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In This Issue...

An Overview of Corporate Criminal Liability for the Civil Practitioner

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The potential criminal implications for a corporation based on the behavior of its employees (even a single rogue actor) are important for corporate counsel and civil litigators to keep in mind. Effective monitoring, compliance, and sound hiring practices go a long way to limit exposure, but there may be no way to completely prevent potential criminal liability. This brief introduction to some of the principles governing criminal liability at the state and federal levels is intended to help civil counsel develop effective oversight and identify those situations which merit consultation with criminal counsel.

ORIGIN OF CORPORATE CRIMINAL LIABILITY

Criminal liability for business entities has been deemed constitutional since at least 1909, when the United States Supreme Court first addressed the issue.[2] In *New York Central R. R. v. United States*, the Court considered whether a New York railroad company could itself be held liable when two of its managers paid illegal rebates to secure shipping business from other companies.[3] In determining whether to impose liability, the Court considered that the company's board had not authorized the rebate, but that corporations generally are unable to act other than through their members.[4] Contemplating the incorporeal nature of a corporation, the Court found that "[i]f, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously."[5] Borrowing from civil agency theory, the Court then implemented a form of *respondeat superior* liability, holding that the criminal acts of agents may be imputed to the employer when those agents act within the scope of their employment in a manner that benefits the corporation.[6]

In the Court's view, a number of public policy concerns required that outcome. First, proliferation of the corporate form suggested a need for regulation. The Court could not ignore that the "great majority of business transactions in modern times" were conducted by corporations.[7] It believed denying liability would essentially immunize corporate entities, taking away "the only means of effectually controlling" corporations or correcting abuses they might cause.[8] Second, corporations were in the best position to regulate the behavior of their employees, and the looming threat of criminal liability provided them with a strong incentive to do so.[9]

CORPORATE CRIMINAL LIABILITY IN OREGON

In Oregon, ORS 161.170 provides authority for imposing criminal liability on a corporation. Like the federal standard, Oregon's statute makes use of a *respondeat superior* theory of liability, holding corporations liable for some acts of their employees. In relevant part, the statute states that a corporation is guilty of an offense if "the conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of employment and in behalf of the corporation."[10]

ORS 161.170 also provides for criminal liability when employees fail to act. Liability may attach where conduct "consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law."[11] In addition, liability can attach for the acts of managers where criminal conduct is "engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of employment and in behalf of the corporation."[12]

ORS 161.170 is different from the federal standard in several important ways. Some of these differences provide increased protection. For example, unlike the federal standard, Oregon's statute stakes out limitations on the kinds of offenses for which corporations can be found liable. Liability under the Oregon statute may only be found where "the offense is a misdemeanor or a violation," or where "the offense is one defined by a statute that *clearly indicates* a legislative intent to impose criminal liability on a corporation."[13] Accordingly, corporations may only be held liable for felonies when the text of the statute creating the felony expresses a clear legislative intent to hold corporate entities accountable. Better yet, until that clear intent appears, the implication is that corporations retain the benefit of a presumptive exclusion from liability.

Another important difference is that the Oregon statute requires a heightened *mens rea* for criminal actions approved by directors or managers. Specifically, ORS 161.170 requires a corporate director or manager "knowingly" tolerate the commission of an offense.[14]

While Oregon law limits corporate criminal liability in several ways, it also expands the class of individuals whose actions can give rise to criminal charges. Pursuant to ORS 161.170, a corporation is guilty of an offense if the underlying conduct is "engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high ministerial agent." A "high managerial agent" is one "who exercises authority with respect to the formulation of corporate policy" *or* who exercises authority with respect to "the supervision in a managerial capacity of subordinate employees" *or* "any other agent in a position of comparable authority."[15] With such an expansive definition, ORS 161.170 hints at corporate responsibility for an entire cohort of lower-level managerial positions. The statute would also seem to invite argument by allowing liability to turn on whether an employee holds a position of authority "comparable" to the authority of one who supervises subordinates.

DEFINING THE LIMITS OF LIABILITY

Keeping both the federal standard and the language of Oregon's statute in mind, a few federal cases help define the outer limits of potential criminal liability for corporate entities. They primarily address the breadth of respondeat superior liability for criminality, a feature common to the federal and state schemes. Considering there are relatively few cases interpreting Oregon's statute, these federal cases may be helpful to practitioners contemplating the potential extent of liability in either the state or federal realm.

First, corporations may be liable for criminal activity "within the scope of employment" if the activity is one in which the employee exercises actual *or apparent* authority. *New York Central R. R.* is a prime example. In that case, the shipping managers involved were not explicitly authorized to offer illegal rebates.[16] The Court found that corporations were criminally liable for "acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized."[17] In such cases, "there need be no written authority under seal or vote of the corporation" in order for an agency relationship to exist and liability to attach.[18]

Second, actions "on behalf" of the corporation or "for the corporation's benefit" may include actions which are harmful to or deceive the corporation so long as the actions minimally benefit the corporation. Consider *United States v. Sun-Diamond Growers*.[19] Sun-Diamond was an agricultural cooperative criminally charged with wire fraud and illegal campaign contributions.[20] The charges were based on acts performed by Sun-Diamond's vice president of corporate affairs, Richard Douglas, who was responsible for representing the corporation's interests in Washington and with the Department of Agriculture in particular.[21] Following an unsuccessful campaign by the then-Secretary of Agriculture's brother, Douglas solicited contributions to repay the campaign debt from a firm which handled communications for Sun-Diamond.[22] Douglas and contributing individuals from the other firm then disguised those expenditures and submitted them for repayment to Sun-Diamond, who unwittingly paid them as a regular expense.[23]

Sun-Diamond argued that liability for the illegal campaign donations could not be attributed to the corporation, since Douglas's actions did not actually benefit Sun-Diamond, but rather defrauded it and caused it financial loss.[24] The court was not persuaded by this reasoning, finding that part of Douglas's job was to cultivate Sun-Diamond's relationship with the Secretary of Agriculture and that the jury was entitled to find that acting to secure the donations could have furthered that interest to some appreciable degree.[25] The court noted that although Sun-Diamond's argument possessed "considerable intuitive appeal," where "adequate evidence for imputation" exists, "the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion."[26]

Sun-Diamond indicates, and other decisions have explicitly affirmed, that a corporation need not actually receive the intended benefit of an employee's actions. More importantly,

the employee's actions need not be solely or even predominantly intended to benefit the corporate employer.[27]

Finally, it is important to understand that at least under federal law, corporations may be criminally liable even in situations where an employee's actions are expressly contrary to corporate policy. For example, in *United States v. Hilton Hotels Corp.*, various businesses in the hospitality industry organized an association to attract events to the Portland area, financed through contributions from members' businesses.[28] A few member hotels agreed to give preferential treatment to suppliers who assisted in funding the association by contributing an amount equal to one percent of their sales.[29] Hilton had a policy against conditioning the purchase of supplies on contributions to the association fund and instructed its purchasers to obtain supplies solely on the basis of price, quality, and service.[30] One purchaser threatened to revoke business from a certain supplier if the association fee was not paid, based in part on his anger towards that particular supplier and in spite of the fact that he had been expressly instructed on Hilton's policy against seeking the association fee.[31] Hilton argued that because the acts of the purchaser were expressly contrary to corporate policy, the company could not be liable for violations of the Sherman Act.[32] The court disagreed with Hilton, holding that the corporation could be liable for acts of its agents within the scope of their employment, "even though contrary to general corporate policy and express instructions to the agent."[33]

Following *Hilton Hotels*, corporate compliance programs offer little hope in the way of negating liability. They may however, be critically important during sentencing and may certainly influence an exercise of prosecutorial discretion.

CRIMINAL LIABILITY OF INDIVIDUAL OFFICERS AND DIRECTORS

Although the scope of this article is limited to criminal liability of the corporate entity, it is helpful to briefly discuss the circumstances under which an individual director of officer may be criminally liable. In Oregon, a director or officer can be criminally liable for acts performed in the name of a corporation. However, that director or officer is criminally liable only for their own acts or acts that are done at a director's or officer's direction.[34]

Under state law there is no mechanism to impute criminal liability to directors where they have no knowledge of an officer's or manager's conduct. But, individual officer or director criminal liability could be based on an aiding and abetting theory that includes solicitation or conspiracy. These theories, however, require some degree of intent.

The same is true in the federal context. Corporate directors, officers, and employees may be held personally liable for directly performing a criminal act with the requisite intent, even when acting in their official capacity or within the scope of their employment. Additionally, a corporate agent may be held liable if he or she "aids, abets, counsels, commands, induces or procures" the commission of that crime or if he or she "willfully causes an act to be done which if directly performed by him [or her] or another would [constitute a crime]."[35]

MANAGING CRIMINAL EXPOSURE

Corporate entities must take steps to establish and continually evaluate monitoring and compliance systems. This is true for a number of reasons. First, sentencing credit for compliance systems can be given only if those systems are "effective."[36] Second, because even a single violation can have serious collateral consequences for an organization, every violation that is not prevented seriously undermines the marginal value of continuing to maintain any monitoring system at all. Third, effective compliance gives a corporation a much stronger argument to persuade a prosecutor not to bring criminal charges in the first place.

Corporate entities can also take steps to limit wrongdoing by eliminating the possibility of any personal benefits that might accrue from misconduct. Individuals are more prone to commit offenses when they derive a personal benefit from doing so.[37] They are also more likely to expect that fellow coworkers will commit violations, which may reduce incentives for them to not act similarly.

Organizations should consider conducting their own internal investigations when wrongdoing is suspected. Companies who conduct their own internal investigations gain the advantage of knowing what the facts are, and are therefore in a better position to negotiate, preserve rights, craft defenses, take remedial action, and make informed decisions should the government become involved.[38] Internal investigations are also an effective means to avoid criminal sanctions and regulatory exposure. One informal study shows a "clear correlation" between internal investigations and more favorable outcomes resulting from the government's willingness not to charge or to settle the case on terms more advantageous to the company.[39] Internal investigations may have the added benefit of reassuring other parties interested in the organization's remediation of the issue, such as employees, investors, and regulators.

Finally, consider involving criminal counsel in strategic discussions early on. Criminal counsel can advise on decision-making in a civil case (or when a parallel criminal investigation is anticipated), help to preserve rights which may later need to be asserted, assist in controlling the flow of information, or work directly with government actors to prevent criminal charges from being filed.

