-incrimination] "can be asserted

in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding. *Kastigar v. United States*, 406 U.S. 441, 444-445, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972); see also *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924) (the privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.").

524 U.S. 666, 672 (1998) (emphasis added).

The scope of the privilege is in no way limited to questions that narrowly concern the ultimate issue out of which criminal liability might flow. The Supreme Court has held that the privilege is to be construed liberally "in favor of the right it was intended to secure." *Hoffman v. United States*, 341 US 479, 486 (1951). *Hoffman* makes clear that the scope of the privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id.* Therefore, a party can only be compelled to testify despite a claim of privilege under the Fifth Amendment if a judge is convinced that it is "perfectly clear, from a careful consideration of all the circumstances in [the] case, that the witness is mistaken, and that the answer cannot possibly have" a tendency to incriminate. *Id.* at 488.

Notably, a corporation does not share the same Fifth Amendment protection

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against compelled self-incrimination that an individual officer or director of the corporation has. In *Braswell v. United States*, 487 U.S. 99 (1988), the United States Supreme Court stated:

The rule was first articulated by the Court in the case of *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906). Hale, a corporate officer had been served with a subpoena ordering him to produce corporate records and to testify concerning certain corporate transactions. Although Hale was protected by personal immunity, he sought to resist the demand for the records by interposing a Fifth Amendment privilege on behalf of the corporation. The Court rejected that argument: “[W]e are of the opinion that there is a clear distinction...between an individual and a corporation, and...the latter has no right to refuse to submit its books and papers for an examination at the suit of the State.” *Id.*, at 74, 26 S.Ct., at 379. The Court explained that the corporation “is a creature of the State,” *ibid.*, with powers limited by the State. As such, the State may, in the exercise of its right to oversee the corporation, demand the production of corporate records. *Id.*, at 75, 26 S.Ct., at 379.

487 U.S. at 105. Therefore, it is crucial for counsel advocating for the rights of a corporation to understand that although a corporation has no right against self-incrimination, an individual corporate employee still enjoys that right to the fullest. Any misunderstanding of this principle could result in serious consequences where counsel fails to recognize the individual’s right against

Any misunderstanding of this principle could result in serious consequences where counsel fails to recognize the individual’s right against self-incrimination might be jeopardized by the demands of civil discovery.

self-incrimination might be jeopardized by the demands of civil discovery. (See discussion at section (3) below)...

3. *The Privilege against Self-Incrimination Extends to the Production of Documents that Could Provide a Link In the Chain Needed to Prosecute Where the Act of Production Implies an Assertion of Fact.*

The privilege against self-incrimination is not limited to testimony or verbal responses to questioning, but also applies to requests for production of documents. In *United States v. Hubbell*, 530 U.S. 27 (2000), the Court reaffirmed the “act of production” doctrine. Under this principle, an individual can invoke the Fifth Amendment privilege when compelled to turn over documents that are incriminating or that may lead to inculpatory evidence, if the act of producing the documents themselves implies assertions of fact. It is not merely the fact that the compelled documents may contain incriminating evidence that justifies invocation of the privilege. Rather, it is the testimonial nature of production of potentially inculpatory documents that triggers the privilege because by complying with the order to produce, the individual is effectively admitting that the documents exist, were in his possession or control, and were authentic. *Id.* at 37.

See also *United States v. Doe*, 465 US 605, 612-613 (1984) (distinguishing between the contents of the records, which are not privileged, and the act of producing the records which was a privileged act.)

United States v. Hubbell arose out of the Independent Counsel’s investigation of the Whitewater Development Corporation. In *Hubbell* the Independent Counsel had served the defendant with a subpoena duces tecum seeking an expansive range of information relating to the defendant’s financial situation. The subpoena ordered him to gather and provide “any and all” documents related to his and his family’s sources of income. This request included his bank records, records of expenses, all tax return information, and all documents related to his work with specific individuals. *Hubbell*, 530 U.S. at 46-50. The Court concluded that the response to the subpoena required both “mental and physical steps necessary to provide...an accurate inventory of the many sources of potentially incriminating evidence sought.” *Id.* at 42. The breadth of the demand for production by the subpoena required a response that was the “functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition.” *Id.* at 41-42. The Court found it was

undeniable that providing a catalog of existing documents fitting within any of the eleven broadly worded subpoena categories could provide a prosecutor with a “lead to incriminating evidence,” or “a link in the chain of evidence needed to prosecute.”

Id. at 42 (quoting *Doe v. United States*, 487 US 201 (1988) and *Hoffman v. United States*, 341 US 479 (1951)).

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Like in *Hubbell*, information sought in civil discovery, along with the often interrogatory-like nature of the preliminary paragraphs ordering a party to explain the disposition of other material no longer in their possession, makes it “unquestionably necessary for [the defendant] to make extensive use of ‘the contents of his own mind’ in identifying the...documents responsive to the requests in the subpoena.” *Hubbell*, 530 U.S. at 43 (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957)). For example, in a recent civil case, based on an allegation of a fraudulent will, the plaintiff’s request for production of a certain category of “documents” defined documents to include:

all documents in your actual or constructive possession, custody or control.

If any document was, but is no longer, in your possession and control or was known to you but is no longer in existence, state whether it is:

- a) missing or lost;
- b) has been destroyed;
- c) has been transferred, voluntarily or involuntarily to other; or
- d) otherwise disposed of and in each instance, explain in detail the circumstances surrounding the authorization for such disposition and state the date or approximate date thereof.

The same request for production also asked for any documents evidencing deposits of the deceased funds in the

Oregon law concerning the assertion of privilege in the act of production is virtually undeveloped as compared to the law established under the Fifth Amendment.

defendant’s bank account, bank transfers and written authorizations to sign checks on behalf of the deceased. The acknowledgement by the defendant of the mere existence of any of these documents in the defendant’s possession would in itself have been incriminating.

Such a broad definition of requested documents and the specific requests for individual categories of documents demonstrates how the assembly and production of such materials and the potential response to this request for production required testimonial acts that are protected by the Fifth Amendment and Article I, section 12, as such acts require the party to communicate as to the existence, possession, and authenticity of the broad categories of documents ordered to be produced.

Oregon law concerning the assertion of privilege in the act of production is virtually undeveloped as compared to the law established under the Fifth Amendment. No Oregon case since *State v. Jancsek*, 302 Or 270 (1986), has attempted to analyze the issue of the privilege against self-incrimination with respect to the compelled production of documents under Article I, section 12 of the Oregon Constitution.

In *Jancsek*, the Court disposed of the state constitutional issue on the narrowest possible grounds by concluding that the document sought to be disclosed, a

letter containing admissions by the defendant to murdering his wife, was specifically identified, its contents were already known by the state, its existence was conceded by the defendant, and it was in the custody of another person, not the defendant. Thus, the act of producing the letter did not compel the defendant to do anything as the letter was not even in his possession. *Id.* at 285. The Court further found that disclosure on those facts did not implicate the act of production doctrine under the Fifth Amendment.

