Oregon State Bar

Litigation Journal

SUMMER 2022 VOLUME 40 NUMBER 1

In This Issue...

Taxing Thoughts for Business Litigators

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Taking tax effects into consideration in framing claims and crafting settlements is easier said than done. To help business litigators think like tax lawyers, this article will provide a roadmap to the tax issues of clients receiving payments ("recipient taxpayers") and clients making payments ("paying taxpayers"). No matter which side they are on in a case, business litigators (and the tax geeks helping them) should analyze both sides' tax consequences to understand the after-tax value and cost of a judgment or settlement. This can often help bridge the gap in crafting an acceptable settlement.[1]

Section I addresses two issues—one legal and one factual—that affect both recipient and paying taxpayers. Section II provides the roadmap for recipient taxpayers and Section III addresses the issues relevant to paying taxpayers.

I. Preliminary Matters

A. Origin of the Claim Doctrine and *Arrowsmith*

The deceptively simple principle underlying the tax treatment of all payments made in litigation is this: the tax consequences of such payments—whether in a settlement or a judgment—depend on the nature of the underlying claims. In tax parlance, this is the "origin of the claim" principle.

The relevant question is "in lieu of what were the damages awarded?"[2] When a court has entered a judgment for the taxpayer, the tax treatment of the taxpayer's recovery will be determined based on the underlying legal claims, derived from the complaint, the issues brought forward during trial, and the evidence presented in court.[3] When the parties settle, the Internal Revenue Service ("IRS") and the courts will look first to the specific language of the settlement agreement to determine the nature of payments and underlying claims.[4] If the settlement agreement is silent or ambiguous, the task for the IRS and the courts is to determine the intent of the paying taxpayer from the asserted facts made in filings, findings of the court, and other relevant circumstances of the case.[5] The importance of the language used in settlement agreements cannot be overstated, because it is nearly impossible to disavow that language later.[6]

When a payment relates to a previous transaction, a special application of the origin of the claim rule—the *Arrowsmith*[7] doctrine—may apply. This principle requires that when a payment is an integral part of a previous transaction, the later payment should have the same tax consequences as payments made in the previous transaction. This principle applies even if the payments are years apart.

As tax lawyers like to say, the later payment "relates back" to the prior transaction. The classic example is a stock sale with a seller indemnity obligation for pre-closing losses. If the seller is required to pay on the indemnity, that payment is treated as if the seller had contributed the additional amount to the corporation just before sale, and the buyer does not have additional income.[8] The *Arrowsmith* principle has been applied in a wide variety of circumstances, sometimes with unexpected results, so care must always be taken in applying it.

B. Who is the taxpayer?

In a simple world, taxpayers would be easy to identify—they would be the people named in the litigation. But (sadly) tax law doesn't really care about *people*—it is on the lookout for *taxpayers*, i.e., whoever actually pays tax. Those taxpayers might be the people involved in litigation—but very often they are someone else.

A common complexity in business litigation is that a party may be a constituent of a complex group of entities that can include corporations, pass-through entities (such as partnerships or LLCs), disregarded entities and even more exotic creatures. Many such groups report federal, state and local taxes on a consolidated basis (as a single entity) pursuant to group-wide tax sharing agreements (also known as tax allocation agreements). The group's tax liability is determined based on relative income and tax benefits contributed by group participants. Such an agreement also typically appoints one entity to handle tax matters and pay taxes for all participants in the group. Computing the tax effect of a payment (whether as a recipient or payor) requires determining the overall effect within a group, not just the effect to the payor or recipient. Making this issue even more complicated is that business entities in a group may choose or be required to report differently as a group for federal, state and local tax purposes.

Even without complex entity structures, analyzing the tax impact of claims may require looking beyond the named parties because of the popularity of pass-through entities. These entities typically do not pay income tax at the entity level, but instead pass through their net income or loss to their owners. Single-member LLCs, which are treated as disregarded entities, are the simplest creatures in this zoo, but even they can pose challenges. S corporations must be analyzed carefully when they were once C corporations or have trusts as shareholders. Partnership tax (which applies to most LLCs as well) is notoriously complex. For any of these entities, simply assuming that tax consequences follow the percentage of ownership reported, for example, on a Schedule K-1 of a partnership's tax return, can be dangerous. The partnership or operating agreement must be studied alongside the tax returns and tax regulations to fully understand the tax consequences of any particular payment. Finally, an entity that is a pass-through entity for federal or state income tax may not be a pass-through for state or local purposes. Particularly among multi-state businesses, a pass-through entity may choose to report owners' shares of tax and pay a composite tax as an entity, and may or may not charge the tax to the owners proportionately.

II. Tax Consequences for Recipient Taxpayers

The fundamental questions for recipient taxpayers are: (1) How much income does a recipient taxpayer have? (2) What is the character of the income? and (3) When will the income be taxed?

A. How much income does a recipient taxpayer have?

The initial measure of a taxpayer's gross income from any payment received, whether under a judgment or settlement, is the amount of cash and the fair market value of property the taxpayer receives. While payments are presumed to constitute gross income, a recipient taxpayer may be able to claim an exclusion for all or part of any payment received. The most familiar exclusion is the exclusion of amounts received on account of personal physical injury,[9] but this concept does not feature prominently in business litigation. More common is the argument that the payment is a nontaxable return of capital that the taxpayer had previously invested. Under the origin of the claim principle, a recovery that compensates for injury or loss to a taxpayer's property is generally considered a restoration of capital to the extent of the taxpayer's unrecovered investment.[10] The nontaxable return of capital principle has been applied in any number of settings with favorable results to the recipient taxpayers.

Example: Suppose that Acquiror sought to purchase the stock of Target Co, but its initial offer of $X was refused due to the tortious interference of D Co. Acquiror's subsequent offer of $X plus $Y for Target was accepted, and the transaction closed. Acquiror then successfully sued D Co for the difference between $X and $Y. Those damages would properly be treated for tax purposes as a nontaxable return of capital to the extent of Acquiror's purchase price (basis) in Target Co.[11]

B. What is the character of the income?

The type (character) of income can make a big difference in the actual tax due. For non-corporate taxpayers, capital gains are taxed at preferential rates for federal (and some states') income tax purposes, as compared to the tax rates applicable to ordinary income.[12] Moreover, a taxpayer's capital losses (current and carried forward) will offset the taxpayer's capital gains, so that only net capital gain is taxed.[13] A taxpayer with significant capital losses will strongly prefer capital gain treatment for any recovery, because capital losses can only offset capital gains (except that individuals may use capital losses to offset an additional $3,000 per year of ordinary income[14]).