No measures can completely eliminate the threat of potential criminal liability, due to the sheer scope of applicable state and federal statutes and corresponding case law. However, organizations that take some (or all) of the above steps will find themselves better able to make arguments about why criminal prosecution should be declined, in better command of the facts and information supporting their case, and advantageously positioned to seek leniency in the event a conviction is obtained.

CONSEQUENCES OF EARLY COOPERATION

Determining whether a corporation should cooperate with the government upon the discovery of possible wrongdoing requires a highly complex analysis and should be done with the assistance of criminal counsel. As will be further explained below, cooperation has many benefits. However, there are numerous potential negative implications including the cre-

ation of conflicts of interest between management and the corporation, as well as the deterioration of workforce morale and productivity. These problems, and others, must be considered before engaging in any cooperation with the government.

Although the scope of criminal liability for the acts of employees is fairly broad, an organization that has taken preemptive steps to deter and report wrongdoing will fare much better in the sentencing phase than a comparable organization that has not. Actions taken or programs implemented which reduce the risk of criminality should therefore be considered by counsel not just to prevent prosecution and conviction, but also to mitigate potential fines and fees in the event a conviction occurs.

Federal criminal sentencing for corporations is governed by the United States Sentencing Guidelines. Under this framework, steps to implement effective compliance, oversight, remediation for wrongdoing, and early and complete disclosure can positively impact the sentencing calculus in a number of ways. For example, a company with an "effective compliance and ethics program" in place is eligible for a three-point reduction in the culpability category.[40] In addition, organizations that take proactive steps to report an employee's behavior, cooperate with an investigation or prosecution, or accept responsibility are further eligible for culpability reduction.[41] Reductions in the culpability score reduce the multiplier applicable to base fines, and therefore dramatically lower the potential exposure to large fines.

On September 9, 2015, Deputy United States Attorney General Sally Yates issued a memorandum on Individual Accountability for Corporate Wrongdoing (also known as the "Yates Memo").[42] The Yates Memo is a directive to federal prosecutors on how to assess and prosecute corporate misconduct. Among the topics discussed in the Yates Memo is eligibility for cooperation credit. According to the Yates Memo, "[i]n order for a company to receive any consideration for cooperation . . . the company must completely disclose to the Department [of Justice] all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose."[43] Besides this threshold requirement, the Yates Memo also describes the factors that impact the extent of any cooperation credit. These include "the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, [and] the proactive nature of the cooperation."[44]

Based on the guidance in the Yates Memo, early cooperation with the government as well as efforts to create and maintain a compliance program that acts meaningfully on reports of potential malfeasance can have a significant impact on mitigating sentences. Sentencing incentives are so significant, they have led some to suggest that for general counsel to ignore the effects of a compliance program under the United States Sentencing Guidelines is professional malpractice.[45] Others argue that limiting favorable treatment to the sentencing phase may actually undermine incentives to maintain effective compliance, since the collateral consequences of the conviction itself may be more severe for certain companies in regulated industries than whatever fine might ultimately be imposed.[46]

CORPORATE-INDIVIDUAL CONFLICTS

Corporations can act only through individuals. As a result, the actions of individuals are the cause of potential corporate criminal liability. Therefore, when misconduct occurs, there is frequently a conflict of interest between individual officers and directors on the one hand, and the corporation itself on the other. This is particularly true in the situation where counsel advises the corporate client of the discovery of criminal conduct within the organization, recommends a voluntary disclosure to the government, and is met with corporate management's refusal to disclose. In such circumstances, it is important for counsel to clearly identify who the client is. This determination dictates whether the attorney-client privilege protects communications between counsel and particular individuals within the corporation and whether the privilege may be waived by the corporation alone. Although counsel may jointly represent a corporation and individual officers or directors, appropriate ethical arrangements must be made.

When the client is the corporate entity, under both federal and Oregon law the corporation owns (and may waive) the attorney-client privilege. "[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. [Thus, a corporation's] new managers . . . may waive the . . . privilege with respect to communications made by former officers and directors."[47] Despite the fact that the corporation owns the privilege with regard to officer or employee communications made to corporate counsel, a corporate officer or employee may establish a personal privilege for communications with corporate counsel by showing they approached corporate counsel and sought confidential advice in an individual capacity.[48] Under Oregon law, an attorney-client relationship exists when the potential client subjectively believes that the attorney represents them, as long as the belief is objectively reasonable under the circumstances.[49] Counsel should therefore make an individual assessment of privilege in any given circumstance.

PRIVILEGE AGAINST SELF-INCRIMINATION

No discussion of corporate criminal liability is complete without consideration of the privilege against self-incrimination. Both Article I, section 12, of the Oregon Constitution and the Fifth Amendment to the United States Constitution protect a person from being compelled to give testimony in any proceeding, civil or criminal, formal or informal, before administrative, legislative, or judicial bodies, when "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."[50] Overall, an individual is entitled to assert the privilege whenever answering a question might furnish a "link in the chain of evidence" leading to a criminal prosecution.[51]

The privilege against self-incrimination is not limited to oral testimony. Pursuant to the "act of production" privilege, the very act of producing documents (as opposed to the contents of the documents themselves) is protected under the Fifth Amendment to the extent the act of production may constitute implied testimony that could be incriminating.[52] In order to be testimonial, the production must itself, explicitly or implicitly,

relate a factual assertion or disclose information.[53] This may arise where the production of records amounts to the tacit admission of a document's existence or an individual's possession of it, either of which could be incriminating. In addition, the "act of production" privilege is also implicated when the production may serve to authenticate documents that would otherwise have questionable foundations.[54]

Under the federal constitution, a corporation—unlike an individual—has no Fifth Amendment privilege against compelled self-incrimination.[55] Thus, an employee of a corporation cannot assert the privilege when answering questions that will only incriminate the corporation and not the employee.[56] Additionally, because the privilege is personal, it cannot be asserted by a corporation on behalf of one of its employees.[57]

Although a corporation has no Fifth Amendment privilege, individual corporate employees do. This right, however, is limited depending on the circumstances. Under the Fifth Amendment "collective entity rule," the government can compel corporate employees (in their capacity as agents of a corporation) to produce corporate records even when the contents of the records or the act of production will incriminate the employees individually.[58] The government may not, however, make evidentiary use of the individual act of production against the custodian.[59] Furthermore, under Ninth Circuit precedent, the agency rationale of the Fifth Amendment collective entity rule does not apply to former employees.[60] Because of this, the actions of former employees are attributable to them individually and not to the corporation. *Id.* Therefore, a former employee who is in possession of (or controls) corporate records may refuse to produce them pursuant to a subpoena to the corporation or the individual.

Oregon courts have not yet considered many of these issues, including whether a corporation would enjoy the privilege against self-incrimination under Article I, section 12 of the state constitution. Such an extension is possible because Oregon courts consider corporations to be people for purposes of constitutional rights.[61] Further, the relevant constitutional analysis is different from that which applies to the Fifth Amendment. The interpretation of the state privilege is not tethered to interpretations of the Fifth Amendment, and Oregon courts have held that Article I, section 12, affords greater protections in some respects.[62]

Endnotes

1 A special thanks to Anthony Li for his assistance with this article.
2 *New York Central R. R. v. United States*, 212 U.S. 481 (1909).
3 *Id*. at 489–92.
4 *Id*. at 492–93.
5 *Id*. at 493.
6 *Id*. at 493–94.
7 *Id*. at 495.
8 *Id*. at 496.
9 *Id*. at 494.
10 ORS 160.170(1)(a).
11 ORS 160.170(1)(b).
12 ORS 160.170(1)(c).
13 ORS 160.170(1)(a), (b)(emphasis added).
14 ORS 160.170(1)(c).
15 ORS 161.170(2)(b).
16 *New York Central R. R.*, 281 U.S. at 492 ("there is no authority shown by the

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board of directors or the stockholders for the criminal acts of the agents of the company, in contracting for and giving rebates").

17 *Id*. at 493–94.

18 *Id*. at 494.

19 138 F.3d 961 (D.C. Cir. 1998).

20 *Id*. at 964.

21 *Id*. at 963–64.

22 *Id*. at 969–70.

23 *Id*.

24 *Id*. at 970.

25 *Id*.

26 *Id*.

27 *United States v. Automated Medical Labs*, 770 F.2d 399, 407 (4th Cir. 1985); *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984).

28 467 F.2d 1000, 1002 (9th Cir. 1972).

29 *Id*.

30 *Id*. at 1004.

31 *Id*.

32 *Id*.

33 *Id*. at 1007.

34 *State v. Baker*, 48 Or. App. 999, 1003, 818 P.2d 997 (1980); ORS 161.175.

35 18 U.S.C. § 2.

36 *See* U.S.S.G. § 8C2.1.

37 Assaf Hamdani & Aron Klement, *Corporate Crime and Deterrence*, 61 Stan. L. Rev. 271, 295 (2008).

38 Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No"*, 45 Am. Crim. L. Rev. 1237, 1280 (2008).

39 *Id*. at 1283–84.

40 U.S.S.G. § 8C2.5(f) ("Effective Compliance and Ethics Program").

41 *Id*. § 8C2.5(g) ("Self-Reporting, Cooperation, and Acceptance of Responsibility").

42 U.S. Dep't of Justice, Office of the Deputy Attorney General, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015).

43 *Id.* at 3.

44 *Id.*

45 Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 75 Wash. U. L. Q. 375, 375 (1993).

46 H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 Loy. L. Rev. 279, 321–22 (1995).

47 *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348–49 (1985).

48 *United States v. Graf*, 610 F.3d 1148, 1161 (9th Cir. 2010).

49 *In re Conduct of Weidner*, 310 Or 757, 770, 801 P2d 828 (1990).

50 *United States v. Balsys*, 524 US 666, 672 (1998).

51 *Blau v. United States*, 340 US 159, 161 (1950).

52 *See United States v. Hubbell,* 530 US 27, 36–7 (2000).

53 *Doe v. United States*, 487 US 201, 210 (1988).

54 *See id.* at 216 (noting that authentication by production would be "testimonial" in nature).

55 *Braswell v. United States*, 487 US 99, 105 (1988).

56 *United States v. Kordel*, 397 US 1, 7–9 (1970).

57 *See State ex rel. Juvenile Dep't of Lincoln Cty. v. Cook*, 138 Or. App. 401, 407, 909 P.2d 202 (1996) (privilege can be invoked or waived only by the individual holding those rights).