Jancsek is easily distinguished from the circumstances most parties may face in civil matters where the issue of asserting the privilege arises. The documents sought in civil discovery are often described in the broadest of terms and without the specificity present in *Jancsek*. Requests for production in civil litigation are typically much more analogous to the broad subpoena in *Hubbell*, seeking “any and all” information related to broad categories of potentially relevant information.

Although the testimonial nature of production was brought up in *Empire Wholesale Lumber Co. v. Meyers*, 192 Or App 221 (2004), there, the assertion of the privilege and the court’s discussion was based solely on the Fifth Amendment, and not on Article I, section 12. *Id.* at 223. As to the Fifth Amendment analysis, the court relied on *Hubbell* and concluded that the privilege could be invoked by a defendant/debtor against whom the plaintiff had obtained a judgment and was seeking to compel the defendant/debtor to answer questions and produce documents related to his income. *Id.* at 227.

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4. Risk of Waiver of Fifth Amendment Protection through Discovery Responses Versus the Risk of Adverse Consequences as Result of Invocation of the Privilege

Counsel should be wary of circumstances where the court finds a waiver of the privilege against self-incrimination as a result of answering questions posed in depositions or in response to broadly worded requests for productions like the one cited above. In *Rogers v. United States*, 340 U.S. 367, 374 (1951), the court held that once a witness makes an incriminating admission, he cannot refuse to disclose details unless such further disclosure would pose a real danger of further incrimination. Despite the general rule that "disclosure of a fact waives the privilege as to the details," the various circuits have interpreted *Rogers* with varying degrees of protection for the witness. The rule in the Ninth Circuit provides the witness with greater protection, stating that "an ordinary witness may 'pick the point beyond which he will not go,' and refuse to answer any questions about a matter already discussed, even if the facts already revealed are incriminating, as long as the answers sought may tend to further incriminate him." *In re Master Key Litigation*, 507 F.2d 292, 294 (9th Cir. 1974) (quoting *Shendal v. United States*, 312 F.2d 564, 566 (9th Cir. 1963)). See also *United States v. Seifert*, 648 F.2d 557, 561 (9th Cir. 1980) (quoting the Ninth Circuit rule from *Master Key* and *Shendal* to hold that testimony of a witness during direct examination did not waive privilege for any question on cross examination that could possibly incriminate witness further than statements already made).

However, "[w]here a witness asserts a valid privilege against self-incrimination on cross-examination, all or part of that witness's testimony must be stricken if invocation of the privilege blocks inquiry

Because the privilege against self-incrimination is a right of constitutional magnitude, "the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side."

into matters which are 'direct' and are not merely 'collateral.'" *Seifert*, 648 F.2d at 561-562. "The distinction between matters which are 'collateral' and those which are 'direct' is not precise or easy. It can be drawn only by reference to the particular facts of the particular case, and . . . [a] trial court has wide discretion to determine whether a witness's testimony must be stricken because cross-examination was restricted." *Id.* at 561-62 (quoting *United States v. Star*, 470 F.2d 1214, 1217-18 (9th Cir. 1972)).

If an implied waiver of the privilege through answers to discovery is at one end of the spectrum of potential pitfalls to be avoided, at the opposite end is the risk of adverse consequences in the civil suit resulting from a party's assertion of the privilege. Unlike criminal cases, where the jury is instructed not to draw adverse inferences from a defendant's silence, such inferences are permissible in a civil case when a party invokes the privilege against self-incrimination. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). In fact, in order to prevent unfairness, a court has discretion in fashioning an appropriate remedy in response to a civil party's invocation. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (citing *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1089 (5th Cir. 1979)). And the remedy could be permitting an adverse inference, burden shifting, or even a dismissal of the action.

Another remedy, discussed below, is a stay of all or part of the proceeding.

In determining a response to invocation of the privilege, courts have developed a test by which the interest of one party's right against self-incrimination is weighed against the other party's right to a fair proceeding. The balance is examined on a case-by-case basis, but the factors for consideration uniformly discussed among the courts include: (1) the importance of the information sought; (2) whether there are alternative means to obtain the information; and, (3) whether there are remedies less drastic than outright dismissal of the action. *Serafino v. Hasbro, Inc.*, 83 F.3d 515, 518-19 (1st Cir. 1996). Courts have also consistently held "that an adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000). Because the privilege against self-incrimination is a right of constitutional magnitude, "the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *Id.* (quoting *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3rd Cir. 1994)).

5. Moving to Stay the Civil Proceeding in Order to Protect the Client In Both the Civil and Criminal Matters

In order to avoid the difficult position of having to decide between waiving the privilege and incriminating one's self on the one hand, or, on the other, asserting the privilege and damaging one's position in a civil matter, counsel should consider moving for a stay of a portion or the entirety of the civil proceeding until the parallel criminal matter is resolved. While no Oregon court has addressed the issue of a stay to protect a party's right against self-incrimination when parallel civil and

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criminal proceedings are pending, federal and other state courts have developed a uniform framework for resolving this issue. Under that analysis, it is well-settled that a court's determination on a motion to stay proceedings is discretionary and, therefore, not a matter of constitutional entitlement. Such a stay may postpone the entire proceeding or may be narrowly tailored to particular discovery processes. In considering whether to grant a stay of the civil proceeding, the court weighs the following factors:

- (1) the extent to which the defendant's Fifth Amendment rights are implicated;
- (2) similarities between the civil and criminal cases;
- (3) the status of the criminal case;
- (4) the interest of the plaintiffs in proceeding expeditiously with the litigation, and the potential prejudice of delay;
- (5) the burden which any particular aspect of the proceedings may impose on defendants;
- (6) the convenience of the court in the management of its cases, and the efficient use of judicial resources;
- (7) the interests of persons not parties to the civil litigation; and
- (8) the interest of the public in the pending civil or criminal litigation.

On the one hand, invoking the Fifth Amendment may protect against potential criminal liability. On the other hand, such invocation may jeopardize a civil litigant's case.

King v. Olympic Pipeline Company, 104 Wash. App. 338, 352-353 (2001) (citing *Keating v. Office of Thrift Supervision*, 45 F3d 322, 324-325 (9th Cir. 1995)).

The court in *King* reversed the trial court's denial of a motion to stay discovery of a civil suit resulting from a deadly explosion caused by the rupture of an underground pipeline. At the time the civil suit was pending, several individual defendants in the action were also the focus of a federal criminal investigation regarding the explosion. *Id.* at 345-346. As a matter of first impression, it was in *King* where the federal framework discussed in *Keating* was adopted.