The origin of the claim principle dictates the character of damages received. A recovery representing damages for lost profits or earnings is taxable as ordinary income, and this will almost always be the default position of the IRS if the situation is at all unclear.[15] If a taxpayer can establish that the damages were received as a replacement for property,[16] the gain in excess of the taxpayer's basis can potentially qualify either as capital gain or "Section 1231 gain," a particularly favorable classification for business taxpayers.[17] Some recoveries may represent both types of income, and it is the taxpayer's obligation to allocate fairly between them. The IRS often challenges

this allocation, and so the taxpayer should carefully consider the basis for its division.[18]

C. When will the income be taxed?

As a general matter, the timing of income depends on a taxpayer's method of accounting. Cash method taxpayers report income when they receive it, actually or constructively.[19] Accrual method taxpayers include amounts in gross income when all events have occurred that fix the right to receive such income and the amount thereof can be determined with reasonable accuracy,[20] but no later than when the income is reported for financial statement purposes.[21] For these purposes, all events have occurred at the earliest of (1) occurrence of the event that fixes the right, (2) payment is made, or (3) payment is due, whichever happens first.[22] Typically, in settlement situations, the fact of the liability is fixed when a judgment or a settlement becomes final.[23] However, when future performance (such as discounts on future purchases) is part of a recovery, accrual method taxpayers and the IRS often disagree on when to include the value of that performance in income.[24] Business litigators must take this risk into consideration in assessing when a recipient taxpayer will owe tax.

D. Attorneys' fees and costs paid by recipient taxpayers

A taxpayer who receives taxable damages associated with a trade or business will normally be able to deduct the costs and attorneys' fees incurred to produce those damages. However, important limitations may apply. First, attorneys' fees and costs to produce nontaxable damages are not deductible.[25] Second, sometimes a recovery consists of both taxable and nontaxable damages, in which case settlement agreements (and, ideally, final orders) ideally will allocate the recovery between the claims that gave rise to the two types of income. This allows the parties to allocate the costs and fees properly.

III. Tax Consequences to Paying Taxpayers

Taxpayers who make payments in litigation[26] generally focus on claiming a deduction for these payments, in order to reduce the overall cost of the claim. The questions for these taxpayers are: (1) How much of a deduction (if any) may a paying taxpayer claim? (2) When will a paying taxpayer be entitled to a deduction? (3) What reporting obligations does a paying taxpayer have?

A. How much of a deduction (if any) may a paying taxpayer claim?

A taxpayer who must make a payment on a judgment or settlement would generally prefer to take a deduction against its ordinary income for the payment, in order to reduce its after-tax cost of the claim. Generally, amounts paid or properly accrued on account of judgments or settlements of lawsuits (including attorneys' fees) are currently deductible if the acts which gave rise to the litigation were performed in the ordinary course of the taxpayer's business, even if such lawsuits are unusual for the taxpayer.[27] However, if the underlying claim is personal in nature, payments do not generate a deduction; personal expenses are nondeductible.[28] The classic case in this situation involved litigation costs incurred in dividing a business in divorce.[29] Because the origin of the claim was personal (the divorce) the costs were nondeductible, even though the consequences of the divorce would play out in the business setting.

In addition, in order to be deductible, a payment must not constitute a capital expenditure.[30] Capital expenditures are those that create or improve an asset, or are expected to produce benefits that outlast the current tax year and must be "capitalized" into the basis of an asset. That cost will be recovered in future years, either through deductions for depreciation or amortization, or upon final disposition of the asset. The IRS and taxpayers squabble endlessly about what constitutes a capital expenditure. For example, consider an investment advisory company on the brink of selling its assets to a buyer. Days before the scheduled sale, it makes a payment to settle a class action lawsuit for alleged securities fraud. Was the settlement payment made in the ordinary course of its business, in which case it would be deductible? Or was it made to ensure the closing of the sale, in which case it would be a capital expenditure? Or was it both? In one similar situation, the IRS agreed with the taxpayer that such a settlement payment would be deductible,[31] but these matters are excruciatingly fact-dependent and require careful analysis.

Sometimes a payment occurs many years after a transaction closes, and the paying taxpayer is tempted to treat it as a business expense. However, the *Arrowsmith* doctrine applies in the deduction context as it does in the income context. This principle requires that payments which are an integral part of a previous transaction be treated consistently with the prior transaction for deduction purposes.

Finally, certain payments are not deductible, even if all the other requirements for deductibility are met. These include: kickbacks, bribes, other illegal payments, antitrust treble damages, fines, penalties, and any payment (including attorneys' fees) related to sexual harassment or sexual abuse, if the recipient is subject to a nondisclosure agreement.[32] A frequently asked question is whether punitive damages are deductible, and the answer is "yes," assuming the other requirements for deductibility are met.[33]

B. When will the taxpayer be entitled to a deduction?

In computing the potential tax benefit of a deduction, the taxpayer's method of accounting will be critical because it controls the proper timing of a deduction. (After all, a deduction in the future is typically worth less than a deduction today.) A cash method taxpayer claims an available deduction when it is paid.[34] An accrual method taxpayer may claim a deduction when all events have occurred that fix the amount of the liability and the amount can be computed with reasonable certainty.[35] This generally means that a final judgment or settlement agreement must exist.[36] In addition, "economic performance" must have occurred.[37] These rules delay a deduction until the taxpayer completes its economic performance, which in the litigation context generally means actual payment, or, if a taxpayer is required to take an action, actual performance.[38]

C. Reporting obligations

Code Section 6041 requires every person, corporate or otherwise, engaged in a trade or business who, in the course of that business, makes a payment aggregating $600 or more to another person in a calendar year to file an information return. Failure to comply with information reporting requirements can result in penalties of up to $250 per return, subject to certain overall limits.[39] The chart below provides a convenient reference table for the proper reporting of payments made in connection with litigation.

SUMMARY OF REPORTING REQUIREMENTS FOR PAYMENTS MADE IN CONNECTION WITH LITIGATION

Type of Payment	Reportable?	By Whom?	Form
Referral fee or co-counsel fee	Yes	Payor	1099-NEC
Client to attorney for legal fees for services in ordinary course of business	Yes	Client	1099-NEC
Client to attorney for legal fees for services not in the ordinary course of business (e.g., estate planning)	No	N/A	N/A
By anyone to attorney for legal fees for someone else (e.g., settlement payment made to attorney)	Yes	Payor	1099-MISC (Box 10)
By anyone to non-attorney as taxable damages	Yes	Payor	1099-MISC (Box 3)
By anyone to non-attorney as nontaxable damages	No	N/A	N/A
By attorney to client for payment previously made to attorney's trust account	No	N/A	N/A

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Endnotes

1 This article is based on a webinar offered by the Business Litigation Section of the OSB in 2021. *This article does not constitute tax advice.* Every situation is unique, and clients and their lawyers should consult with their own tax advisors prior to determining the tax consequences of any particular settlement or judgment.

2 Raytheon Production Corp. v. Commissioner, 144 F.2d 110 (1st Cir. 1944), cert. denied, 323 U.S. 779 (1944).

3 *See, e.g.,* State Fish Co. v. Commissioner, 48 T.C. 465 (1967), modified by 49 T.C. 13 (1967), acq. 1968-2 C.B. 1.

4 Rivera v. Baker W., Inc, 430 F.3d 1253 (9th Cir. 2005).

5 *Id*. at 1257. The IRS will sometimes even inquire into negotiations between a taxpayer and its insurance company about coverage and claims. *See, e.g.,* Technical Advice Memorandum 200322017 (5/30/2003).