58 *Braswell*, 487 U.S. at 109–10.

59 *Id.*

60 *In re Grand Jury Subpoena*, 383 F.3d 905 (2004).

61 *See City of Keizer v. Lake Labish Water Control Dist.*, 185 Or. App. 425, 440–42, 60 P.3d 557 (2002).

62 *See State v. Soriano*, 68 Or. App. 642, 646, 662, 684 P.2d 1220 (1984).

Comments From The Editor

Personal Credibility

By Dennis P. Rawlinson
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Dennis P. Rawlinson

It's not unusual for a client or a referral source looking for a trial lawyer to say that he is looking for a lawyer who is "mean, aggressive, and hostile." My personal observation has been that "mean, aggressive, and hostile" lawyers tend to receive the same in kind and usually end up costing their clients substantial amounts in unnecessary attorney fees and ultimately alienate the fact finder.

Perhaps we sometimes mistake "meanness, aggressiveness, and hostility" for "personal credibility."

There is no question that every client and referral source should be looking for a lawyer who will put his or her "personal credibility" on the line for the client. Such a lawyer unleashes his or her personal belief and conviction to support the client's position.

In a recent seminar given by Wisconsin Federal Appellate Judge Ralph A. Fine, Judge Fine emphasized the importance of the lawyer's personal credibility in a jury trial.

The Lawyers Know the Real Truth

Judge Fine explained that jurors are convinced that the lawyers know the "real and whole" truth (regardless of the reality of whether they do or don't) of the case that they bring to trial.

It is not surprising that Judge Fine comes to this conclusion. After all, lawyers spend their time in front of the jury objecting to the introduction of evidence. Obviously, they wouldn't object if the information they were trying to keep out was not important and hurt their case. Based on these objections, the jurors conclude that the lawyers are attempting to keep them from knowing "the real and whole" truth, which the lawyers alone know.

Similarly, lawyers regularly have "secret" conferences with the judge (while the jury is excused) and whispered sidebar conversations with the judge. We all learn at an early age that it is impolite to whisper in the presence of others. Again, the natural conclusion of the jurors is that something is being kept from them. The lawyers know the important facts that the jurors do not.

Personal Credibility

Once one concludes that jurors assume that each of us knows the "real and whole" truth, the most effective way to be persuasive is to be zealously committed to one's client's position. Anything less suggests that the lawyer doubts the client's position.

Judge Fine uses a couple of examples to demonstrate when "personal credibility" is present and when it is not.

Never Apologize

Judge Fine urges trial lawyers never to apologize for their client's position. Apologies do not curry favor and do not make us likable. Instead they make us look weak and our client's position suspect.

For example, when Marcia Clark prosecuted O.J. Simpson for the murder of Nicole Simpson, she apologized in opening statement for prosecuting a popular high-profile football star. If in fact, as the jury presumes, she knows the "real and whole" truth (namely, that Simpson had committed the brutal cold-blooded murders), why would she be apologizing?

Don't Distance Yourself From the Facts

Similarly, Judge Fine criticized Robert Bennett's recent defense of President Clinton to the charges of Kathleen Willey. In response to some rather graphic allegations by Ms. Willey on the *60 Minutes* television news program concerning improper sexual advances by the President, attorney Bennett was careful not to place his personal belief and conviction on the line. Instead he told the television reporter what he understood to be "President Clinton's version of the facts." Hiding behind what he referred to as his "client's account" of the facts instead of responding clearly and directly that his client was not guilty and he would prove so was fatal to his persuasiveness.

Credibility Must Be Consistent With the Facts and Common Sense

Needless to say, a lawyer cannot place his unqualified personal belief and commitment behind a client's position unless it is believable. Personal credibility must be consistent with the facts and the jurors' common sense. The lawyer must first analyze the facts and adopt a version of the facts and a theme that is consistent with them and with common sense. Having done so, the lawyer's most persuasive tool for adoption of the lawyer's version of the facts and theme is the lawyer's credibility.

Prohibition Against Announcing Personal Belief

It has long been recognized that even in closing argument lawyers are prohibited from announcing their own personal belief concerning the truth or untruth of the facts or witnesses' credibility. *See e.g., Fowler v. State*, 500 SW2d 643 (Tex Crim App 1973); *People v. Bain*, 489 P2d 564 (Cal 1971). Why? Because it is so powerful. One can demonstrate one's personal belief, however, without announcing it.

One does so not by apologizing for prosecuting O.J. Simpson but by stating unequivocally that "I will prove to you that this man is a murderer." One does so not by hiding behind "the President's version of the facts" but by stating that "the President is innocent of the charges, and when the time is right we will prove it."

Conclusion

Next time someone approaches you and tells you that he or she is looking for a trial lawyer who is "mean, aggressive, and hostile," I suggest that you encourage him or her to reconsider. What he or she is really looking for is a trial lawyer who will place his or her own personal credibility on the line to support his or her client.

Appellate Considerations for Trial Counsel

By Anna K. Sortun and Bob Koch
Tonkon Torp LLP


Anna K. Sortun


Bob Koch

Whether in or out of a pandemic, no trial goes perfectly. Stress is high and hours are long. Something inevitably gets overlooked, missed, or outright messed up—whether by you, opposing counsel, or the court. To maximize your odds of success, who you gonna call? Your friendly local appellate lawyer!

Involving an appellate specialist as part of a trial team has a number of benefits. First, it can lighten the load of trial lawyers, particularly in briefing motions and crafting jury instructions. Second, it can improve outcomes for clients at trial by identifying the pertinent legal elements that the evidence must satisfy. Third, it can improve outcomes for clients post-trial by helping to ensure that potential challenges are properly preserved for appeal. When the budget of a case justifies additional staffing, bringing an appellate lawyer onto a litigation team as early as case inception can pay big dividends.

Even if the case size or budget precludes doing so, trial lawyers still should put on an appellate hat at key junctures throughout the life of a case. To help them along the way, the Bar recently added a new chapter on appellate preservation to the pantheon of civil litigation BarBooks. *See* Oregon Civil Pleading and Litigation ("OCPL"), Chapter 39: Appellate Considerations for Trial Counsel (2020 ed. in progress).

This article discusses how to navigate the major life stages of a case in Oregon state court with an eye toward appeal. Anna Sortun, co-chair of Tonkon Torp's litigation department, will provide lessons learned from her experience trying cases. Bob Koch, who chairs Tonkon's appellate practice group and authored the aforementioned BarBooks chapter, will highlight case law and sections of the chapter to which trial lawyers can look for support.

Pre-litigation

Anna:

We have all experienced the initial jolt of ramping up on a new matter, when lawyers are asked to issue spot a client's problems and sometimes to predict how a matter will play out in litigation. During this initial stage of pre-litigation analysis, I often think back to an experience I had as a junior associate, when the late Don Marmaduke gave a presentation about his trial preparation strategies. One piece of advice especially stuck out. Don taught that a trial lawyer should think about jury instructions from the inception of a case, and then use those instructions to steer strategy throughout the litigation. With this forward-looking approach, lawyers can avoid procedural headaches down the line, including attacks on the pleadings, and can better position their case for presentation at trial.

After gathering all available information, including interviewing clients and reviewing key documents, litigators begin crafting the pleadings. Even as early as the pleading stage, trial lawyers should put on an appellate hat. For plaintiffs, one way to do so is to rely on model jury instructions to craft the complaint in a way to avoid motions against the pleading, such as motions to strike and motions to dismiss. For one simple example, the complaint must allege ultimate facts sufficient to allege each element of each claim, or it is subject to a motion to dismiss under ORCP 21 A(8). Plaintiff lawyers can also plan in advance for potential affirmative defenses and strategically plead around them.

On the defense side, lawyers must pay close attention to the rules regarding which defenses must be raised or waived, either in the pleadings, by motion, or otherwise.

At the pleading stage, parties can also consider the use of motions to strike, both against the claims and the defenses, although the utility of such motions has been called into question by many practitioners.

Bob:

As a general rule, affirmative defenses must be raised in the pleading that responds to a pleading asserting a claim for relief. *See* ORCP 13 B (pleadings); ORCP 19 B (affirmative defenses). Certain defenses also may be raised in a motion to dismiss. *See* ORCP 21 A (listing the defenses).

In addition, other affirmative defenses can be raised in a motion for judgment on the pleadings or at a trial on the merits. ORCP 21 G(3). Such defenses must be raised, at a minimum, before judgment has been entered in the trial court. *See Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 382, 8 P3d 200 (2000), *adh'd to and remanded on recons*, 331 Or 595, 18 P3d 1096 (2001) (holding, "without deciding precisely when a trial on the merits ends," that a challenge to the legal sufficiency of a claim was waived when the defense of failure to state a claim was first raised after the trial court already had entered judgment).

As for motions to strike, a party can move to strike "(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated"; or "(2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading." ORCP 21 E. If a motion to strike is denied, "the party filing the motion does not waive the objection or defense by filing a responsive pleading or by failing to re-assert the objection or defense in the responsive pleading or by otherwise proceeding with the prosecution or defense of the action." ORCP 25 C.

For more information, see OCPL Chapter 39, § 39.2-1(a) (affirmative defenses); *id.* at § 39.2-1(b) (motions to strike); see also OCPL Chapter 16 (answers, affirmative defenses, counterclaims, and replies).

Summary Judgment

Anna:

Once the pleadings are settled, trial lawyers generally shift focus to fact development, which monopolizes much of the discovery phase of a case. One overgeneralization you hear about trial lawyers as compared to their appellate counterparts is that trial lawyers focus on story-telling and fact development, whereas appellate practitioners focus on legal arguments tailored to a judge. Although every good trial lawyer is nimble with legal argument, and all good appellate lawyers tell a winning story, this generalization can be useful when thinking about division of labor along the life of a case.

For example, appellate lawyers can assist in laying the groundwork for a successful summary judgment motion (or defending against such a motion) by helping trial lawyers craft thoughtful requests for admission, which can serve as useful building blocks for summary judgment.

By the time a case is set for dispositive motion practice, key facts have been developed through investigation, depositions, and paper discovery. And appellate lawyers who have advised on discovery strategies can add significant value to clients by drafting the legal arguments to either press or defend against summary judgment with an eye on arguments tailored for a judge.

One surprise I had early on is that summary judgment motions can often be defeated in Oregon through the filing of an ORCP 47 E declaration by a lawyer opposing summary judgment. It is worthwhile thinking through this tactical maneuver when either filing or opposing a summary judgment motion.