In *Keating*, the application of the federal test led to a denial of the requested stay of an administrative SEC proceeding. Keating appealed an administrative denial of his motion for a stay of a civil enforcement proceeding pending the resolution of all criminal proceedings against him. He argued that the pending criminal case had forced him to invoke the Fifth Amendment privilege during the agency hearing, which, according to Keating, deprived him of the opportunity to fully defend himself in the agency action. The Court rejected Keating's claim because the agency had severed the counts related to the pending criminal charges. *Id.* at 326. Additionally, the court considered "the interest of the

public in the pending civil and criminal litigation," reasoning "that Keating had [had] adequate time to prepare for the [Office of Thrift Supervision] hearing" and, given the numerous delays in the proceedings, "any burden on Keating was far outweighed by the public interest in a speedy resolution of the case." *Id.* at 325.

The factors outlined in these cases provide a good foundation upon which to balance the competing interests at stake concerning a party's invocation of the privilege. On the one hand, invoking the Fifth Amendment may protect against potential criminal liability. On the other hand, such invocation may jeopardize a civil litigant's case.

6. *The Corporate Attorney's Ultimate Ethical Conflict*

The above discussion highlights concerns as to a corporate counsel's inherent ethical conflict in a civil case when abiding by civil discovery rules that might produce information detrimental to a corporate employee's constitutional right to remain silent. Generally, Rule 1.13 of the Oregon Rules of Professional Conduct, captioned "Organization as a Client," governs this issue. Specifically subsection (g) provides:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Also related to this issue, Rule 1.7(a)

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provides that, with limited exception, a lawyer “shall not represent a client if the representation involves a current conflict of interest,” which exists if, in pertinent part, 1) representing one client will be directly adverse to another client, or 2) a significant risk arises that representing one or more clients will be materially limited by the lawyer’s responsibilities to another client or former client. Notwithstanding these conflicts, Rule 1.7(b) provides that a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client, *and*
- (4) each affected client gives informed consent, confirmed in writing.

As these ethical rules demonstrate, the Oregon State Bar has recognized the precarious nature of representing the interests of individuals within a corporation while also advocating for the corporation as a whole. Rule 1.7(a), without further limitation, arguably would effectively prohibit an attorney from advocating for a corporation that is disclosing corporate records under a subpoena duces tecum—records that might criminally implicate an em-

The option of invoking the right against self-incrimination must be considered and evaluated in circumstances where providing testimony...places the client in a position where he is forced to provide information that may be used as a “link in the chain” of evidence used to prosecute him in a parallel or subsequent criminal proceeding.

ployee of the corporation who is also represented by the lawyer. And although Rule 1.7(b) provides exceptions to the otherwise prohibited dual representation, the four conditions cited above arguably prevent a lawyer representing a corporation from also representing a corporate employee where there is potential criminal exposure for the simple reason that a corporation may be injured by the employee’s invocation of the right against self incrimination, or more importantly, the failure to assert the Fifth Amendment guarantee may be devastating to the employee.

7. Proposed Solutions and Practice Tips

Although the above discussion has highlighted the dilemma that counsel faces about whether to assert the right against self incrimination, there are options available that might eliminate the conflict. First, in corporate situations where criminal conduct is also implicated, it is advisable to obtain separate counsel for the officer, director, or employee, who may be implicated. Second, counsel should consider moving for a stay of the

civil case or discovery pending resolution of the criminal proceeding. Third, it may simply be best to assert the right against self-incrimination in the civil matter and suffer the potentially adverse consequences at that phase. Fourth, counsel may work to settle the pending parallel criminal matter so that disclosure in the civil case no longer poses the difficulty it otherwise would. Lastly, counsel could strive to settle the parallel civil matter before the criminal case and before the defendant is in a position of possible self incrimination.

Conclusion

The option of invoking the right against self-incrimination must be considered and evaluated in circumstances where providing testimony or even complying with civil discovery, including the production of documents, places the client in a position where he is forced to provide information that may be used as a “link in the chain” of evidence used to prosecute him in a parallel or subsequent criminal proceeding. The initial act of producing documents responsive to broad civil discovery requests typically requires significant physical and mental processes on the part of the client. The responses will often imply statements of facts and are therefore testimonial in nature. If such requests are responded to, counsel must assume that the government will have access to that information and will evaluate it for the purpose of determining whether criminal liability may be proven from it. For these reasons, the thorough evaluation of the right against self-incrimination in a civil proceeding is absolutely critical. ■

Principles of Marketing a Personal Injury Case

By Lyle C. Velure
Lane County Circuit Court Judge

We are born into this world unseeing and unknowing. It takes days for our eyes to focus and slowly we learn how to communicate our needs and wants to our parents. Over the years we learn how to effectively communicate until we become teenagers. For a few short years communication skills seem to be eroded to a few simple grunts. Emancipation from the parental support system with resultant survival instincts significantly improves communication skills during undergraduate years. Then some of us go to law school and we learn how to communicate in a language foreign to the general populace. Talking like a lawyer is as ineffective a communication skill as the grunts of the teenage years.

The best trial lawyers are marketing geniuses. They understand the concept of the development of a marketing plan and how to communicate that plan effectively to their consumers, the jury.

Marketing experts generally agree that the four principles of marketing are product, place, price and promotion or communication with the customer. In order to meet the goals of those four principles you must have a marketing plan. The marketing principles are the controlled components of your marketing plan.

The Product

The product you are marketing is your client. This is the most important part of your strategy since your entire plan will fail if your product is not acceptable to your buyer.



Of course, in personal injury litigation the product is your client. With any product the “packaging” of the client is of utmost importance. Creativity on the part of the lawyer is demanded.

Creativity starts with a healthy dose of cynicism. Never trust anything that your client tells you until it is corroborated. An insurance company will not settle a case unless your assertions are verified in writing. Such verification is the start of your marketing plan. A good lawyer assumes that every client’s case must be tried from the very beginning. The following are considerations in your creation of the plan:

(1) Investigate liability and obtain police reports, photos and witness statements. The only way liability can be improved upon is with a prompt and thorough investigation.

(2) Make sure you have all of your client’s medical records – both before and after the accident. You cannot plan your

case unless you have all of your client’s medical information.

(3) Identify your client’s injury. Advise your client about the effect of palliative “overtreatment.” A soft tissue case has only so much value regardless of the lawyer. Do you want to work for your client or the treatment provider? Do you want a PIP examination that can shoot you down?¹

(4) Consider having your own medical examination if your client’s medical provider is uncooperative in litigation.

(5) Make sure you have verification of your client’s wage loss and/or limitation of earning capacity². Always advise your client to try to return to work and all other activities. Juries do not like “slackers” but admire people who try.

(6) A good lawyer recognizes the importance of your client’s deposition. The client should be prepared for every ques-

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tion your opponent might ask. Remember, you must live with the testimony in the deposition forever. Prepare yourself and your client for a deposition.

(7) The deposition is also the time for your opponent to determine what kind of impression your client will make on the jury. A personal injury case will be evaluated by all insurance companies within certain financial parameters. Your client's dress, grooming and demeanor at deposition will push the value of your case towards the top of the scale. On the other hand, nose rings, tattoos, inappropriate jewelry, makeup or dress and a defensive manner will plummet the value.