6 ***See***, ***e.g.,*** Doyle v. Commissioner, TC Memo 2019-8 (taxpayer unsuccessfully argued for different tax treatment than described in settlement agreement).

7 Arrowsmith v. Commissioner, 344 U.S. 6 (1952).

8 Rev. Rul. 83-3, 1983-1 C.B. 84; Freedom Newspapers Inc. v. Commissioner, T.C. Memo. 1977-429.

9 IRC §104. All section references, unless otherwise indicated, are to the Internal Revenue Code of 1986, as amended (the "Code"), and the regulations thereunder.

10 Rev. Rul. 81-277, 1981-2 C.B. 14 (treating buyer's recovery of damages from contractor for additional construction costs to correct construction defects as return of capital).

11 Private Letter Ruling 201152010 (12/30/2011).

12 Ordinary income is taxed (as of this writing, in mid-2022) at maximum 37% rates, while capital gain is taxed at 0%, 15%, 20%, 25% and 28% maximum rates, depending on the type of gain. IRC § 1(h). States vary widely in their treatment of capital gain, with Oregon providing no rate preference for such income.

13 IRC § 1211.

14 *Id*.

15 Freda v. Commissioner, TC Memo 2009-191, *aff'd* 656 F.3d 570 (7th Cir. 2011).

16 In order to potentially qualify for capital gain or Section 1231 gain treatment, the property must either be a capital asset or a Section 1231 asset. *See* Code §§ 1221, 1231.For example, damages received for destroyed inventory would generally produce ordinary income.

17 Walter A. Henshaw, 23 TC 176 (1954).

18 Gail v. United States, 58 F.3d 580 (10th Cir. 1995) (damages partially for damage to property and partially replacement for ordinary income that would have been earned). .

19 Treas. Reg. § 1.461-1(a)(1). Constructive receipt occurs when a taxpayer has the right to funds and access to them, but refuses to accept them, usually to push income to the next tax year.

20 Treas. Reg. § 1.451-1(a).

21 IRC § 451(b).

22 Rev. Rul. 74-607, 1974-2 C.B. 149.

23 H. Liebes & Co. v. Commissioner, 90 F.2d 932 (9th Cir. 1937) (income accrued when time for appeal from judgment expired); Rev. Rul. 70-151, 1970-1 CB 116.

24 *See* John Graf Co., 39 B.T.A. 379 (1939).

25 IRC § 265.

26 This discussion focuses on taxpayers with the sole obligation to make payments. Some of these taxpayers' obligations will be satisfied by the taxpayers' insurance companies. In those situations, the paying taxpayer will be entitled to deduct only those amounts the taxpayer pays in excess of amounts paid by the insurance company.

27 *See, e.g.*, Federation Bank & Trust Co. v. Commissioner, 27 T.C. 960 (1957) *aff'd per curiam* 256 F.2d 764 (2d Cir. 1958); (allowing petitioner to deduct amounts paid in settlement of legal proceedings charging petitioner with the mismanagement in the liquidation of assets); Rev. Rul. 80-211, 1980-2 C.B. 57 (allowing corporation to deduct amounts paid as punitive damages that arose from a civil lawsuit against the corporation for breach of contract and fraud in connection with the ordinary conduct

of its business activities).
28 IRC § 262.
29 United States v. Gilmore, 372 U.S. 39 (1963).
30 IRC § 263. *See* INDOPCO, Inc. v. Commissioner, 503 U.S. 79 (1992).
31 Private Letter Ruling 9621037 (5/24/1996).
32 IRC § 162(q).
33 Rev. Rul. 80-211, 1980-2 CB 57.
34 Treas. Reg. § 1.461-1(a)(1).
35 Treas. Reg. § 1.461-1(a)(2).
36 United States v. Consolidated Edison Co., 366 U.S. 380, 385 (1961).
37 Treas. Reg. § 1.461-1(a)(2); IRC § 461(h).
38 However, IRC § 461(f) permits taxpayers to deduct a liability, even if contested, if a transfer of money or other property is made in the tax year to provide for satisfaction of the asserted liability and if the all events test is otherwise met. Treas. Reg. § 1.461-2(a)(1).
39 IRC § 6721.

Comments from the Editor

Direct Examination of Expert Witnesses

By Dennis P. Rawlinson
Miller Nash LLP


Dennis P. Rawlinson

One of the most important but often least effective components of a trial presentation is the direct examination of expert witnesses. It is unusual these days when a trial or arbitration presentation does not include direct examination of at least one expert. Completing such a direct examination is not difficult, but it is rarely done effectively and persuasively.

Set forth below for your consideration are some suggestions for the framework of the direct examination of an expert.

1. The Tickler

For two to three minutes, when an expert first takes the stand, he enjoys a few golden moments when he has the fact-finder's full attention, and so do you as his direct examiner. Instead of spending the first 15 minutes of testimony on a litany of the background and qualifications of the expert and encouraging the court or jury to daydream or grow bored, ask two or three initial questions that tell the fact-finder who the expert is and why he is there. For instance:

Q. Doctor, can you tell us what kind of doctor you are?

A. Yes, a neurologist.

Q. Is a neurologist a doctor skilled in the diagnosis and treatment of diseases of the nervous system?

A. Yes.

Q. And have you come here today to explain to the fact-finder (court or jury) your diagnosis and treatment of the damage to plaintiff's nervous system caused by the accident?

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Summer 2022

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The Litigation Journal is published three times a year by the Litigation Section of the Oregon State Bar (offices located at: 16037 S.W. Upper Boones Ferry Road, Tigard, Oregon 97224; mailing address: P.O. Box 231935, Tigard, Oregon 97281-1935; phone: 503-620-0222).

In short, within the first two to three minutes, make it clear to the fact-finder who the expert is and what he or she will be talking about.

2. Qualifications

In federal court, curriculum vitaes and résumés are generally admitted into evidence. In state court, they are admitted by certain judges and upon stipulation by the parties. If you have the opportunity to do so, save precious examination time by introducing the vitae.

It is preferable to cover only the highlights of the expert's qualifications (which will relate directly to his or her specific opinion) during direct examination and leave the rest of the general background for the fact-finder to obtain from the curriculum vitae. This, of course, means that the curriculum vitae should be reviewed and edited so that it becomes self-explanatory and persuasive and so that extraneous matters are deleted.

Nothing encourages the fact-finder's mind to wander more than 20 minutes of detailed background questioning of an expert that has little to do with his or her opinion in a specific case. An effective discipline is to limit the expert's qualifications to no more than five minutes or no more than 10 to 15 questions (depending on the expert and the case). Consider covering only the vitae's highlights and select those highlights for their relevance to the opinion in the particular case.

3. Lead With the Opinion

Unlike lay witnesses, who seem to be most believable when they explain the factual basis for their opinions before they give an opinion (e.g., the symptoms of drunkenness as perceived by the witness before the opinion of drunkenness), expert opinion is more powerful if the opinion is given before its basis.