Bob:

To preserve an argument against summary judgment, a party must provide enough information to allow the opposing party to respond and to allow "the trial court to consider the argument and correct any error." *Buchwalter-Drumm v. State ex rel. Dep't of Human Servs.*, 288 Or App 64, 72, 404 P3d 959 (2017) (quoting *I*, 357 Or 745, 753, 359 P3d 232 (2015)). In addition, any evidentiary objections to the summary-judgment record must be made before the motion is decided. *Schram v. Albertson's, Inc.*, 146 Or App 415, 419 n 1, 934 P2d 483 (1997).

As Anna noted, if a party must provide an expert opinion to establish a genuine issue of material fact, then "an attorney's affidavit asserting that a retained expert will provide admissible evidence is sufficient, without more, to create a factual

dispute on that issue." *Piskorski v. Ron Tonkin Toyota, Inc.*, 179 Or App 713, 718, 41 P3d 1088 (2002). "The affidavit . . . must be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney, who is available and willing to testify, and who has actually rendered an opinion or provided facts that . . . would be a sufficient basis for denying the motion for summary judgment." ORCP 47 E.

For more information, see OCPL Chapter 39, § 39.2-1(c) (summary judgment).

Other pre-trial motions

Anna:

Pre-trial motions are another good opportunity to team with an appellate lawyer. I typically keep a working list of potential motions in limine and miscellaneous pre-trial motions in my case management document. In most Oregon state courts, judges set the due date for motions in limine at a day or two before trial. But some courts, and some individual judges, will consider and rule on early-filed motions in limine further in advance of trial. Consider drafting these motions well in advance of the trial crunch and seeking an earlier motion setting. If possible, delegate these motions to an appellate specialist.

Motions in limine traditionally center on evidence that will be considered by the jury or excluded by the court, but a wide variety of motions may be filed prior to trial, including motions concerning logistical trial matters like the exclusion of fact witnesses from the courtroom during trial under OEC 615. In state court, all pre-trial evidentiary and logistical motions may be filed in one document or in separate filings. Check with your judge's clerk or assistant to find out the judge's individual preferences for these pre-trial motions.

I'm particularly fond of asking the court to schedule a pre-trial hearing under OEC 104, which permits pre-trial rulings regarding the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence. In my experience, a Rule 104 hearing, after efforts to confer with opposing counsel on stipulations and pre-admission, can save precious time during trial. In jury trials in particular, trial days fly by and jurors are eager to end their service. The more legal issues that can be decided before voir dire, the more efficient the trial. That said, some judges are wary of making rulings about the admissibility of evidence prior to trial and prefer to rule as the evidence is presented.

Even if the court defers on ruling on any particular motion in limine, pre-trial drafting and presentation of motions offers a good opportunity to educate the court about crucial evidentiary aspects at trial and the applicable law, so that error can be avoided when the court is asked to make an in-the-moment decision on an evidentiary issue while a witness is on the stand.

Keep in mind that if a pre-trial evidentiary motion is granted, resulting in the exclusion of evidence, the proponent of the evidence must make an offer of proof on the record.

Bob:

A motion in limine preserves an evidentiary objection if a party makes a sufficient offer of proof and the trial court gives a definitive ruling. *State v. Pitt*, 352 Or 566, 574, 293 P3d 1002 (2012) (discussing *State v. Foster*, 296 Or 174, 183–84, 674 P2d 587 (1983)). However, evidentiary challenges often depend on context and must be specific; when in doubt, raise the objection again when the evidence is offered. In addition, arguments discussed at a pretrial hearing and ruled on by the court are preserved for appeal. *State v. Roberts*, 291 Or App 124, 130–31, 418 P3d 41 (2018).

As Anna flagged, when evidence is excluded, the trial lawyer must declare on the record, before or immediately after the ruling, why the evidence is admissible and must make an offer of proof. *State v. Morgan*, 251 Or App 99, 105, 284 P3d 496 (2012) (citing *State v. Affeld*, 307 Or 125, 128, 764 P2d 220 (1988); OEC 103(1) (ORS 40.025(1)). "One method of making an offer of proof is by question and answer. It also is acceptable, however, for a party's counsel to state what the proposed evidence is expected to be." *Morgan*, 251 Or App at 105 (quoting *State v. Phillips*, 314 Or 460, 466, 840 P2d 666 (1992)). Additionally, "an error is preserved if the substance of the evidence was apparent from the context within which questions were asked." *Id.* at 106 (internal quotation marks omitted) (quoting *Schacher v. Dunne*, 109 Or App 607, 610 n 1, 820 P2d 865 (1991), *rev den*, 313 Or 74 (1992)). Keep in mind that "[t]he purpose of this rule is to assure that appellate courts are able to determine whether it was error to exclude the evidence and whether any error was likely to have affected the result of the case." *Affeld*, 307 Or at 128.

Finally, for most pretrial issues, raise them again at trial to preserve them for review. For example, if you lost a motion to dismiss or strike, raise it again at trial with a motion for a directed verdict.

For more information, see OCPL Chapter 39, § 39.2-1(d) (motions in limine); *id.* at § 39.2-1(e) (pretrial hearings).

Trial: Voir Dire

Anna:

I tend to plan for trial chronologically. That means I spend time fairly early on thinking about my jury and preparing for voir dire. In some cases, I've relied on jury consultants to help identify problematic jurors for my case and to craft voir dire in a way that identifies those individuals so that I may thoughtfully exercise peremptory challenges. In other cases, I do my own work brainstorming with team members. In every case, my focus is on identifying those jurors who may be biased against my client or our case.

Voir dire can feel chaotic. To make an adequate record in the voir dire environment, it is helpful to have a system in place before beginning jury questioning. My system involves using a chart in the shape of the jury box with detailed notes and symbols that I use to keep track of information learned during the process and to note needed follow up. This system is useful in many ways. For example, under ORCP 57 D(4)—which states that peremptory challenges may not be exercised on the basis of race, ethnicity, or sex—objections to a peremp-

tory challenge must be made before the juror is excused and must be made outside the presence of the jurors. Although I've never drawn an objection to a peremptory challenge under this provision, the chart arms me with the information I would need to make a record that the challenge was exercised for a lawful reason.

In addition, when peremptory challenges are made off the record (for example, in a judge's chambers), I ask to make a record outside the presence of the jury at an appropriate time.

Bob:

Any claim of failure to comply with the jury-selection provisions of ORS Chapter 10 must be brought before the jury is sworn and within seven days after a party discovers or should have discovered facts showing the failure. ORCP 57 A(1); *see State ex rel. Click v. Brownhill*, 331 Or 500, 507, 15 P3d 990 (2000) (discussing ORCP 57 A).

To Anna's point, as a general rule, it is imperative that any meaningful oral proceeding in the trial court is captured on the record, either through a court reporter or with the trial court's recording device. "The burden of creating and providing a record rests with the party seeking to alter the decision." *Foust v. Am. Standard Ins. Co. of Wis.*, 189 Or App 125, 134 n 8, 74 P3d 1111 (2003). "An appellant has the responsibility of providing a sufficient record for review of the claims of error. If the record is insufficient for review, the unreviewable claims of error will be disregarded." *Russell v. Nikon, Inc.*, 207 Or App 266, 270, 140 P3d 1179, *adh'd to as modified on recons*, 208 Or App 606, 145 P3d 312 (2006) (quoting *H.N.M. Enters., Inc. v. Hamilton*, 49 Or App 613, 617, 621 P2d 57 (1980)); *see* ORS 19.365(5) ("If the record on appeal is not sufficient to allow the appellate court to review an assignment of error, the appellate court may decline to review the assignment of error and may dismiss the appeal if there are no other assignments of error that may be reviewed.").

For example, an in-chambers, off-the-record discussion is not part of the record on appeal. *See Rains v. Stayton Builders Mart, Inc.*, 359 Or 610, 636–38, 375 P3d 490 (2016). As a result, be respectful but persistent when you need to make your record. Be cognizant when a conference, either in chambers or at a sidebar, is not being recorded. If something meaningful happens, ask the judge to put the matter on the record. Similarly, do not be afraid to use "may the record reflect" to capture nonverbal and other events that otherwise may not be reflected by a reporter or in a recording.

For more information, see OCPL Chapter 39, § 39.2-1(f) (jury trial and selection); see also *id* . at § 39.3 (creating a record for appeal); OCPL Chapter 35 (jury selection).

Trial: Evidentiary objections

Anna:

Moving forward to presentation of the evidence, I have a few rituals prior to trial. One of the last things I do the day before trial is read the entirety of the applicable rules of evidence. I adopted this practice at the advice of a mentor and find it enormously helpful, particularly when trial is before a judge who pays attention to and applies the hearsay rules. Having the rules fresh and top of mind assists when witness testimony begins.

Granted, one should work on how to articulate objections. At one of my early trials, a case involving the interpretation of insurance policies, a witness began down a line of testimony that was irrelevant to the case but highly inflammatory and damaging to my client. I rose to my feet and said, "Objection, prejudicial." A kind partner on my team reminded me that making such an objection focused the jury, who had previously been nearly asleep, and made them pay closer attention to the damaging testimony. If necessary, I now object to such testimony by referencing Rule 403 and follow my objection with a request to approach (if necessary) to explain the basis of the objection. More times than not, I may pass on making the objection entirely so as not to unduly draw attention to the testimony.

As with pre-trial motions, if an evidentiary motion results in the exclusion of evidence at trial, the trial lawyer propounding the evidence needs to remember to make an offer of proof on the record. Many judges will fit in the offer of proof during a jury break, over lunch, or at the beginning of a trial day. As Bob discussed above, it is incumbent on the trial lawyer to be sure this record is made.

Bob:

A party must specifically either object to or move to strike inadmissible evidence. OEC 103(1)(a) (ORS 40.025(1)(a)); *see Shields v. Campbell*, 277 Or 71, 77, 559 P2d 1275 (1977) ("A party owes the trial court the obligation of a sound, clear and articulate motion, objection or exception, so as to permit the trial judge a chance to consider the legal contention or to correct an error already made."). For example, if a witness gives allegedly inadmissible testimony, a prompt motion to strike is required to preserve the issue for appeal. OEC 103(1)(a) (ORS 40.025(1)(a)); *see McEwen v. Ortho Pharm. Corp.*, 270 Or 375, 421, 528 P2d 522 (1974).