Now that you have your product "packaged" move on to the next principle.

The Place

Now you are ready to file your Complaint. The saying — location, location, location — holds true for personal injury cases just like any other marketing strategy. The demographics in Oregon have changed dramatically over the last twenty years. For example, when the timber and shipping industries and their unions controlled Coos County, the defense couldn't buy a verdict. Those days are gone. Now Coos County has become more of a retirement community and plaintiff's verdicts have disappeared.

Do you have the option of where to file your case? Remember venue can exist either where the accident occurred or where the defendant can be found.³ If your client gets hit in the rear end by a Multnomah County resident in Hillsboro, it would seem that Washington County might not be your first choice.

If you are out of the county in which you normally practice find out a bit about the location. Read the Supplemental Local Rules and ask other lawyers about motion practice, unique discovery rulings and the like. We always find it interesting

in Lane County that lawyers from the tri county area think that the "first setting" of a trial is just a mere formality that can be adjusted at will. In Lane County the "first setting" is usually the only setting and you will go to trial.

After you have checked out the local judges then check out the jury results on similar cases. In some of the smaller counties it might be wise to associate with a well known local lawyer to assist you at trial. Your client will fare better in the long run. While we are all Oregonians, the people and attitudes in Klamath County may be far different than Jackson County even though they are 60 miles apart.

The Price

You must set a price for your product that will entice the customer to buy. In a lawsuit price does not only mean the monetary prayer for damages but the recognition of your product and how well it will sell in the marketplace determined by location.

One of the biggest mistakes many lawyers make in handling an automobile personal injury case is not trying the case they have but trying to "make a silk purse out of a sow's ear." This does not mean that you should not be creative. However, the facts that you have been handed will limit the extent of creativity.

In establishing the price, be realistic with your client. It is very important that your client has a realistic expectation from the outset as to the ultimate recovery that can be expected. Again, make sure your client understands that the insurance company will view extensive palliative care in a soft tissue case to be overtreatment and a failure to return to work as malingering. It doesn't necessarily help your case just because you have high economic damages.

A wise old lawyer once told me not to BS a jury, because they can smell it. That is the best advice one could give a young lawyer. Don't overplead or overtry

your case. Withdraw any allegation that you can't prove — such as permanency if your doctor won't give it to you.

In drafting your pleading be a minimalist. Don't use a lot of flowery language that your client may have to eat on the stand. A good example of overkill is an allegation like "the plaintiff was thrown in and about the automobile resulting in tearing, wrenching, and stretching of the nerves, ligaments, discs, muscles and other soft tissues of her cervical spine." You will hear that kind of language during the deposition and in the cross examination of your client. Simply allege that "as a result of the automobile accident the plaintiff sustained a sprain and strain of her neck."

Likewise, be realistic in the amount you claim for damages in your pleading. It must be a number that you are willing to mention on voir dire, for if you don't the defense lawyer will ask "do you realize they are asking for a quarter of a million dollars from my client?"

Never plead punitive damages unless you have a punitive case. Remember that most insurance policies exclude punitive damages.⁴ The insurance company will view you as an "amateur" and it will reduce the value of your case in their eyes. Don't inflate your case by making nonexistent claims.

Likewise, always advise the spouse of your client that the possibility of a loss of consortium claim exists and then advise them not to file one. Quite frankly, the only loss of consortium cases worthwhile are those where you never have to mention sex.⁵ These are usually catastrophic injury cases. In my courtroom juries have returned defense verdicts on clear liability cases when lawyers have filed loss of consortium claims on whiplash cases.

The Promotion Communication with the Customer

Message sent. Message received. Message acted upon. That is communication. You

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can do all the above work and if your customer doesn't receive or act upon your message, all is for naught.

Your customer is the jury. Your customer is not the other lawyer or the judge. The jury is not made up of people trained in the law. The jury is a cross section of society with whom you must communicate. You must send your message in such a way that they can receive it and act upon it to the advantage of your client.

When you are in front of a jury don't talk like a lawyer. You will be as unintelligible as the stereotypical teenager.⁶ Whenever you are talking to the jury be conversational. Talk to them in language they can understand.

Never talk down to a jury or be condescending. If the jury thinks you are patronizing your case is lost.

Be yourself. It's always nice to go to seminars and hear masters talk about trial tactics. However, don't mimic an older trial lawyer. Develop your own skills and underplay your role until you are completely comfortable in the courtroom. This is particularly true on voir dire.

Jury service is a severe imposition on the time of those willing to serve. It can be emotionally and physically exhausting, as well as creating personal financial havoc. A good marketer recognizes the target audience in making the promotion informative, understandable and short. A good lawyer never gives the jury the impression they are wasting their valuable time.

The following is a list of things that have occurred in my courtroom that have destroyed effective communication with the jury, your customers:

(1) Don't delay the commencement of the trial by pretrial motions that can be heard later in the day. Get your jurors out of jury assembly and up to the courtroom as early in the morning as possible. They are anxious to get on with it and if they have to sit in jury assembly too long

they will be surly from the beginning. Also, you delay too long in the day and you are liable to get a bunch of jurors who have already been rejected in other courtrooms.

(2) Don't ask repetitive, inane questions on voir dire. Avoid "Ms. Smith, I haven't picked on you today, what do you think about the McDonald's coffee cup case." Don't put jurors on the spot – one of our most experienced trial judges says that when a juror answers "I can't tell you because I haven't heard the evidence yet" the lawyer has lost.

(3) Opening statements are the most important part of any trial. It is your first and best opportunity to sell your product. Too often lawyers are unorganized and try to improvise their way through opening statements missing their best chance to introduce the product to the consumers. If there are any warts in your case bring them up during opening statement. Do not allow your opponent the luxury of telling the jury why you have a lousy product. The best teachers are exceptionally organized and simplify the subject. The boring teachers are unorganized and present the material in a tedious fashion. Be a good teacher in opening statement.

(4) Likewise, organize your direct examination. Do not try to improvise. Particularly with expert witnesses, make sure you know the answers. I have seen more poor direct examinations because of lack of organization than any other part of trial. If you are bumbling around having trouble phrasing your questions the jury will become very impatient and punish your client.⁷

(5) Do not greet or introduce yourself to witnesses. Commence your examinations without preliminaries.⁸ It is phony and a waste of time to commence either direct or cross examination with "Good

Morning Ms. Smith, I am Sidney Shyster, lawyer for Ms. Whiplash and I would like to ask you a few questions." Or worse yet – "Good Morning, Dr. Schumdfunk, would you kindly introduce yourself to the jury." The jury knows you are there to ask questions and this is patronizing and a waste of their time.