To begin with, if the opinion is held back until a lengthy explanation of the basis is given, the opinion itself may be lost as the fact-finder's mind wanders. Accordingly, if your expert is going to give three opinions, you should consider having the expert give all three opinions early in his or her testimony in a succinct, systematic manner and explain after each opinion that you will come back to it and explain the basis and procedure in arriving at it.

Such an approach ensures that even if a fact-finder pays attention to only the opening ten minutes of the examination, the fact-finder will understand who the expert is, why he is there, and what his opinions are.

4. Explain the Basis for the Opinion

In my experience, the most persuasive expert testimony is the expert testimony in which the basis for the opinion is well organized, understandable, and succinct.

It is often helpful to use an overhead projector or a chalkboard to list the points or the procedures as the expert testifies about them to reinforce them and demonstrate their interrelationship.

The expert must use common, everyday language—not jargon. The best experts use picture words and analogies, just as the best lawyers use them in a closing argument.

5. Prepare for Cross-Examination

An often overlooked but important component of any direct examination of an expert is to have the expert undercut the adversary's anticipated cross-examination by explaining away in his or her own words the points that you believe he or she will be asked on cross-examination. Such a preemptive strike, particularly at the end of the direct examination and just before cross-examination is to begin, may convince your adversary to either abandon the proposed line of cross-examination or risk the patience of the fact-finder by covering "purported weaknesses," which you have already shored up on direct examination.

6. Conclusion

One thing I have learned about direct examination is that it may not be as exciting as cross-examinations, opening statements, and closing arguments, but it is usually the battlefield on which cases are won or lost.

It is a constant challenge to turn the direct examination of an expert into an entertaining and attention-demanding presentation. You may want to consider the above-listed suggestions the next time you conduct the direct examination of an expert. Experience has taught me that no matter how accomplished your direct examination of an expert may be, it can always be made better.

Jury Screening for English Language Proficiency

By Emily Johnson and Elizabeth Bailey Stoll Berne

Emily Johnson

Elizabeth Bailey

The right to a jury trial is a basic principle. But is there a right to *serve* on a jury? The right to serve on a jury intertwines with a party's right to a jury trial, such as a criminal defendant's right under the Sixth Amendment to a trial from a fair cross-section of the community. And the right to serve may also be a right in its own course. This right is squarely put at issue when a potential juror is not considered "proficient" in the English language. At present, both federal and Oregon state law permit exclusion of potential jurors who are deemed not sufficiently proficient in English. This may be a time to re-examine the English language proficiency requirement for jurors.

Federal law provides that a juror must be able "to speak the English language" and "read, write, and understand the English language" to "satisfactorily" fill out the juror qualification

form.[1] By contrast, ORS 10.030, which sets forth eligibility requirements for jury service, does not expressly provide English language proficiency as a requirement. But, considering relevant case law and information on the Oregon judicial department's website, Oregon state courts also appear to screen potential jurors for English language proficiency.

In 2010, Oregon Supreme Court held in *State v. Haugen* that it was not error for the trial court to *sua sponte* dismiss a non-English speaking juror.[2] The Court held that neither the Sixth Amendment nor the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibited Oregon trial courts from excluding jurors who were unable to read, write, understand, and/or speak the English language.[3] The Court determined: "[N]o Oregon statute articulates a policy in favor of, much less requires, interpreters for non-English-speaking jurors. . . Moreover, we fail to see how an administrative or judicial decision not to fund interpreters—as long as it is applied in a nondiscriminatory manner—would violate a defendant's constitutional rights, when a statute excluding non-English-speaking jurors does not."[4]

In part, the Court reasoned:

> We agree that the interests articulated by the state are sufficient to justify excluding non-English-speaking persons from the jury pool. It is critical for jurors to be able to follow the proceedings in the courtroom and to be able to participate meaningfully in deliberations. The state may also reasonably conclude that the cost of providing interpreters for one or more non-English-speaking jurors is an expense that the state should not incur.[5]

In 2001, one decade before *Haugen*, the Oregon Judicial Department sponsored legislation that would have provided interpreters for non-English speaking jurors and allowed interpreters to be in the jury room during deliberations.[6] The bill, however, did not pass due to "the high fiscal impact."[7] By contrast, Oregon law requires interpreters in state court for jurors who have hearing or speech impairments.[8]

While budgetary and logistical issues are important, assessing whether these rationales are sufficient to support the consequences associated with limiting the jury pool to English-speakers raises many considerations: Should we deprive non-English speaking citizens of the opportunity to participate in an important civic duty?[9] Is it good policy, or even constitutionally permissible, for the jury pool to exclude the wide range of cultural backgrounds and life experiences of non-English speaking jurors? We should also consider that this policy gives English-speaking jurors a disproportionate impact on jury verdicts in the State of Oregon.[10] And defendants who do not speak English or are from a community with relatively fewer English speakers may be deprived of a jury of their peers.[11]

History of jury service in the United States

One concern with screening jurors for English language proficiency is that it can act as a proxy for race.[12] Prior to the adoption of the Fourteenth Amendment, federal and state courts historically excluded citizens from jury duty due to race.[13] Congress prohibited the race-based exclusion of any qualified citizen from jury service in 1875.[14] In 1880, the United States Supreme Court held that a state statute excluding Black people from jury service violated a Black defendant's right to equal protection under the Fourteenth Amendment.[15] The court reasoned that Black defendants faced the threat of white racism in the jury, concluding that the law does not protect equally if "every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color," while every Black man is not.[16] Strauder did not discuss injury to prospective jurors under the Fourteenth Amendment, and instead focused on the injury to the criminal defendant who was deprived of a jury of his peers. Strauder's holding was soon extended to racial exclusion of grand jurors in Ex Parte Virginia.[17]

In 1965, in *Swain v. Alabama*, the United States Supreme Court eroded *Strauder*'s protections for Black defendants, holding that it was permissible to insulate a prosecutor from questions about the removal of Black jurors, "on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendants involved, and the particular crime charged."[18] The Court unanimously held that that no claim arose from the fact that the prosecutor had used his peremptory challenges to eliminate all six Black jurors from Swain's jury.[19]

Twenty-one years later, the Supreme Court decided *Batson v. Kentucky*.[20] In *Batson*, a Black man was tried and convicted by an all-white jury.[21] The prosecutor used his peremptory