As noted above, when evidence is excluded, the trial lawyer must declare on the record, before or immediately after the ruling, why the evidence is admissible and must make an offer of proof. *State v. Morgan*, 251 Or App 99, 105, 284 P3d 496 (2012) (citing *State v. Affeld*, 307 Or 125, 128, 764 P2d 220 (1988); OEC 103(1) (ORS 40.025(1)). This includes materials offered in connection with expert testimony. *Marshall v. Korpa*, 118 Or App 144, 149, 846 P2d 445, *rev den*, 316 Or 527 (1993). A lawyer can make an offer of proof by question and answer or by stating what the proposed evidence would be. *Morgan*, 251 Or App at 105 (quoting *State v. Phillips*, 314 Or 460, 466, 840 P2d 666 (1992)). In addition, "an error is preserved if the substance of the evidence was apparent from the context within which questions were asked." *Id.* at 106 (internal quotation marks omitted) (quoting *Schacher v. Dunne*, 109 Or App 607, 610 n 1, 820 P2d 865 (1991), *rev den*, 313 Or 74 (1992)).

Keep in mind that Oregon's appellate courts will not reverse a trial court for evidentiary error unless the "error substantially affect[s] the rights of a party." ORS 19.415(2); *see* OEC 103 (ORS 40.025). "[E]videntiary errors substantially affect a party's rights and require reversal when the error has

some likelihood of affecting the jury's verdict." *Dew v. Bay Area Health Dist.*, 248 Or App 244, 258, 278 P3d 20 (2012).

For more information, see OCPL Chapter 39, § 39.2-2(a) (evidentiary objections).

Trial: Directed verdict motions

Anna:

Another pretrial ritual I have involves creating a trial timeline with emphasis on points in the trial that a record must be created to preserve rights on appeal. I keep my timeline front and center on the trial table, next to my trial notebook. Out of paranoia, I've been known to put multiple sticky-note reminders on top of my timeline. For example, at the close of an opponent's case (whether plaintiff or defendant), I note the requirement to bring motions for directed verdict on the record.

Directed verdict motions under ORCP 60 can be made by either party, based upon whether the evidence is sufficient to prove a claim or defense. The importance of making a record for a directed verdict motion cannot be understated. The motions must state specific grounds, ideally with legal authority cited, and must be directed to a particular part of an opponent's claim or defense. Ideally, motions for directed verdict should be planned ahead, and potentially drafted ahead, allowing further room for collaboration with appellate specialists.

In practice, many courts in Oregon permit directed verdict motions against portions of an opponents claim or defense, such as with respect to damages or one specification of liability.

Making a directed verdict motion on the record at the close of my opponent's case is not the only ORCP 60 item on my timeline. I also remind myself to *renew* my directed verdict motion at the close of all the evidence. That is because ORCP 63A provides that a motion for directed verdict must be made at the close of *all the evidence* for the court to consider entering a judgment notwithstanding the verdict.

Bob:

In a jury trial, a party must move for a directed verdict before the jury is instructed and must specify the grounds on which it is based; grounds not argued to the trial court may not be raised on appeal. *See Remington v. Landolt*, 273 Or 297, 302, 541 P2d 472 (1975) (citing cases).

In a trial to the court, a party must move for dismissal before the court's decision; a litigant may not raise the sufficiency of the plaintiff's evidence on appeal unless the litigant has asserted the legal insufficiency of the evidence in the trial court. *Peiffer v. Hoyt*, 186 Or App 485, 493–95, 63 P3d 1273 (2003) (quoting *Falk v. Amsberry*, 290 Or 839, 843, 626 P2d 362 (1981)); *see* ORCP 54 B(2).

Keep in mind that "[a] directed verdict is appropriate only if there is a complete absence of proof on an essential issue or when there is no conflict in the evidence and it is susceptible of only one construction." *Peterson v. McCavic*, 249 Or App 343, 350, 277 P3d 572, *rev den*, 352 Or 564 (2012) (quoting *Malensky v. Mobay Chem. Corp.*, 104 Or App 165, 170, 799 P2d 683 (1990), *rev den*, 311 Or 187 (1991)).

For more information, see OCPL Chapter 39, § 39.2-2(b) (directed verdict motions); see also OCPL Chapter 34, § 34.9 (motion for directed verdict); OCPL Chapter 38 (verdicts and findings).

Trial: Jury instructions

Anna:

Another key point in my trial timeline is remembering to object to the final jury instructions if necessary and making sure such objections (also called exceptions) are on the record. Sometimes, the process of winnowing down and settling on the final jury instructions is cumbersome and informal. In complex cases, parties may submit to the court long lists of uniform instructions along with long lists of special instructions (altered uniform instructions or instructions drafted by counsel based on legal authority). Eventually, and sometimes after extensive argument both on and off the record, the court will present the lawyers with a set of its final instructions. It is critical for trial lawyers to be vocal with the court on the need to make a record of exceptions to the final instructions.

Bob:

"Under Oregon law, there are two different types of error respecting jury instructions: (1) error in the failure to give a proposed jury instruction, and (2) error in the jury instructions that actually were given." *Williams v. Philip Morris, Inc.*, 344 Or 45, 55, 176 P3d 1255 (2008) (subsequent history omitted).

To preserve a challenge to a trial court's refusal to give a jury instruction, a party must object or except on the record and state with particularity the grounds for the objection. ORCP 59 H; *see Migis v. Autozone, Inc.*, 282 Or App 774, 791 n 11, 387 P3d 381 (2016), *adh'd to as modified on recons*, 286 Or App 357, 396 P3d 309 (2017) (quoting ORCP 59 H). "As a general matter, a party is entitled to a jury instruction on its theory of the case if the requested instruction correctly states the law, is based on the operative pleadings, and is supported by the evidence." *Ossanna v. Nike, Inc.*, 365 Or 196, 212, 445 P3d 281 (2019).

Note that "the failure to give a requested instruction is not error if the requested instruction was not correct in all respects." *Bennett v. Farmers Ins. Co. of Or.*, 332 Or 138, 153, 26 P3d 785 (2001) (citing *Hernandez v. Barbo Mach. Co.*, 327 Or 99, 106, 957 P2d 147 (1998)); *see Williams*, 344 Or at 56 (quoting *Beglau v. Albertus*, 272 Or 170, 179, 536 P2d 1251 (1975)). Moreover, a trial court has no duty or obligation to correct or edit an incorrect instruction. *Winnett v. City of Portland*, 118 Or App 437, 447, 847 P2d 902 (1993) (citing *Beglau*, 272 Or at 179).

To preserve a challenge to a jury instruction given by the trial court, a party similarly must object or except on the record and state with particularity the grounds for the objection. ORCP 59 H; *Bennett*, 332 Or at 152–53 (citing ORCP 59 H). An instruction is erroneous if it "is at odds with a general rule of Oregon law or inconsistent with a specific application

of that rule in prior Oregon case law. An instruction can also be erroneous because there is no evidence in the record to support giving the instruction." *Montara Owners Ass'n v. La Noue Dev., LLC*, 357 Or 333, 347–48, 353 P3d 563 (2015) (alterations, internal quotation marks, and citations omitted).

For more information, see OCPL Chapter 39, § 39.2-2(d) (jury instructions); see also OCPL Chapter 37 (jury instructions).

Trial: Other jury issues

Anna:

It is useful to spend a significant amount of time well in advance of trial on the verdict form and to consider drafting alternate proposed verdict forms in complex, multi-party cases. Do not leave this key piece of the trial record to the last minute. For a variety of reasons, it is imperative to think through the utility of a complex verdict form versus a simple general verdict form. In my practice, I like to test my draft verdict forms by having colleagues (lawyers and non-lawyers) unfamiliar with my case fill out the forms after hearing a mock closing or opening. Inevitably, we tinker with our draft form after such a test.

Keep in mind that the verdict form should anticipate issues relating to the "same nine" rule, which requires the same nine jurors to agree on every interdependent element of a particular claim against a particular defendant.

Forms initially submitted by the parties are rarely accepted by the opposing party/parties and the court without modification. Settling on a final version of the verdict form is often left to the last minute at trial. Once the verdict form is finalized, trial lawyers must state objections to the final verdict form on the record.

When the jury returns its verdict, there is an opportunity to poll the jury. ORCP 59 G(3) provides that any party may request to poll the jury. A losing party is missing an opportunity if it fails to poll the jury. Particularly in a complex case with a special verdict form, a losing party should assure itself that the same nine jurors voted down the form for each claim. If there is an inconsistency, a trial lawyer needs to request that the jury continue deliberations.

Because of the many variations of verdict forms and the importance of the verdict form itself in the appellate setting, consulting with an appellate lawyer when crafting the strategy for a verdict form is advisable.

Bob:

The validity of the verdict form must be challenged at trial, or any error is waived. *U.S. Nat'l Bank of Or. v. Zellner*, 101 Or App 98, 104, 789 P2d 670, *rev den*, 310 Or 122 (1990) (citations omitted). The trial court must be given the opportunity to resubmit the case to the jury with a proper verdict form. *Bldg. Structures, Inc. v. Young*, 328 Or 100, 110, 968 P2d 1287 (1998); *Smith*, 269 Or at 655; *Zellner*, 101 Or App at 104.

As explained by Anna, when the verdict is returned, each party has a right "to request a poll of the jury to ensure that

the verdict is correct." *Congdon v. Berg*, 256 Or App 73, 75, 299 P3d 588 (2013) (citing *Eisele v. Rood*, 275 Or 461, 468, 551 P2d 441 (1976); ORCP 59 G(3)). A failure to request a poll waives that right. *Eisele*, 275 Or at 469; *see Congdon*, 256 Or App at 76. The court does not have to poll the jury in the exact manner requested by a party. *Martin v. Burlington N., Inc.*, 47 Or App 381, 385, 614 P2d 1203 (1980) (citing *Aronson v. Fagan*, 278 Or 135, 562 P2d 974 (1977)). However, "the rule requires an individual poll of each juror in a manner that demonstrates whether each juror agreed with the entire verdict." *Congdon*, 256 Or App at 81.

The validity of the verdict must be challenged once the verdict is returned, otherwise any error is waived. *Big Bend Agric. Coop. v. Tim's Trucks, Inc.*, 277 Or 17, 20, 558 P2d 844 (1977); *Smith v. J.C. Penney Co.*, 269 Or 643, 655, 525 P2d 1299 (1974). That is so "the trial court can decide whether to resubmit the case to the jury and have the case decided correctly by the jury which has heard the case." *Smith*, 269 Or at 655.