(6) Have your exhibits marked in advance. Know how to handle exhibits efficiently to get them into evidence. Lay your foundation with the witness, tell the court you "offer" Exhibit One and hand it to adverse counsel. Never, ever, say "I move the introduction of Exhibit One". There is no such motion and we have at least one judge in Lane County who will say OK and you will not have any received exhibits at the end of the trial. Again, don't waste time with exhibits.

(7) In some fashion let the jury know why you are offering the exhibit. What is in it? Have the witness explain or read the crucial point of the exhibit or if it is a photograph ask to have it handed to the jury. Don't be a phony and ask the judge to "publish" the exhibit. Talk like a human being.

(8) Teach your client to behave during trial. Make sure the client is dressed and groomed appropriately. You must tell your client not to react during trial or to pull on your sleeve. Likewise, don't give a client a yellow pad and pencil. It will simply encourage them into activity when your opponent scores a point. Why not just wave a white flag in surrender. Remind your client that good behavior is not only in the courtroom but in the near vicinity of the courthouse. Don't let them stand out in front of the courthouse and smoke cigarettes. In many smaller communities there are few places to eat lunch. It is important that the client, relatives and friends do nothing that might offend a juror.

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(9) On cross examination never ask a question to which you do not know the answer or don't care about the answer. You do not have to cross examine a witness. Look at the jury now and then to see the effect your brilliant questioning is having. If the jury is asleep maybe you should rethink your strategy. As Judge Edwin E. Allen once told a lawyer who complained that a juror was asleep: "You put him to sleep, you can wake him up."

(10) We are in the technology age. It can be a very effective trial tool but only if you are facile in its use. Technology should not be overused. Use it as part of your organized presentation as a teaching tool. Likewise, plan when you are going to use any technology. Three videotaped depositions in a row starting just after lunch could lull the most cranky baby asleep.

(11) By the time argument rolls around the jury wants to start their work in deciding the case. Make your arguments short and organized. You can lose your case on argument quicker than you can win. Lawyers generally have not done a good job of clearly explaining the concept of noneconomic damages in argument. They allow the defense to talk about "pain and suffering" money like it has some kind of bad connotation. Take some time talking about not only compensation for the pain that your client has suffered and will suffer but also about the other part of noneconomic damages. Talk about the interference with activities separate and apart from employment. Tell the jury what is meant by that mouthful of words. Talk about how difficult it is to be a mother to a toddler when your neck is injured. Don't overdo it or be phony but explain in everyday terms why your client should be compensated for the interference with the activities that we all enjoy in life.

Conclusion

Learn to build your marketing plan from the beginning of your representation. If you follow the few basic principles of marketing you will be successful in the representation of a personal injury client.

Talk like a real person, not a lawyer. Be organized. Be creative. Help your client understand his or her role. Give the jury a reason to like your client and want to award adequate compensation.

Never give the jury the impression you are wasting their time. After all, brevity is the soul of wit.⁹ ■

(Endnotes)

¹ See *Barackman v. Anderson*, 192 Or App 176 (2004) which held that PIP arbitrations can be given preclusive effect in subsequent proceedings.

² For a good discussion on impairment of earning capacity see *Richmond v. Zimbrick Logging Co.*, 124 Or App 631, 863 P2d 520 (1993).

³ ORS 14.080 (1)

⁴ *Harrell v. Traveler's Indemnity Company*, 279 Or 199, 567 P2d 1013 (1979).

⁵ Unless your case involves direct injury to sexual function.

⁶ See the comic strip "Zits" to see the frustration of parents in trying to communicate with a teenage boy.

⁷ For a checklist of the direct examination of an expert see Velure, Lyle C., "Direct Examination of a Doctor", *The Litigation Journal*, volume 17, Number 2, July, 1998.

⁸ This is language taken from "Helpful Hints for Trials Before Judge Redden." You will find similar language in all the handouts from the federal judges in the District of Oregon.

⁹ William Shakespeare, *Hamlet*, Act II, Scene 2.

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following scenario. Four years ago your small to mid-sized mortgage broker client purchased a software package including a one-year license with automatic renewal, coupled with 24-hour service and support, which includes periodic fixes and updates to the software required to meet constantly changing federal and state lending regulations. Your client's business has grown over time and all of its 43 loan brokers and 50 additional staff personnel are dependent on the software, which allows your client to qualify and document \$10,000,000 in loans per month. The software license deal was straightforward. There were no negotiated terms and the agreement was based on the licensor's form. On a random Tuesday your client receives notice that the licensor has filed bankruptcy and is looking to sell the rights to the software irrespective of any rights the client may have to continue to use it. Your client has invested over \$180,000 in the license and countless additional funds on specialized training. Without the software, the business will be effectively shut down.

Congress established a special provision in the Bankruptcy Code that protects licensees of intellectual property in such situations. To provide protection of intellectual property rights upon which today's businesses rely, 11 U.S.C. § 365(n) supersedes the bankruptcy trustee's ability under § 365 to retain or reject an executory contract.¹ Typically licenses may be rejected by the trustee in order to maximize the bankrupt's assets; normally, the licensee has few remedies other than making an unsecured claim for damages against the estate. Under § 365(n), the licensee is provided additional rights. If the trustee rejects an intellectual property license, the licensee can either bring an unsecured claim for damages *or* may elect to retain its rights under the license as they existed pre-bankruptcy

Typically licenses may be rejected by the trustee in order to maximize the bankrupt's assets; normally, the licensee has few remedies other than making an unsecured claim for damages against the estate. Under § 365(n), the licensee is provided additional rights.

for the duration of the contract, plus any period for which the contract may be extended.²

Consequently, a licensee facing the dilemma wrought by the licensor's bankruptcy has specific rights that protect the continuity of its business. Nevertheless, several challenges remain.

The first hurdle presented will be an obstacle over which your client has no control: whether the trustee assumes or rejects your client's contract. This decision hinges in part on whether the debtor intends to stay in business. If the debtor seeks to reorganize and retain the contract, your client may well enjoy the same use and, presumably, the same support as before. In many cases, however, the debtor must liquidate its assets.

If the debtor liquidates, the trustee may still elect to assume your client's license so that it can sell the intellectual property, including the executory contracts. In this scenario a prospective buyer would likely be interested in purchasing not only the software rights, but also the existing licenses that provide continuing

income through fees for renewal and support—not unlike a commercial real estate sale that includes the leases of existing tenants. In these situations, the buyer simply fills the shoes of the debtor under the standard executory contract provisions of § 365.

The second potential hurdle arises if the trustee elects to sell the intellectual property sans licenses—perhaps to an existing licensee (and competitor to your client) not interested in providing on-going support to your client. With a view to eliminating its competition, this particular buyer might be willing to pay as much or more for the intellectual property alone as a buyer looking to acquire not only the software but the income stream of the licenses as well.

Assuming that your client requires the continued use of the software, § 365(n) protects such licensees facing the sale of the underlying intellectual property in two ways. First, until the trustee actually rejects your client's license, the trustee must continue to perform the licensor's obligations under the license and not interfere with your client's rights.³ Second, once the trustee rejects the license, § 365(n) allows the licensee to retain its rights for the duration of the contract and for any period of time such contract can be extended.