1 28 U.S.C. § 1865(b)(2)-(3). *See also* U.S. District Court of Oregon, *Qualification Questionnaire Letter or Form* (last updated Sept. 22, 2021), https://ord.uscourts.gov/index.php/jurors#qualification-questionnaire-letter-or-form (accessed Jan. 23, 2022).
2 *State v. Haugen*, 349 Or 174, 189 (2010).
3 *Id.*
4 *Id.*
5 *Id.* at 187.
6 Oregon Judicial Department, *Jury Service Improvements*, https://www.courts.oregon.gov/how/Pages/improvements.aspx (accessed Jan. 23, 2022).
7 *Id.*
8 ORS 10.115 (2021).
9 Jasmine B. Gonzales Rose, *Language Disenfranchisement*, 65 Hastings L.J. 811, 829 (2014) ("Next to voting, jury service is the most celebrated responsibility of U.S. citizenship.") (citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991)).
10 *Id.* ("[J]ury service provides an important opportunity for minority groups—who might not have strong support from the legislature or society in general—to directly partake in and influence the justice system.") (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994)).
11 *Id.* at 825–26.
12 *See generally id.*
13 *See* Equal Justice Initiative, *Race and the Jury: Illegal Racial Discrimination in Jury Selection* (2021) (https://eji.org/report/race-and-the-jury/) (accessed Jan. 31, 2022).
14 Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336 (codified as amended at 18 U.S.C. § 243 (1988)).
15 *Strauder v. West Virginia*, 100 U.S. 303 (1880).
16 *Id.* at 309.
17 100 U.S. 339 (1880).
18 *Swain v. Alabama*, 380 U.S. 202, 223 (1965).
19 *Id.* at 210–11; 221–22.
20 476 U.S. 79 (1986).
21 *Id.* at 82–83.

challenges to eliminate four Black jurors from the venire.[22] The majority held that the Equal Protection Clause "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that [B]lack jurors as a group will be unable to impartially consider the State's case against a [B]lack defendant."[23]

But just five years later, in *Hernandez v. New York*, the Supreme Court took up the question of whether *Batson* protections extended to Spanish-speaking jurors.[24] In *Hernandez*, a prosecutor used peremptory challenges to strike four Latino jurors.[25] Hernandez raised a *Batson* objection, arguing that these peremptory challenges were racially motivated.[26] At trial, the prosecutor contended that the potential jurors, who spoke both English and Spanish, were stricken for their Spanish-language proficiency because he was concerned that the jurors would be unable to accept an interpreter's translation of Spanish-speaking witnesses' testimony.[27] The Court, in a plurality opinion, ultimately sided with the prosecutor, rejecting Hernandez's argument that "Spanish-language ability bears a close relation to ethnicity, and that, as a consequence, it violates the Equal Protection Clause to exercise a peremptory challenge on the ground that a Latino potential juror speaks Spanish."[28] The Court reasoned that under the *Batson* standard, the trial court's decision on discriminatory intent represents a finding of fact that requires great deference on appeal.[29]

The Supreme Court has yet to squarely address the question of eliminating non-English speaking jurors, but the holding in *Hernandez* suggests that the Court would find this practice permissible, as long as there is an articulated non-discriminatory reason for doing so.

New Mexico's constitutional provision for non-English speaking jurors

Only one state provides for a constitutional right for all citizens to serve as jurors, irrespective of language proficiency: New Mexico. This right is enumerated in Article VII, Section 3 of the New Mexico Constitution. This constitutional protection is a result of New Mexico's history as a Spanish territory with primarily Spanish-speaking citizens.[30] New Mexico provided this constitutional protection in response to New Mexico Supreme Court case, *Territory v. Romine*, in which the entire jury panel consisted of Mexicans who only spoke Spanish.[31] This protection has since been extended to languages beyond Spanish, including Apache, Arabic, American Sign Language, Cantonese, Farsi, French, German, Korean, Laotian, Mandarin, Tagalog, Russian, and Vietnamese.[32] Although the cost of interpretation services accounts for a significant portion of the state court budget, the inclusion of jurors with limited English proficiency has generally been positively received by judges and jurors throughout New Mexico.[33]

The District of Puerto Rico requires English language proficiency

Puerto Rico's federal district court is beholden to the English language proficiency requirement of all United States district courts.[34] The English language proficiency requirement as applied to the District of Puerto Rico presents a problem for a population that primarily speaks Spanish. In Puerto Rico, it is estimated that less than 10 percent of the population speaks English, yet English language proficiency remains a requirement to serve on a federal jury.[35]

Puerto Rico is perhaps an extreme example of language imbalance in the court system. However, this still begs the question of whether there is a particular threshold at which the courts should consider investing in interpreters for jurors.

Oregon's history and changing demographics

Oregon has it its own history of excluding people of color from even coming to our state.[36] Even while still a territory, the Donation Land Claims Act of 1850 granted any white male citizen over the age of twenty-one up to 640 acres of land in the Oregon Territory. Today, Oregon continues to have a relatively high percentage of white residents.[37]

And, in 1934, Oregon voters added non-unanimous jury convictions in criminal cases to the state Constitution, "during a time when anti-immigrant sentiment was high and the Ku Klux Klan was coming off the height of its power in the state."[38] The practice occurred until 2020, when the United States Supreme Court in *Ramos v. Louisiana* held that the Sixth Amendment requires a unanimous verdict for a conviction of "a serious offense" in state court.[39] The racial disparities caused by Oregon's lengthy history of non-unanimous jury verdicts are difficult to measure due to a lack of state court data on this issue.[40] However, data from the Criminal Justice Commission suggests that defendants of color, and Black defendants in particular, were convicted more often by non-unanimous juries in Oregon.[41]

22 *Id.* at 83.
23 *Id.* at 89.
24 500 U.S. 352 (1991).
25 *Id.* at 356.
26 *Id.*
27 *Id.*
28 *Id* at 360.
29 *Id.* at 364.
30 Kyle Duffy, *Lost in Translation: New Mexico's Non-English Speaking Jurors and the Right to Translated Jury Instructions*, 47 N.M.L.R. 376, 378 (2017).
31 *Territory v. Romine*, 1881 WL 4061 (N.M. 1881).
32 Duffy, *supra* note 30 (citing Edward L. Chávez, *New Mexico's Success with Non-English Speaking Jurors*, 1 J. Ct. Innovation 303, 315–16 (2008)).
33 Chávez, *supra* note 32, at 310.
34 Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors*, 46 Harvard Civil Rights-Civil Liberties L.R. 497, 502 (2011) (describing the Jury Selection and Service Act, 28 U.S.C. § 1865(b) (2006), and its application to the District of Puerto Rico).
35 *Id.* at 509.
36 Willamette University College of Law Racial Justice Task Force, *Remedying Batson's Failure to Address Unconscious Juror Bias*, 57 Willamette L.R. 85, 108 (2021).
37 *See* Douglas Perry, *Oregon's founders sought a 'white utopia,' a stain of racism that lives on even as state celebrates its progressivism*, Oregonian (Jun. 15, 2020) (https://www.oregonlive.com/history/2020/06/oregons-founders-sought-a-white-utopia-a-stain-of-racism-that-lives-on-even-as-state-celebrates-its-progressivism.html) (accessed Jan. 25, 2022).
38 Conrad Wilson, *Oregon lawmakers to consider relief for those convicted by non-unanimous juries*, OPB (Nov. 16, 2021) (https://www.opb.org/article/2021/11/16/non-unanimous-juries-new-oregon-legislation/) (accessed Jan. 28, 2022).
39 *See Ramos v. Louisiana*, 590 U.S. ___, 140 S.Ct. 1390 (2020).
40 Wilson, *supra* note 38.
41 *Id.*

The Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System was established in 1992 in response to a judge's disparaging comment about a Mexican-American criminal defendant.[42] In its 1994 report, the task force analyzed how to accommodate non-English speaking individuals in the courtroom, but this report was mainly limited to non-English speaking parties and witnesses, and the role of interpreters in the courtroom.[43] And similarly, while Oregon law provides that courts must appoint interpreters for non-English speaking parties and witnesses for court proceedings,[44] the Oregon Supreme Court in *Haugen* held "the statute nevertheless does not *require* the trial court" to appoint interpreters for jurors.[45]

Today, Oregon has approximately 4.2 million residents.[46] Nearly 25 percent of Oregon's population is not white, including an Asian population of 4.9 percent and a Latino population of 13.4 percent.[47] The Asian and Latino portions of Oregon's population have steadily increased over the past few decades.[48] As Oregon becomes a more diverse state, the share of non-English speaking residents will increase as well. Oregon's master jury lists will include more prospective jurors with limited English proficiency. The issue of how to accommodate non-English speakers in the courtroom will only continue to grow more relevant.