For more information, see OCPL Chapter 39, § 39.2-2(e) (verdict form); *id.* at § 39.2-2(f) (defective verdict).

JNOV/Motions for a new trial

Anna:

After the verdict is rendered and a judgment is entered, the losing party can consider making a motion for a judgment notwithstanding the verdict (JNOV) and can consider accompanying such motion with a motion for a new trial under ORCP 63.

There are some procedural landmines to keep in mind here. First, as mentioned, a prerequisite to filing a JNOV motion is the prior presentation of a directed verdict motion under ORCP 60. What's more, a party filing a JNOV must keep a careful eye on the clock. Motions must be *heard and determined* within 55 days of entry of the judgment. This is a real deadline and should be docketed accordingly. I once had a case in which a judge issued a favorable opinion granting a JNOV motion one day late, resulting in the court having no jurisdiction to enter such an order. This resulted in a mess on appeal and likely could have been avoided by a letter or call to the judge's assistant, reminding chambers of the deadline.

Bob:

Unlike in federal court, a motion for JNOV in Oregon state court is not required to preserve an attack on the sufficiency of the evidence in a jury case; rather, a party must move for a directed verdict before submission of the case to the jury. *Arena v. Gingrich*, 305 Or 1, 8 n 1, 748 P2d 547 (1988). Similarly, a motion for a new trial is not required to preserve on appeal an error previously preserved during trial. *Kahn v. Weldin*, 60 Or App 365, 371, 653 P2d 1268 (1982), *rev den*, 294 Or 682 (1983) (citing *Nat'l Council v. McGinn*, 70 Or 457, 462, 138 P 493 (1914)). Relatedly, the denial of neither motion is appealable. *Bldg. Structures, Inc. v. Young*, 328 Or 100, 111, 968 P2d 1287 (1998) (motion for JNOV); *Migis v. Autozone, Inc.*, 282 Or App 774, 808 n 21, 387 P3d 381 (2016), *adh'd to as modified on recons*, 286 Or App 357, 396 P3d 309 (2017) (motion for a new trial). Rather, on appeal, a party should assign error to the denial of their motion for a directed verdict.

Be careful that, if a party files only a motion for JNOV and does not join it with an alternative motion for a new trial, then the party waives any right to a new trial for any error asserted in the JNOV motion. ORCP 63 C; *Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc.*, 325 Or 46, 53, 932 P2d 1141 (1997).

For more information, see OCPL Chapter 39, § 39.2-3(a) (motion for judgment N.O.V.); *id.* at § 39.2-3(b) (motion for a new trial); see also OCPL Chapter 40, § 40.4 (judgment n.o.v.); *id.* at § 40.5 (motion for new trial).

Notice of appeal

Anna:

Once the judgment is entered, the clock starts ticking for the filing of a notice of appeal. Whether or not to appeal a judgment involves multiple factors, not the least of which are time, money, and likelihood of success on appeal. Obviously, if an appellate lawyer is not yet involved, post-judgment is a key time to consult with a specialist.

Bob:

A notice of appeal is required to appeal to the court of appeals from a judgment of a circuit court (ORS 19.240), or to a circuit court from a county court (ORS 5.120) or justice court (ORS 53.030). The specific requirements for a notice of appeal to the court of appeals are delineated in ORS 19.250 and ORAP 2.05. A sample notice of appeal is provided at ORAP Appendix 2.05.

As a general rule, a party must file a notice of appeal within 30 days from when the order or judgment being appealed is entered in the lower court's register. ORS 5.120; ORS 19.255(1); ORS 53.030; ORAP 2.05. If more than 30 days have elapsed from the date the judgment was entered, then the notice of appeal must state why the appeal is nevertheless timely. ORAP 2.05(8). A judgment is "entered" not when the judge signs it, but "when a court administrator notes in the register that a judgment document has been filed with the court administrator." ORS 18.075(1).

The proper filing *and* service of a notice of appeal are "jurisdictional and may not be waived or extended." ORS 19.270(2); *see Ann Sacks Tile & Stone, Inc. v. Dep't of Revenue*, 352 Or 380, 386–87, 287 P3d 1062 (2012). There are two ways to file a notice of appeal in the Oregon Court of Appeals: electronically or conventionally. *See* ORAP 16.30(3)(a) (allowing either for a notice of appeal); *see also* ORS 19.260(1)(a) (allowing conventional filing for a notice of appeal); ORAP 1.35(1)(b)(iii) (same); ORAP 16.60 (requiring electronic filing for most other documents on appeal for active members of the Oregon State Bar). Currently, "only attorneys who are members of the Oregon State Bar and are authorized to practice law in Oregon are eligible to file documents electronically." ORAP 16.03.

Service can be accomplished by: (1) "first-class, registered or certified mail"; or (2) "[m]ail or dispatch for delivery via the

United States Postal Service or a commercial delivery service by a class of delivery calculated to achieve delivery within three calendar days." ORS 19.260(2)(a). Service also can be accomplished by email in the circumstances provided under ORCP 9 G. *See* ORS 19.500 (incorporating the service methods of ORCP 9 B for ORS chapter 19); ORCP 9 B (allowing service by email as provided in ORCP 9 G); *see also* ORAP 1.35(2)(b)(iii) (same); ORAP 16.45(3)(a) (incorporating service methods of ORAP 1.35 for initiating documents on appeal). Given the ease of first-class mail, best practice is to accomplish service via both email and first-class mail.

For more information, see OCPL Chapter 39, § 39.4-1 (notice of appeal); see also *Appeal and Review: The Basics* §§ 3.40–3.61 (OSB Legal Pubs 2010).

Post-appeal bonds and motions

Anna:

Sometimes it may feel like trial court litigation never ends, even in the post-verdict, pre-appeal setting. It is important to be familiar with the requirements of posting bonds pending appeal and the options and procedures to stay enforcement of judgments while a case is on appeal. Advising clients on these issues before the decision is made to appeal a judgment is critical so that the client can assess the risks and rewards of proceeding in the appellate setting.

Bob:

As a general rule, "[t]he filing of a notice of appeal does *not* automatically stay the judgment that is the subject of the appeal." ORS 19.330 (emphasis added). Rather, "[a] party may seek to stay a judgment in the manner provided by ORS 19.335, 19.340[,] or 19.350, or as provided by other law." ORS 19.330; *see also* ORS 19.312 (actions against tobacco product manufacturers); ORS 19.355 (domestic-relations judgments).

A supersedeas undertaking—aside from being a mouthful of a term—is something that secures performance of the judgment being appealed and operates to stay enforcement of the judgment pending appeal. ORS 19.335. When a judgment is for the recovery of money, such an undertaking takes the form of "a promise secured by sureties or by money, bond[,] or any other security described in ORS 22.020." ORS 19.005(9); ORS 19.335(1); *see* ORS 19.315–19.320 (letter of credit requirements). Note that bonds can be difficult to secure; a party also can use cash or a letter of credit. ORS 22.020. In turn, the respondent can object to the sufficiency of an undertaking. ORS 19.305(3); ORCP 82 F. In addition, the parties or the trial court can waive, reduce, or limit an undertaking under ORS 19.310; *see* ORS 19.300(3) (discussing how to file, serve, and provide notice of undertakings).

An undertaking for costs—a cost bond—secures payment of costs and disbursements awarded on appeal. ORS 19.005(8). "An appellant must serve and file an undertaking for costs within 14 days after the filing of a notice of appeal. Unless the undertaking is waived, reduced or limited under ORS 19.310, an undertaking for costs must be in the amount of $500." ORS 19.300(1); *see* ORS 19.300(3) (discussing how to file, serve, and provide notice of undertakings). An undertaking for costs is typically accomplished by depositing $500 with the trial court. ORS 19.300(1); ORS 22.020(1); ORS 22.030(1). If an appellant fails to timely serve and file an undertaking for costs, then the appellee can file a motion to dismiss the appeal after giving the appellant at least seven days' notice before doing so. ORAP 7.40(1).

For more information, see OCPL Chapter 39, § 39.4-2 (securing the appeal; understaking); see also *Appeal and Review: The Basics* §§ 3.64–3.92 (OSB Legal Pubs 2010).

Parting thoughts

Anna:

Once the decision has been made to file a notice of appeal, the question arises of who should do the appellate work. Sometimes it is difficult to let go of a case after trial, but in my practice I have determined that my clients are best served by having an appellate specialist take control of the case at the appellate stage. And if I have done the work of creating a sufficient record at trial, Bob is better positioned for success on appeal.

Bob:

Trial lawyers should keep in mind that two major purposes underlie the preservation requirement and inquiry: fairness and efficiency. *State v. Stevens*, 328 Or 116, 122, 970 P2d 215 (1998); *see Peeples v. Lampert*, 345 Or 209, 219–20, 191 P3d 637 (2008) (discussing the prudential and pragmatic reasons behind preservation). In short, there is no playing "gotcha" with Oregon's appellate courts. As a result, to preserve an issue for appeal, a party generally must—and need only—raise the issue in the trial court in a way that (1) allows the opposing party an opportunity to respond, (2) gives the trial court an opportunity to correct any error, and (3) obtains a ruling from the trial court for an appellate court to review. *State v. Clemente-Perez*, 357 Or 745, 752, 359 P3d 232 (2015); *State v. Vanornum*, 354 Or 614, 631–32, 317 P3d 889 (2013); *Peeples*, 345 Or at 219–20; *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000).

For more information, see OCPL Chapter 39, § 39.1 (overview of preservation).

Conclusion

Case outcomes can improve dramatically when trial lawyers either involve an appellate specialist in a case team or don an appellate lawyer hat at key points in the litigation. Taking a future-oriented approach of this type is essential to serving clients effectively and to ensuring the best possible position should lawyers face an appeal down the line. For more information, check out Chapter 39 of Oregon Civil Pleading and Litigation on the Bar's website.