If your client is unable to effectively use the software without the benefit of support, electing to retain its rights under § 365(n) may be of little value. (While allowing a licensee to retain its rights under the contract, § 365(n) does not require the trustee to provide any affirmative actions, such as support services, in return.) On the other hand, if the client can manage the software's maintenance without licensor support, the ability to use the software—at least for some meaningful period of time—can be critical to its survival.

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By retaining its rights, an intellectual property licensee remains obligated for its “royalty payments” to the holder of the license—whether the estate or a subsequent buyer.⁴ An interesting and unresolved issue arises in a situation in which the license requires payment of ongoing support and renewal fees, yet the licensee receives no continued support services from the estate. It could be argued that § 365(n) effectively strips such support fees from this royalty obligation. Ultimately, this scenario should boil down to a negotiation with counsel for the trustee over the amount of a flat fee payment to cover the “value” of the royalties, absent any service or support. If the license agreement allocates all of the annual payment to support and services, rather than a split between support and licensing, the licensee may assert the argument raised but not addressed in *Prize Frize*, namely “whether it is proper to consider all of the license fees as royalties or whether some of the fees should be allocated to payment for the obligations assumed by the debtor.”⁵ If all of the fees identified in the license agreement for annual renewals are for support and services, should any amount be payable as royalties?

Regardless of the protections provided by § 365(n), the bankruptcy of an intellectual property licensor can be devastating due to the disruption it causes to a licensee’s business—especially in the case of software licenses. Software licenses typically only allow possession of the software “object code” but not its underlying, human-readable “source code.”⁶ Thus, even though licensees may have the right to continue licensing the software, the right is very limited because the licensee cannot make updates or perform maintenance to the software program without obtaining the source code. Even if the license itself provides for the release of the source code in bank-

Although not fail-proof, in an effort to avoid spending the time and money required to litigate the issue in bankruptcy court, licensees of intellectual property should request a separate intellectual property escrow agreement.

ruptcy, we have found from personal experience that trustees may disregard such provisions because the release of the source code can, theoretically, devalue the software copyright.

Although not fail-proof, in an effort to avoid spending the time and money required to litigate the issue in bankruptcy court, licensees of intellectual property should request a separate intellectual property escrow agreement. Under such an agreement, a third-party escrow⁷ maintains the property for the benefit of the licensee. An escrow can ensure that the source code is maintained according to agreed-upon standards (which often include periodic updates from the licensor and verification thereof by the escrow). Then, when bankruptcy or another specified event occurs, the source code is automatically released by escrow to the licensee, thus bypassing the bankruptcy estate.⁸ In fact, § 365(n) was specifically crafted to ensure that trustees would not interfere with such intellectual property escrows.⁹

A licensee is well advised to secure a separate written escrow agreement with

the licensor. The written escrow agreement should reference the licensee’s license agreement and vice versa. It is not uncommon for the escrow agreement to be collective, for the benefit of all of the licensees of the subject software. The escrow agreement must meet certain minimum requirements in order to avoid being considered property of the bankruptcy estate.¹⁰ If these conditions are met, a trustee is less likely to act in contravention of the licensees’ rights under the escrow agreement.

If, notwithstanding the clarity of the escrow arrangement and the licensee’s rights to the source code, the trustee nevertheless endeavors to limit a licensee’s access to the source code, a licensee is well advised to file a motion to compel the release of the source code. Although a motion to compel is consistent with the position that escrowed source code is not property of the estate, a motion for relief from stay can be a more practical (albeit technically improper and theoretically unnecessary) means to the same end. Because the trustees may initially contend that the escrowed software is property of the estate, a motion for relief from stay can address the licensee’s rights to use the intellectual property and/or access the embodiment (e.g., source code) under § 365(n) without needlessly fighting a battle regarding whether the escrowed embodiment is property of the estate.

In our technology-driven world, businesses rely on the continued ability to use the intellectual property of others. When bankruptcy strikes a licensor, § 365(n) provides some measure of protection. However, few courts have addressed (and some trustees misinterpret) this exception to the otherwise broad powers of the bankruptcy trustee. Therefore, your client should consider establishing an intellectual property escrow **before** such disaster strikes. But if your client-licensee lacks an escrow agreement and faces the

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bankruptcy of its licensor, careful application of § 365(n) can still ensure that your client's intellectual property rights are maintained. ■

(Endnotes)

1. Whether a contract is "executory" is often disputed, but in the case of a copyright license, the law is fairly clear and the standard is relatively light. The Ninth Circuit has determined that the licensor's obligation under an exclusive software license agreement to refrain from suing its licensee for infringement was sufficient to make the license executory. *In re Select-a-Seat Corp.*, 625 F.2d 290, 292 (9th Cir. 1980).

2. Bankruptcy Code § 365(n)(1) provides in its entirety:

(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable non-bankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable non-bankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual

The Ninth Circuit has determined that the licensor's obligation under an exclusive software license agreement to refrain from suing its licensee for infringement was sufficient to make the license executory.

property to the extent protected by applicable non-bankruptcy law), as such rights existed immediately before the case commenced, for:

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable non-bankruptcy law.

3. Bankruptcy Code § 365(n)(4) discusses the immediate post-petition rights of a licensee and provides, in its entirety:

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall:

(A) to the extent provided in such contract or any agreement supplementary to such contract:

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

4. Bankruptcy Code § 365(n)(2) requires a continuing licensee to make "royalty payments." It provides, in its entirety (with emphasis added):

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract -

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall pay all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive:

(i) any right of setoff it may have with respect to such contract under this title or applicable non-bankruptcy law; and

(ii) any claim allowable under section 503(b) of this title [for administrative expenses of the estate] arising from the performance of such contract.

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While few courts have addressed § 365(n), the Ninth Circuit has addressed the meaning of “royalty payments” in § 365(n)(2) and determined that royalties include all types of license and service fees. *In re Prize Frize, Inc.*, 32 F.3d 426, 428-29 (1994). In addition, a recent Third Circuit opinion, *In re Cellnet Data Systems, Inc.*, clarified that such royalties are to be paid to the holder of the license, not the owner of the intellectual property. 327 F.2d 242, 250-52 (3rd Cir. 2003). Thus, in the above scenario, if your client’s competitor purchases the software itself but not the licenses, your client must continue its royalty payments to the debtor’s estate—even though the estate no longer holds the intellectual property.