Challenges of implementing this practice

As noted previously, the Oregon Judicial Department sponsored a bill that would have provided jurors for interpreters who are not proficient in English, but the bill did not pass due to the fiscal impact. With an increased population of multilingual Oregonians, there is likely a larger potential labor pool for court certified interpreters. However, the training for interpreting, particularly in a court setting, is not simple. A court certified interpreter needs to master multiple skills in addition to language proficiency before being able to serve.[49]

Additionally, courts are currently facing a backlog of trials due to the COVID-19 pandemic. This backlog comes in the midst of a tight labor market, strained by pandemic related challenges for many Oregonians.[50] Implementing a new system for non-English speaking jurors implicates many challenges while the courts are grappling with the impacts of the current pandemic.

Conclusion

Although there are still financial and practical challenges in creating a system to accommodate non-English speaking jurors, it might be time for Oregon to revisit this issue, as a matter of policy, as to whether it properly interprets the Oregon juror qualification statute, and constitutionally. As Oregon grows more diverse, its court system should adapt to better serve and reflect the community. This policy is one change that could contribute to a more inclusive and democratic judicial system in Oregon.

42 Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues, 73 Or. L.R. 823, 827 (1994).
43 *Id.* at 837–38.
44 ORS 45.275.
45 *Haugen*, 349 Or. at 182–83 (emphasis in original).
46 United States Census 2020, https://www.census.gov/quickfacts/OR (accessed Jan. 25, 2022).
47 *Id.*
48 Jeff Mapes, *How Oregon's statistics on race often get misinterpreted*, OPB News (Aug. 10, 2020) (https://www.opb.org/article/2020/08/10/how-oregons-statistics-on-race-often-get-misinterpreted/) (accessed Jan. 25, 2022).
49 Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues, 73 Or. L.R. 823, 839–40 (1994) ("[S]imultaneous interpretation of oral testimony requires a high level of training and skill. Mere proficiency in a foreign language, in and of itself, does not qualify one to interpret in-court testimony from that language or to that language.")
50 *See* Mike Rogoway, *Oregon's unemployment rate drops to 4.1% as state adds another 8,200 jobs*, Oregonian (Jan. 20, 2022) (Oregon's unemployment rate drops to 4.1% as state adds another 8,200 jobs - oregonlive.com) (accessed Jan. 26, 2022).

Book Review: *A Shot in the Moonlight*

By Gary M. Berne
Stoll Berne


Gary M. Berne

It was a cold night in January 1897 on the Dinning farm in southwestern Kentucky. George Dinning was home with his family. A group of 25 men on horseback, armed, faces covered, surrounded the house. The night riders claimed that they were there to advise Dinning to leave town for his own safety—or else he would face the consequences for stealing from a smokehouse. Shots were exchanged. Dinning killed one of the men, and the family fled, never to return. Dinning turned himself over to the sheriff and was tried for murder.

A Shot in the Moonlight, written by reporter Ben Montgomery, tells Dinning's story based upon the court records and historical documents. Dinning was born into slavery. He was denied freedom until the Thirteenth Amendment was ratified in 1865. Deeply divided Kentucky, while it remained in the Union, did not abolish slavery, and refused to ratify the Amendment—until 1976. Dinning owned the home and land he left that night, and he did not steal anything from a smokehouse.

The book is a good trial story, but its genius is to fold the story into the society of the time and the history of post-Civil War Kentucky. It presents a society beset by racial divisions, where some whites react to change and endeavor to maintain their power by directing horrific violence at Blacks, mobs rule some counties, and a variety of groups ardently resist legislation intended to protect minority rights. It shows the importance of the courts, which at times need to be protected by troops, and the benefits of having both state and federal court systems. It also is a story of whether the legal and political systems will rise to the occasion or succumb to the loudest community pressures. And finally, it is a story of irony, as key

players help Dinning while at the same time working to preserve memories of the Confederacy.

I will avoid spoiling the twists and turns of this story. I will only suggest that the legal community may have particular interest in this book both because it shows the role of the legal system in dramatic historical events and because those events are part of how we got to where we are today and took place during a time that has similarities to the present time.

The book is available in an audio version which helps to bring the trial testimony to life.

The Curious Case of the Purloined Document

By Mark J. Fucile
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Mark J. Fucile

The past 20 years brought increasing clarity to what had been a confusing area: how to handle inadvertently produced privileged documents. There are now professional and procedural rules, court decisions and accompanying Oregon and ABA ethics opinions to guide lawyers through the sensitive considerations involved.[1] These rules, however, are tailored to *inadvertently* produced information—such as a privileged document that slips through in a document production or a misdirected email.[2] An opponent's privileged documents that may have been obtained improperly by either a client or a third-party and are *intentionally* offered to a lawyer, by contrast, present both different and difficult issues.[3] Mishandling an opponent's privileged documents in these latter contexts can trigger potential sanctions that include disqualification and exclusion of the material involved as well as regulatory discipline.[4] In this article, we'll first examine settings where an opponent's privileged documents are obtained improperly by the lawyer's client and then offered to the lawyer. We'll then survey situations where a third-party, such as a former employee, offers the lawyer an opponent's privileged documents.[5] With both, we'll use the term "documents" to apply to both traditional paper documents and their electronic equivalents.[6]

Clients

Clients sometimes assume they are doing their lawyer a favor by covertly taking or copying an opponent's privileged documents without authorization. In most instances, however, the clients have likely created problems for both themselves and their lawyers.

For the client, the conduct may trigger potential criminal or civil liability (or both).[7] Depending on the circumstances, the client's potential liability may range from "simple" theft or conversion to more sophisticated electronic privacy or trade secrets claims.[8] Unless the lawyer is familiar the legal areas involved, the lawyer is well-advised to associate a specialist to accurately gauge the client's exposure.[9]

Accurately determining the client's potential legal liability for taking the documents involved (whether originals or copies and whether physical or electronic) will also better inform the lawyer's options under a pair of Oregon State Bar ethics opinions: Formal Opinion 2011-186 (rev 2015) and 2005-105 (rev 2016). The former counsels that the confidentiality rule—RPC 1.6—generally prohibits notifying the owner of the client's removal of the documents involved when doing so would implicate the lawyer's client in a potential crime. The latter states the longstanding rule that a lawyer is generally prohibited from accepting evidence of a crime. In other words, the lawyer is ordinarily prohibited from revealing the client's conduct and is also prohibited from receiving the documents involved.