Recent Significant Oregon Cases

By The Honorable Stephen K. Bushong
Multnomah County Circuit Court

The Honorable Stephen K Bushong

Claims and Defenses

Albany & Eastern Railroad Co. v. Martell, 366 Or 715 (2020)

In this quiet title action, defendants and other residents of a small neighborhood had used a railroad crossing on a private roadway to access their homes since 1942. The trial court determined that such use gave rise to prescriptive easement. The Court of Appeals reversed, concluding that the "presumption of adversity" did not apply because the residents' use of the crossing was not likely to put the landowner on notice of the adverse nature of the use. The Supreme Court reversed the Court of Appeals and affirmed the judgment of the trial court. The railroad's mistaken belief that the crossing was "public" did not mean that the presumption of adversity did not apply. Under these circumstances, the court concluded, "to allow the mistaken belief of an historical fact—that the crossing was 'public' rather than 'private'—to interrupt a period of continuous use by the residents and their predecessors for almost 70 years would fly in the face of the basic rules of prescriptive rights." 366 Or at 727.

Lowell v. Wright, 306 Or App 325 (2020)

Plaintiff owns a piano store in Medford. He sued for defamation based on a Google review of plaintiff's store posted by defendant Wright, an employee of a competing piano store, defendant Artistic Piano. The trial court granted defendants' motion for summary judgment, concluding that the absence of the Google review from the record was fatal to plaintiff's claim. The Court of Appeals reversed, concluding that the absence of a copy of the actual review from the record "did not entitle defendants to summary judgment." 306 Or App at 349. As to whether the statements were protected by the First Amendment, the court concluded that "Wright was speaking on a matter of public concern, but a reasonable factfinder could find that Wright's review implies two assertions of objective fact about plaintiff . . . [so] the First Amendment does not preclude liability on those statements." *Id.*

Morris v. Dental Care Today, P.C., 306 Or App 261 (2020)

Plaintiff alleged that dentures provided by her dental providers were substandard. She brought claims under the Unlawful Trade Practices Act (UTPA) and for professional negligence. The trial court granted defendant's motion for summary judgment, concluding that the UTPA was time barred, and the negligence claim failed because plaintiff did not produce supporting expert testimony in response to defendants' expert testimony on standard of care and causation. The Court of Appeals affirmed. The UTPA claim was time barred because plaintiff's own declaration established that she "knew or should have known" about defendants' improper conduct more than two years before filing her complaint. 306 Or App at 262. On the negligence claim, plaintiff contended that expert testimony was not required under the doctrine of *res ipsa loquitor*. The court concluded that the doctrine does not apply because "there are a number of other potential explanations" for plaintiff's loss of her teeth. *Id.* at 264. In the face of defendant's expert affidavit testimony on the standard of care, plaintiff "was required to produce expert medical evidence sufficient to raise a genuine issue of material fact in order to survive summary judgment." *Id.*

JH Kelly, LLC v. Quality Plus Services, Inc., 305 Or App 565 (2020)

Defendant Quality Plus, a subcontractor on a large construction project, was hired to fabricate piping to be installed on the project. Quality Plus performed fabrication services using a welding machine manufactured by third-party defendant Georg Fischer and serviced by Plastic Services, a Georg Fischer distributor. Hundreds of the pipes had to removed and replaced when it was discovered that one of the settings on the welding machine had been mistakenly recalibrated during a service call, compromising the welds. At trial on Quality Plus's third-party claims, the jury returned a verdict of more than $2 million in damages, apportioning 46 percent of the fault to Plastic Services; 35 percent to Georg Fischer; and 19 percent to Quality Plus. The trial court affirmed on Georg Fischer's appeal and Quality Plus's cross-appeal. The court concluded that, because Quality Plus "presented evidence that tangible physical property was damaged while in its possession and control," Georg Fischer was not entitled to a directed verdict based on the economic loss doctrine. 305 Or App at 578. The court further concluded that the trial court did not err in denying Georg Fischer's motion for a directed verdict on the lost profits claim, explaining that "the evidence of the historical performance of Quality Plus's business, plus the projections of its office manager based on his industry experience, allowed the jury to determine the amount of those profits to a reasonable certainty." *Id.* at 586. Finally, the court agreed with the trial court's conclusion that Quality Plus's standalone claim to recover attorney fees and costs arising from its defense of claims originally brought against Quality Plus "was not cognizable under Oregon law." *Id.* at 591.

Berger v. Safeco Ins. Co., 305 Or App 380 (2020)

Plaintiff prevailed in an action to recover underinsured motorist (UIM) benefits from his insurer. The trial court awarded plaintiff attorney fees pursuant to ORS 742.061(1), concluding that the insurer's arguments challenging plaintiff's comparative fault removed the protections of the "safe harbor" provision in ORS 742.061(3). The Court of Appeals reversed. The court noted that the statute expressly permits an insurer to contest "the liability" of an underinsured motorist without losing the protection of the safe harbor provision. The court concluded, after examining the text and context of the statute, that "the issue of plaintiff's fault falls within 'the

liability of the uninsured or underinsured motorist' under ORS 742.061(3)." 305 Or at 385.

Chang v. Chun, 305 Or App 144 (2020)

After moving to Eugene, Oregon, from South Korea, Ik Jung Chun "started a second family without telling or leaving his first one." 305 Or App at 146. He housed the second family in a rental home in Vancouver, Washington, that he owned with his first wife. Eventually, Ik's deceit caught up with him, leading to two confrontations at the rental house between members of both families. Ultimately, plaintiffs—members of Ik's second family—sued Ik's first wife and her daughter for trespass, assault, false imprisonment, and intentional infliction of emotional distress. Before trial, the court dismissed plaintiff E's claim for emotional distress as a discovery sanction after his psychologist's office refused to produce his treatment records. At trial, the court dismissed the trespass claims for failure to state a claim. The jury returned a verdict in plaintiff Sophia's favor on her assault claim, awarded her $31 in damages, and otherwise rejected plaintiffs' claims. The Court of Appeals reversed in part, concluded that the trial court erred in dismissing E's emotional distress claim and the trespass clams, but did not err in denying plaintiffs' motion for a new trial. The court explained that the record "discloses too little about what, if anything, E did to allow for the conclusion that the failure to produce the documents as required was the product of E's own willful conduct." *Id.* at 153. The court further concluded, applying Washington law, that "allegations like those made by Sophia—that defendants intentionally entered her property without permission, thereby causing her to suffer emotional distress—state a claim for trespass." *Id.* at 157.

Ghiglieri v. Tomalak, 304 Or App 717 (2020)
Partney v. Russell, 304 Or App 679 (2020)

In *Ghiglieri*, the Court of Appeals—affirming the trial court—concluded that plaintiffs had an implied easement to access their property across a portion of defendant's property. The Court considered the eight nonexclusive factors identified in *Cheney v. Mueller*, 259 Or 108, 118019 (1971), and found that plaintiffs had established an implied easement by clear and convincing evidence. In *Partney*, the Court of Appeals concluded that the trial court erred in finding that defendants had a valid express easement across a portion of plaintiffs' property. The court explained that a declaration and subsequent deed recorded in the real property records by prior owners of the property—the Haneys—did not create an easement, and, in any event, any easement that the Haneys may have created did not survive their simultaneous acquisition of the two lots at issue.

Procedure

Golik v. CBS Corp., 306 Or App 202 (2020)

A jury found defendant—owner of a paper mill in Camas, Washington—liable for Robert Golick's death from mesothelioma caused by asbestos exposure. After trial, defendant received, for the first time, documents that provided details about Golik's other exposures to asbestos. Among other things, plaintiff had failed to produce an affidavit that Golik signed in connection with a claim he made against certain bankruptcy trusts; the affidavit described in detail his exposure to asbestos during his time working for the U.S. Merchant Marine. The trial court granted defendant's motion for a new trial on the grounds of misconduct under ORCP 64 B(2). The Court of Appeals affirmed, concluding that the misconduct "materially affected defendant's substantive rights; it materially impaired defendant's ability to present its case to the jury." 306 Or App at 223. The court further concluded that there "is some likelihood that the outcome would have been different if defendant had been able to present the merchant marine affidavit." *Id.* The court also held that the trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict (JNOV) on one claim even though the record "does not support plaintiff's theory that defendant owed Golick a common-law duty because it retained sufficient control over the manner in which he performed the work to make him akin to an employee, rather than an independent contractor." *Id.* at 237. The court explained that the error was not a reversible error because, on this claim, "plaintiff presented two alternative theories of duty to the jury, and the jury accepted both." *Id.* Thus, the court "did not commit reversible error in denying defendant's JNOV motion on plaintiff's second claim unless both theories of duty were invalid." *Id.* Plaintiff's alternative theory—duty based on a Washington statute—was not invalid because the degree of control required by the statute "is much less than the high degree of control necessary to show a common-law duty to the employee of an independent contractor." *Id.* at 238.

Daniels v. Johnson, 306 Or App 252 (2020)

Plaintiffs brought a private nuisance claim, alleging that the sound and fumes from diesel trucks on defendant's neighboring property interfered with plaintiffs' ability to enjoy their own property. After a jury returned a verdict for defendants, the trial court awarded defendants attorney fees under ORS 20.105(1), concluding that plaintiffs lacked an objectively reasonable basis for their claim. The Court of Appeals reversed, concluding that the record was not entirely devoid of evidence supporting the claim. The court first explained that denial of defendant's motion for a directed verdict "did not establish the objective reasonableness of plaintiffs' claim." 306 Or App at 257. But the trial court erred in awarding fees because, under ORS 20.105(1), fees may be awarded "only when the moving party defeats a claim for which the record is 'entirely devoid' of supporting evidence." *Id.* Here, there was some evidence, and "the overall persuasiveness of evidence is not the question[.]" *Id.*

Dorn v. Three Rivers School Dist.,
306 Or App 103 (2020)

After the trial court ruled on summary judgment that defendant breached a settlement agreement, the court empaneled a jury to determine damages in this employment case. The jury awarded plaintiff $5,000. Plaintiff appealed, contending that the trial court erred in denying her challenge to a juror for cause. The Court of Appeals affirmed, holding that, under *State v. Wright*, 294 Or App 772, 773-74 (2018), *rev den*, 364

Or 294 (2019), "a party may not challenge an adverse for-cause ruling on appeal if the party could have used an available peremptory challenge to cure any prejudice flowing from that ruling." 306 Or App at 118.

Gist v. Zoan Management, Inc., 305 Or App 708 (2020)

Plaintiff worked as a delivery driver for defendants. He brought this class action lawsuit, asserting claims under Oregon's wage and hours laws. The trial court granted defendants' motion to compel arbitration pursuant to the arbitration clause in the parties' Driver Services Agreement. On appeal, plaintiff contended that the Driver Services Agreement is contrary to statute and thus is unconscionable. The Court of Appeals affirmed the trial court, explaining that the court "is the proper forum when the determination of unconscionability concerns the arbitration provisions. When, however, challenges concern the validity of the contract as a whole or the validity of unrelated terms, the challenges must go to the arbitrator." 305 Or at 724.