5. *Prize Frize, supra* at 426.
6. In simplistic terms, source code is the “English language” version of a software program. A software’s source code is written in a logic-based programming language that often includes explanatory notes to guide other programmers. In order to be functional, however, the software’s source code must be translated into machine readable “object code.” Often referred to as “machine language,” the object code is “a binary language using two symbols, 0 and 1, to indicate an open or closed switch (e.g. ‘01101001’ means, to the Apple [computer], add two numbers and save the result).” See *Apple Computer, Inc., v. Franklin Computer Corp.*, 714 F.2d 1240, 1243 (3rd Cir. 1983). The object code lacks much of the information contained in the original source code, including all of the programmer’s comments as

...if your client’s competitor purchases the software itself but not the licenses, your client must continue its royalty payments to the debtor’s estate—even though the estate no longer holds the intellectual property.

well as symbolic constant and variable names. Thus, there is very little comprehensible material present in the object code that would allow for reverse engineering or further modifications of the software.

7. Intellectual property and software source code escrow companies in the Pacific Northwest include Escrow West (www.escrowwest.com), Innovasafe (www.innovasafe.com), and Iron Mountain (www.ironmountain-ipm.com).
8. Although trustees have contended otherwise, escrowed assets are rarely considered property of the estate. See generally *In re Cedar Rapids Meats, Inc.*, 121 B.R. 562, 567-69 (Bankr. N.D. Iowa 1990) (reviewing case law addressing whether an escrow is property of a bankruptcy estate and concluding that “[i]n cases where the escrow arrangement acted as an assurance or guarantee fund, courts have found that the

escrow funds are not property of the estate”); COLLIER ON BANKRUPTCY ¶ 541.09A[2] (15th ed. 2000) (“In general, most courts have held that assets in escrow are not property of the estate, even though the debtor may have certain rights under an escrow agreement and, therefore, in the assets escrowed.”).

9. By enacting § 365(n), Congress intended to protect a licensee’s rights after bankruptcy of its licensor even if the enforcement of such rights could arguably impact the value of the estate. See generally S. Rep. 100-505, 1988 WL 169875. Such protections specifically include enforcement of source code escrow agreements. The Senate Report accompanying the final legislation specifically notes that the term “embodiments” includes computer software source code. *Id.* at *9-10. Furthermore, a software escrow agreement was exemplified in the report as a contract “supplementary” to the license agreement. *Id.* at *9.
10. Under New York law, three requirements must be met in order to find a true escrow: (1) an agreement on the terms governing the escrowed assets; (2) the assets must in fact be delivered to a third party for transferee to the licensee, conditioned upon the performance of some act or the occurrence of some event; and (3) the stipulated conditions must be met before the assets can be released from escrow. COLLIER ON BANKRUPTCY ¶ 541.09A[1] (15th ed. 2000) citing, *inter alia*, *Stockschlaeder & McDonald v. Kittay*, 145 B.R. 797, 812 (Bankr. S.D.N.Y. 1992).

I. Claims and Defenses.

A. Employment claims.

The test for determining whether a person is "disabled" under Oregon law is different from the test applied under the federal Americans with Disabilities Act (ADA), the Court of Appeals held in *Washburn v. Columbia Forest Products, Inc.*, 197 Or App 104 (2005). Plaintiff worked as a millwright; he suffered from muscle spasms that limited his ability to sleep when untreated. He used marijuana under Oregon's Medical Marijuana Act (OMMA), claiming that this "completely resolves his sleeping problem." *Id.* at 106. After a urine sample revealed marijuana in his system, plaintiff's employment was terminated. He sued, alleging that his employer had failed to reasonably accommodate his disability in violation of ORS 659A.112. The trial court granted summary judgment to the employer, finding that (1) plaintiff was not a qualified individual with a disability (and thus not protected by Oregon disability law), and (2) the OMMA does not require employers to accommodate medical marijuana users.



Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

The Court of Appeals reversed. The court acknowledged that the United States Supreme Court concluded in *Sutton v. United Airlines, Inc.*, 527 US 471 (1999), that a person is not "disabled" under the ADA if mitigating measures essentially removed the disability, but the court declined to adopt that test in applying Oregon's disabilities law. 197 Or App at 109-110. The court further found that the OMMA's non-accommodation provision did not apply because plaintiff "did not engage in the medical use of marijuana in the workplace[.]" *Id.* at 114.

An employer's decision to change eligibility for an early retirement program gave rise to viable claims for breach of contract and promissory estoppel, the Court of Appeals held in *Furrer v. Southwestern Oregon Community Col-*

lege, 196 Or 374 (2004). The trial court dismissed those claims, finding that the early retirement policy did not give rise to contractual obligations that bound the employer. The Court of Appeals reversed, finding that (1) the employee began working, thus accepting the employer's offer of terms and conditions of employment; (2) the employer cannot then unilaterally modify the resulting contract so as to alter rights that have vested under it; and (3) the employer's discretion to modify the terms of the early retirement policy was limited by a duty to exercise that discretion in good faith, so "the promise of an early retirement in that policy was not illusory." *Id.* at 381. The court also concluded that plaintiff had adequately alleged each of the required elements of a promissory estoppel claim. *Id.* at 382-83.

In *Williams v. Freightliner, LLC*, 196 Or App 83 (2004), the Court of Appeals held that the burden-shifting analysis applied in employment discrimination cases under Title VII of the Civil Rights Act does not apply to discrimination actions under Oregon law. The trial court had granted summary judgment to the employer because "plaintiff failed to pro-

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duce evidence to rebut defendant's non-discriminatory explanation for plaintiff's termination." *Id.* at 90. That statement, explained the court, "suggests...that the trial court applied a burden-shifting analysis" (*Id.*), but "Oregon courts...have rejected that approach." *Id.* at 89.

B. Other claims.

Summary judgment was improperly granted to a property owner in a premises liability action, the Court of Appeals held in *Cassidy v. Bonham*, 196 Or App 481 (2004). Plaintiff was injured when she fell through a recess in the living room floor of defendant's house. Defendant moved for summary judgment on the grounds that (1) plaintiff was in his home as a licensee, not an invitee, and (2) she was aware of the recess and recognized that it posed a risk of injury. *Id.* at 485. The trial court granted the motion without explanation. The Court of Appeals reversed, finding that "there is a triable issue of fact as to whether plaintiff was an invitee." *Id.* at 487. The court explained that, under *Walsh v. C&K Market, Inc.*, 171 Or App 536, 539 (2000), a landowner's duty to an invitee "is to warn of latent dangers and to affirmatively protect the invitee against dangers in the condition of the premises about which the occupier knows or should reasonably have known." 196 Or App at 486. Plaintiff's status as an invitee, not a licensee, hinged on "whether a reasonable person could have understood defendant's words or conduct as expressing a desire that plaintiff come into her home for a purpose directly or indirectly connected to defendant's business[.]" *Id.* at 487.