Formal Opinion 2011-186 also offers a starker practical reason for the lawyer not to accept the documents: the lawyer may be put at risk of criminal liability for receiving stolen documents or tampering with evidence.[10] For the same reason, lawyers in this uncomfortable position need to be appropriately cautious when advising about the client's own handling of the documents going forward. Lawyers are generally permitted under RPC 1.2(c) to advise a client about the legal implications of potential conduct, but are not permitted to "assist" a client in carrying out a crime.[11]

If the lawyer has already taken possession of the documents involved without having realized either what the client was providing or the potential implications, the lawyer's options are more fraught. Rather than a single approach applicable to all situations, lawyers in this uncomfortable position more likely find themselves confronted with a non-exclusive list[12] of imperfect solutions:

- As noted, Formal Opinion 2011-186 concludes that if the client's conduct in obtaining the documents constituted a crime, Oregon RPC 1.6 precludes notifying the opponent (through counsel) because doing so would implicate the lawyer's client in that crime. A client can waive RPC 1.6 with "informed consent," but notifying and returning the documents inherently poses risk to the client that may require close analysis by a criminal defense lawyer as discussed above. Having the lawyer return the documents "anonymously" poses many of the same practical problems.
- Returning the documents to the client presents its own practical problems. The client may no longer have access to the location where the documents were removed, and, therefore is unable to return them. Returning them with the understanding (express or implicit) that that client will destroy the documents—whether originals or copies—warrants careful review by a criminal defense lawyer when the client's acquisition of the documents may have constituted a crime.[13] Regardless, the client should be instructed not to further review the documents.[14]
- If there are issues over whether privilege attached to the documents (for example, whether they are subject

to the "crime-fraud" exception) or concerns that the documents will be destroyed if returned, the lawyer could file them under seal with the court concerned for *in camera* review.[15] This approach assumes client approval to waive confidentiality under RPC 1.6 as noted above to explain the circumstances surrounding the acquisition of the documents. This approach also assumes that the lawyer-recipients move with reasonable dispatch to present the issues involved to the court.[16]

All of these imperfect solutions are also painted against the possibility—if not the probability depending on the circumstances—that the client may be asked under oath at a deposition about whether the client took any documents when, for example, the client left an employer against whom a subsequent lawsuit was filed.[17]

A clear lesson from the case law in this area, however, is that lawyers should not simply make their own determinations that privilege either never attached or was waived and use the documents without first having a court make those determinations. OSB Formal Opinion 2011-186 catalogs several decisions nationally concluding both that the documents may not be used and disqualifying the lawyer-recipients who did not first seek court determinations on privilege.[18] The unremarkable logic of those decisions is that because there is no other way to "erase" the lawyer's knowledge gained improperly, disqualification is an appropriate sanction.[19] Oregon decisions in this area are generally in accord.[20] In one Oregon federal case, the court put it this way: "It appears to the court that . . . [the recipient lawyers] . . . felt no obligation to any person or institution other than . . . [their client]. In that they are deeply mistaken."[21] As noted earlier, lawyer-recipients who do not handle documents appropriately may also be subject to later disciplinary proceedings.[22] In this regard, Oregon RPC 4.4(a) prohibits lawyers from "knowingly us[ing] methods of obtaining evidence that violate the legal rights of . . . [another] . . . person."[23]

Third Parties

The dynamics when a non-client offers a lawyer an opponent's privileged documents that reasonably appear to have been improperly obtained present similar, but in some ways separate, issues than when the documents were taken by a client.

They are similar in three principal respects.

First, OSB Formal Opinion 2011-186 concludes that there is no duty to notify the owner of the overture. Formal Opinion 2011-186 reasons that because the confidentiality rule—RPC 1.6—is broader than privilege standing alone, confidentiality constraints may still apply because "disclosure could nevertheless work to the detriment of the client in the matter." [24]

Second, Formal Opinion 2011-186 counsels against taking possession of documents that reasonably appear to have been obtained improperly for the same reasons discussed earlier.[25]

Third, Formal Opinion 2011-186 notes that a lawyer who nonetheless takes possession of documents risks discovery sanctions and potential disqualification if the lawyer simply uses them without first obtaining court approval to do so. This can be a particularly sensitive practical issue because under *In re Lackey*, 333 Or 215, 37 P3d 172 (2002), there is no general "whistle blower" exception to privilege in Oregon and, therefore, a lawyer-recipient would likely be left either arguing that the documents were not privileged in the first place or fell within a recognized exception such as "crime-fraud."[26] The OSB opinion cites a nationally discussed case where the lawyer-recipients did not promptly tender documents to the court involved for *in camera* review to assess privilege and were later sanctioned.[27] As the court in that case put it: "[T]here exists ample authority recognizing that in reviewing Plaintiff's privileged and confidential documents, Defense counsel proceeded at their own and their client's peril."[28]

They are different in two primary ways.

First, because the documents were not obtained by the lawyer's client, they do not present the same stark questions of potentially implicating the client in a crime if revealed. The documents, for example, might have been sent to the lawyer (or the lawyer's client) anonymously.[29] Therefore, issues surrounding potential disclosure usually have less practical risk than when the documents were obtained improperly by the lawyer's client.[30]

Second, assuming the person offering the documents is not represented,[31] the lawyer would need to be appropriately cautious about not providing the person legal advice or otherwise inadvertently creating an attorney-client relationship (with its own potential conflicts) with the third-party.[32]

Summing Up

One of the leading national cases cited in OSB Formal Opinion 2011-186 notes "the adage, 'if something appears too good to be true, it probably is.'"[33] Lawyers offered an opponent's privileged documents that were improperly taken need to proceed with extreme caution in light of the potential risks to both the lawyer and the lawyer's client.

Endnotes

1 Oregon RPC 4.4(b) (notice), ABA Model Rule 4.4(b) (notice); OSB Formal Op 2005-150 (rev 2015) (addressing ethical aspects); ABA Formal Op 05-437 (2005) (addressing ethical aspects); Fed R Civ Pro 26(b)(5)(B) (procedure to litigate privilege waiver); *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 838 P2d 1069 (1992) (standards for waiver through inadvertent production); Fed R Evid 502 (standards for waiver through inadvertent production).

2 *See* OSB Formal Op 2005-150, *supra*, at 2-3 ("[W]hen the delivery of privileged documents is the result of other circumstances aside from the sender's inadvertence, Oregon RPC 4.4(b) does not apply."); ABA Formal Op 06-440 (2006) at 2 ("It further is our opinion that if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply[.]")

3 ABA Formal Opinion 11-460 (2011) addresses issues surrounding employees corresponding with their personal lawyers on employer-issued devices. *Kyko Global Inc. v. Prithvi Information Solutions Ltd.*, No C13-1034 MJP, 2014 WL 2694236 (WD Wash June 13, 2014) (unpublished), in turn, discusses privilege issues involved with abandoned electronic devices. For a discussion of similar issues involving non-privileged documents, *see* Helen Hierschbiel, *Rules for Privileged or Purloined Documents*, 72, No 6 Or St B Bull 9 (July 2012).