Jones v. Bhattacharyya, 305 Or App 503 (2020)

The plaintiff attorney previously represented a tenant who prevailed in a forcible entry and detainment (FED) action brought by landlord. Tenant was awarded damages and attorney fees in the FED action. Landlord paid the damages, and ultimately paid the attorney fee award to the tenant, who was listed as the "creditor" in the supplemental judgment. Tenant did not forward the fees to the attorney. Attorney then filed a notice of claim of an attorney lien on the supplemental judgment and initiated this garnishment action against landlord. Landlord responded that the attorney lien was extinguished because she had paid the supplemental judgment in full before the attorney had given notice of his claim. The trial court ruled in attorney's favor, concluding that prior notice was not required because the attorney lien attached as soon as the FED action was commenced. The Court of Appeals reversed. The court acknowledged that attorney "had a lien on the underlying [FED] action under ORS 87.445 and that, before a judgment was entered—when it was still an 'action'—he would not have been required to give notice in order to claim that lien." 305 Or App at 511-12. But once judgment was entered in the FED action listing only the tenant as the judgment creditor, the attorney must file notice to enforce his lien against the judgment debtor. "At that point, the attorney is no longer enforcing a lien on the underlying action, but on the judgment, and the attorney must file notice to claim that right." *Id.* at 512.

Cerner Middle East Ltd. v. Belbadi Enterprises LLC, 305 Or App 413 (2020)

Plaintiff—a medical information technology developer—entered into a contract to provide software and services to iCapital, a company owned and operated by a former government official in the United Arab Emirates (UAE). The contract was secured by guarantees from iCapital's parent company, defendant Belbadi Enterprises (Belbadi), a UAE corporation. When iCapital defaulted, plaintiff brought this action against Belbadi to enforce the guarantees. Plaintiff alleged that Oregon courts have jurisdiction over Belbadi because Belbadi is the alter ego of an affiliated Oregon corporation known as Orland Ltd. (Orland). The trial court dismissed for lack of personal jurisdiction. The Court of Appeals reversed. The court concluded that plaintiffs "have presented sufficient facts to make a *prima facie* case of *in personam* jurisdiction over Belbadi, based on a unity of identity of Orland and the Belbadi affiliates." 305 Or App at 421. The court explained that "[j]urisdiction over Belbadi because of its presence in Oregon as the alter ego of Orland does not depend on Orland's involvement with the guarantees or the underlying litigation." *Id.* at 424.

Lycette v. Kaiser Foundation Health Plan, 305 Or App 360 (2020)

In this employment action, the trial court revoked the *pro hac vice* admission of plaintiff's California lawyer, granted a mistrial, and awarded attorney fees after the attorney repeatedly violated the trial court's rulings. Among other things, the attorney violated the court's pretrial rulings by (1) repeatedly referring to defendant as an insurance company; (2) referring in his opening statement to a previously-dismissed constructive discharge claim; (3) referring to a dismissed claim of gender discrimination in his opening statement; and (4) repeatedly implied that defendant had engaged in practices that put profits ahead of patient care. The Court of Appeals affirmed, concluding that "the trial court did not err in ordering that appellant not participate any further in the litigation and in assessing attorney fees under ORS 20.125." 305 Or App at 367.

Vergara v. Patel, 305 Or App 288 (2020)

Plaintiff brought statutory employment claims and a common-law wrongful discharge claim against her former employer. The trial court granted defendant's motion for summary judgment, concluding that the statutory claims were time-barred, and the common-law claim was unavailable. The Court of Appeals reversed as to the statutory claims, concluding that plaintiff's amended complaint—naming two business entities as defendants—related back to the original complaint—which named an individual as defendants—under ORCP 23. The court explained that relation back applied "because the business entities should reasonably have understood from the original complaint that they were the intended defendants." 305 Or App at 290.

LNV Corp v. Fauley, 305 Or App 251 (2020)

Defendant Fauley appealed an order under ORS 18.948 confirming a sheriff's execution sale of real property, contending that the sale was unlawful because the sheriff failed to file a return of execution within 60 days after receiving the writ, as required by ORS 18.872. The Court of Appeals affirmed, concluding that Fauley was not damaged by the sheriff's failure to timely return the writ of execution. The court explained that, under ORS 18.948(2), "the sole remedy the court could have provided had it sustained Fauley's objection was further delay in the sale by directing the sheriff to resell the property. That

cannot be what the legislature intended by providing a process to object to an execution sale." 305 Or App at 263.

Stachlowski v. 1000 Broadway Building LP, 305 Or App 174 (2020)

In this derivative action, defendant 1000 Broadway Building LP filed on interlocutory appeal under ORS 36.730 after the trial court denied defendants' petitions to compel arbitration. While that appeal was pending, the trial court granted plaintiff's motion for summary judgment on its conversion claim against defendant First Republic Bank (First Republic). First Republic appealed, contending that its co-defendant's interlocutory appeal divested the trial court of jurisdiction to address the summary judgment motion. The Court of Appeals disagreed, concluding that the trial court retained jurisdiction under ORS chapter 19 to rule on the summary judgment motion because the motion "presented to the trial court a distinct set of issues involving a different defendant from 1000 Broadway Building LP's interlocutory appeal." 305 Or App at 188. The court further concluded, however, that the trial court erred in granting plaintiff's motion because "the summary judgment record presents a triable issue of fact" on the merits of plaintiff's claim. *Id.* at 193.

Evidence

H.K. v. Spine Surgery Center of Eugene, 305 Or App 606 (2020)

Plaintiff alleged that the owner of a surgery clinic sexually harassed her during the six years that she worked at the clinic. She asserted a statutory claim against the clinic under ORS 659A.029 and 659A.030, and intentional infliction of emotional distress and battery claims against the clinic and its owner. At trial, the court received into evidence over defendants' objection documents from a Bureau of Labor and Industries (BOLI) file relating to its investigation of a prior sexual harassment complaint filed by another former employee, reasoning that such evidence was admissible for "notice and knowledge." The jury returned a verdict in plaintiff's favor and awarded substantial damages. The Court of Appeals reversed and remanded for a new trial. The court concluded that the "burden to prove the employer's notice or knowledge does not arise when the hostile working environment has been created by the employer or a person who stands in the employer's shoes." 305 Or App at 614. Thus, the BOLI evidence "was not relevant here, because plaintiff's claim was against the employer directly, and she therefore did not have a burden to show notice or knowledge." *Id.* at 615. The evidentiary error was not harmless because plaintiff "relied extensively on the evidence, which was highly incriminating." *Id.*

Arrowood Indemnity Co. v. Fasching, 304 Or App 749 (2020)

Plaintiff Arrowood brought this subrogation claim against defendant after he defaulted on student loans from a lending institution, Discover Bank. The trial court granted Arrowood's motion for summary judgment, concluding that Discover Bank's proof-of-loss records were admissible as business records under OEC 803(6). The Court of Appeals affirmed. The court adopted a three-part test for determining whether the Discover Bank records were admissible under OEC 803(6). The party offering the evidence "must establish that (1) the third party had a duty to accurately record the information in the regular course of its business; (2) the third party had a duty to accurately report that information to the business whose records are being offered; and (3) the business whose records are being offered adopts and relies upon that third-party information in the regular course of its own business." 304 Or App at 758. Applying that test, the court concluded that "the proof-of-loss records submitted by [Discover Bank] to Arrowood are admissible under OEC 803(6)." *Id.* at 759.

Miscellaneous

James v. State of Oregon, 366 Or 732 (2020)

Plaintiffs—members of the Public Employees Retirement System (PERS)—alleged that amendments to PERS adopted by the legislature in SB 1049, Or Laws 2019, ch 355, violated the state and federal constitutional Contract Clauses, Article I, section 21, of the Oregon Constitution and US Const, Art I, § 10, and other constitutional provisions. The Supreme Court disagreed, finding no constitutional violation because (1) "the challenged amendments do not operate retrospectively to decrease the retirement benefits attributable to work that the member performed before the effective date of the amendments" (366 Or at 734); and (2) "the preamendment statutes did not include a promise that the retirement benefits would not be changes prospectively." *Id.*

Busch v. McInnis Waste Systems, Inc., 366 Or 628 (2020)

Plaintiff's leg was amputated due to injuries he suffered when he was hit by a garbage truck while walking in a crosswalk. A jury awarded him more than $3 million in economic damages and $10 million in noneconomic damages. The trial court reduced the noneconomic damages award to $500,000 pursuant to ORS 31.710(1). The Supreme Court reversed that decision, holding that the "application of ORS 31.710(1), as a limit on the noneconomic damages that a court can award to a plaintiff, violates Article I, section 10" of the Oregon Constitution. 366 Or at 652.

City of Damascus v. State of Oregon, 367 Or 41 (2020)
Elkhorn Baptist Church v. Brown, 366 Or 506 (2020)

In *City of Damascus,* the Supreme Court held that Senate Bill 226 (2019) "is valid and . . . it accomplishes what the legislature intended, *i.e.*, it gives effect to the 2016 vote by the city's residents to disincorporate." 367 Or at 43. In *Elkhorn Baptist Church,* the Supreme Court granted a peremptory writ of mandamus, concluding that the trial court erred in granting a preliminary injunction blocking enforcement of executive orders issued by the Governor in response to the COVID-19 pandemic. The court concluded that the Governor's orders "were issued pursuant to ORS chapter 401, and they are not subject to the time limit in chapter 433. Therefore, the circuit

court's preliminary injunction was based on a legal error." 366 Or at 543.

Couey v. Clarno, 305 Or App 29 (2020)
City of Portland v. Bartlett, 304 Or App 580 (2020)

In *Couey,* the Court of Appeals addressed the constitutionality of a statute that prohibits paid initiative petition circulators from simultaneously collecting signatures on a volunteer basis on petitions for which the circulator is not being paid. The court concluded that "the trial court did not err in rejecting plaintiff's challenge that ORS 250.048(10) is unconstitutional under Article I, sections 8 and 26" of the Oregon Constitution. 305 Or App at 45. In *Bartlett,* the Court of Appeals concluded that "ORS 192.390 requires the disclosure of the requested records, namely the requested attorney-client privileged public records that are older than 25 years." 304 Or App at 597.