A city can lawfully lease public property to a private party with a provision that allowed the lessee to decide whether to exclude persons carrying concealed handguns from the premises, the Court

of Appeals held in *Starrett v. City of Portland*, 196 Or App 534 (2004). The trial court properly distributed the residuary portion of a trust estate on the basis of extrinsic evidence of the trustor's intent, the Court of Appeals held in *Goodwill Industries v. U.S. Bank*, 196 Or App 556 (2004), because the terms of a trust instrument were ambiguous. In *Pfaendler v. Bruce*, 195 Or App 561 (2004), the Court of Appeals declined to decide whether the doctrine of equitable estoppel could establish an interest in real property because the court found that "defendant has failed to prove equitable estoppel." *Id.* at 569. The court pointed out that there was a split of authority in other jurisdictions, and that several Oregon cases "have appeared to recognize" that an interest in real property could be established through equitable estoppel, but there was no case "in which an Oregon appellate court has held that directly." *Id.* at 569. And in *Bachmeier v. Tuttle*, 195 Or App 83, 91 (2004), the Court of Appeals held that "the fact that an attorney defendant prosecuted a prior action on a client's behalf without probable cause cannot, by itself support a legally sufficient inference that the attorney acted with an 'improper purpose.'" Instead, the court explained, "there must be other, independent evidence substantiating" that the purpose was improper before the attorney can be held liable for wrongful initiation of a civil proceeding. *Id.*

C. Defenses.

In *Simonsen v. Ford Motor Co.*, 196 Or App 460 (2004), the Court of Appeals held that most, but not all, of plaintiff's claims against an automobile manufacturer were barred by the 8 year statute of limitations for product liability actions set forth in ORS 30.905 (1). The court found that 2 of the 3 specifications of negligence were subject to ORS 30.905

(1), rather than the general negligence statute, and that this statute of ultimate repose was not subject to tolling under ORS 12.160. One of the specifications of negligence, however, was governed by the general negligence limitations provisions (and thus subject to tolling) because the pleading, construed liberally in plaintiff's favor, sufficiently alleged "a negligence act...that would have occurred after the date of purchase[.]" *Id.* at 473.

The two-year limitations period set forth in ORS 12.110 (1) was suspended by an "advance payment" made by defendant's insurer, the Court of Appeals held in *Blanton v. Beiswenger*, 195 Or App 335 (2004). The court held that the "advance payment" provision in ORS 12.155 is "defendant specific", so the fact that plaintiff had timely commenced an action against another defendant (an action that was later dismissed) did not matter. *Id.* at 344. The statute of limitations does not apply to declaratory judgment actions seeking equitable relief, the Court of Appeals held in *Frasier v. Nolan*, 195 Or App 211 (2004). Instead, the doctrine of laches applied, and this action was not barred by laches because plaintiff did not unreasonably delay in asserting his claim after obtaining full knowledge of the relevant facts. And the plaintiff in *Waggoner v. City of Woodburn*, 196 Or App 715 (2004) was injured when she fell not from a wagon but from a swing set. The court held that the "recreational use" immunity set forth in ORS 105.682 barred her negligence claim.

II. Evidence.

An objection to the admissibility of expert testimony on the grounds of inadequate scientific foundation was waived by failing to assert the objection at the time of a perpetuation deposition,

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the Court of Appeals held in *Evers v. Roder*, 196 Or App 758 (2004). The court explained that the word "objection" as used in ORCP 39 I(6) "applies not only to improper questions, but to the evidence that they elicit." *Id.* at 762.

In *Mitchell v. Mt. Hood Meadows*, 195 Or App 431 (2004), the trial court granted plaintiff's motion for a new trial in part because it found that expert testimony concerning the extent to which plaintiff was impaired by marijuana at the time of his snowboarding accident was inadmissible. The Court of Appeals reversed. The court explained that "scientific evidence will be admissible if the evidence is based on a methodology that has scientific validity, even if other scientists or experts might be unwilling to draw the same conclusion." *Id.* at 444. Generally, the court explained, "a conflict in scientific opinion presents a question of weight to be resolved by the trier of fact." *Id.* at 446.

III. Procedure.

Oregon courts lack the judicial power to decide a case that becomes moot even if the case is "capable of repetition yet evading review," the Supreme Court held in *Yancy v. Shatzer*, 337 Or 345 (2004). A trial court erred in quashing a subpoena directed to a newspaper reporter in a defamation case, the Court of Appeals held in *Brown v. Gatti*, 195 Or App 695 (2004). The court explained that, under ORS 44.530(3), the media shield law does not apply to a subpoena issued in a civil action for defamation if the defendant asserts a defense based on the content or source of the allegedly defamatory information. *Id.* at 714. In *Rieker v. Kaiser Foundation Hospitals*, 194 Or App 708 (2004), the Court of Appeals held that

the trial court abused its discretion by allowing defense counsel to read medical literature that was not in evidence to the jury during closing argument, but the error was not reversible because it did not substantially affect plaintiffs' rights. And in *Forsi v. Hildahl*, 194 Or App 648 (2004), the Court of Appeals held that the trial court did not abuse its discretion in permitting plaintiff to amend her complaint on the day of trial to reduce her prayer for damages to \$5,500 in order to recover attorney fees under ORS 20.080.

Litigants had some difficulty applying the new judgment statute, Or Laws 2003, ch 576 (HB 2646), in three recent cases. In *Galfano v. KTVL-TV*, 196 Or App 425 (2004), the Court of Appeals concluded that an attorney fee award was appealable even though it was entered in a judgment erroneously denominated as a "supplemental general judgment." In *Garcia v. DMV*, 195 Or App 604 (2004), the Court of Appeals allowed an appeal to proceed even though the judgment entered in the register was erroneously described as a "limited" instead of a "general" judgment. And in *Strawn v. Farmers Ins. Co.*, 195 Or App 679 (2004), defendants' appeal from a "limited judgment" entered in a class action lawsuit was dismissed. The judgment dismissed 3 claims in their entirety, and purported to resolve the main issues in dispute on 3 other claims in plaintiffs' favor. The Court of Appeals dismissed the appeal because it could not tell "whether the trial court would have determined that there was no just reason for delay in rendering judgment...as required by ORCP 67 B" on the 3 claims that were dismissed or on the 3 claims that were partly decided in plaintiffs' favor. *Id.* at 691. ■

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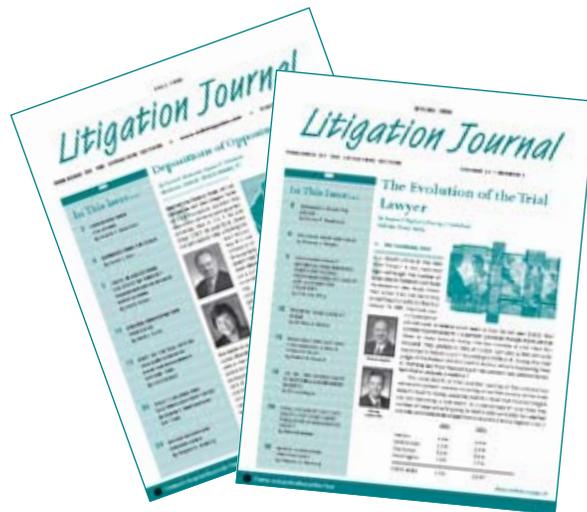
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