4 *See, e.g., Richards v. Jain*, 168 F Supp 2d 1195 (WD Wash 2001) (ordering the return of privileged documents improperly obtained by law firm's client and disqualifying law firm); *Furnish v. Merlo*, Civ No 93-1052-AS,

1994 WL 574137 (D Or Aug 29, 1994) (unpublished) (directing law firm to forward privileged documents improperly obtained by law firm's client to court for in camera review); *In re Hartman*, 332 Or 241, 25 P3d 958 (2001) (regulatory proceeding following *Furnish*); *Foss Maritime Co. v. Brandewiede*, 359 P3d 905 (Wash App 2015) (remanding disqualification order for further findings in case involving receipt of opponent's privileged information from former employee).

5 This article will focus primarily on Oregon authority. There is some variation in approach around the country on the issues involved and, therefore, close attention should be paid to local guidance if litigating this area in another jurisdiction. *See, e.g.,* DC Bar Ethics Op 318 (2002) (analyzing under the rule governing safeguarding property of another, ABA Model Rule 1.15); *see generally* Douglas R. Richmond, *Ethics and Evidence Too Hot to Handle*, 87 Tenn L Rev 869 (2020) (surveying these issues nationally).

6 Acquisition of an opponent's privileged information standing alone—such as asking a former employee about privileged conversations the former employee had with the employer's attorney when the employee was still working for the employer—is discussed and generally proscribed by OSB Formal Opinion 2005-80 at 3-4 (rev 2016).

7 *See, e.g., K.F. Jacobsen & Co., Inc. v. Gaylor*, 947 F Supp 2d 1120 (D Or 2013) (discussing potential criminal and civil liability based on unauthorized access and sharing of former employer's information by client of lawyer).

8 *Id.*

9 *See generally* Oregon RPC 1.1 (duty of competence); UCJI 45.04 (standard of care for attorney services).

10 *Id.* at 2. *See* ORS 162.295 (tampering with physical evidence); *see also State v. Martine*, 277 Or App 360, 371 P3d 510 (2016) (discussing the interplay between physical devices and the electronic information they carry under ORS 162.295).

11 *See also* Oregon RPC 8.4(a)(4) (prohibiting conduct prejudicial to the administration of justice); *see generally* OSB Formal Op 2005-53 (rev 2016) (discussing RPCs 1.2(c) and 8.4(a)(4)).

12 Given the fact-dependent circumstances often involved in these situations, the approaches surveyed are intended to be illustrative rather than exhaustive.

13 *See also Markstrom v. Guard Publishing Company*, 315 Or App 309, 501 P3d 71 (2021) (discussing spoliation of evidence in the context of destruction of emails). *See also* Oregon RPC 3.4(a) (prohibiting "knowingly and unlawfully obstruct[ing] another party's access to evidence or unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value").

14 *See Restatement (Third) of the Law Governing Lawyers*, § 60, cmt. m (2000) ("The receiving lawyer must take steps . . . to keep it confidential from the lawyer's own client in the interim."). This *Restatement* comment is cited (albeit on another point) in OSB Formal Opinion 2011-186 (at 2).

15 *See, e.g., Furnish v. Merlo, supra*, 1994 WL 574137 at *11 (imposing this solution). In the interim, the lawyer should prudently segregate and secure any copies within the lawyer's own files. *See* Alec Rothrock, *Handling Electronic Documents Purloined by a Client*, 48, No. 1 Colorado Lawyer 22, 25 (Jan 2019) (discussing protocols for handling documents clients have taken from litigation opponents without permission).

16 Courts are usually critical when lawyers wait to see if the documents involved can be used at an opportune time. *See, e.g., Furnish v. Merlo, supra*, 1994 WL 574137 at *2, *9.

17 *See, e.g., Richards v. Jain, supra*, 168 F Supp 2d at 1199 (client testified at deposition about taking documents).

18 *Id.* at 3 n.3.

19 *See, e.g., Richards v. Jain, supra*, 168 F Supp 2d at 1209 ("The disclosure of privileged information cannot be undone in these circumstances. Therefore the Court finds that the only remedy to mitigate the effects of . . . [the law firm's] eleven month possession and review of the Disk is disqualification.").

20 *See, e.g., Furnish v. Merlo, supra*, 1994 WL 574137 at *11 (finding lawyer misconduct, directing that the documents involved be submitted to the court for *in camera* review and directing further proceedings on the remedy to be imposed); *K.F. Jacobsen & Co., Inc. v. Gaynor*, No 3:12-CV-2062-AC, 2014 WL 273140 at *1 (D Or Jan 23, 2014) (unpublished) (noting that in earlier Oregon state court action lawyer-recipient

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was ordered to return documents improperly obtained and was disqualified).

21 *Furnish v. Merlo, supra*, 1994 WL 574137 at *9.

22 *See, e.g., In re Hartman, supra*, 332 Or 241.

23 Oregon RPC 4.4(a) is based on its ABA Model Rule counterpart. Alaska Bar Ethics Opinion 2019-1 (2019) notes (at 5) that "legal rights" for purposes of Rule 4.4(a) potentially extends beyond privilege to documents that are protected by a contractual confidentiality agreement.

24 *Id.* at 2.

25 *Id.*

26 OEC 503(4)(a).

27 *Id.* at 3 (citing *Burt Hill, Inc. v. Hassan*, No Civ A 09-1285, 2010 WL 419433 (WD Pa Jan 29, 2010) (unpublished)).

28 *Id.* at *4.

29 In *Burt Hill*, for example, the documents were provided anonymously.

30 Given the sensitivity that usually accompanies an offer of documents from a third-party, the client should ordinarily still be consulted regarding this development. *See* RPC 1.4 (communication); *see generally* Los Angeles County Bar Op. 531 at 9 (2019) (discussing counseling the lawyer's client on the duties and risks involved).

31 If the person was represented in the general matter involved, then the "no contact" rule—RPC 4.2—would likely apply.

32 *See* RPC 4.3 (dealing with unrepresented persons); *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990) (test for attorney-client relationship).

33 *Burt Hill, Inc. v. Hassan, supra,* 2010 WL 419433 at *5.

Recent Significant Oregon Cases

By The Honorable Stephen K. Bushong
Multnomah County Circuit Court


Hon. Stephen K. Bushong

Claims and Defenses

Abraham v. Corizon Health, Inc., 369 Or 735 (2022)

Defendant provided health care services to plaintiff while he was incarcerated at the Clackamas County Jail. Plaintiff filed an action in federal court, alleging that defendant discriminated against him based on his disability in violation of ORS 659A.142. Answering a question certified by the Ninth Circuit Court of Appeals, a divided Oregon Supreme Court held that "a private contractor providing healthcare services at a county jail is a 'place of public accommodation' within the meaning of ORS 659A.400 and can be subject to liability under ORS 659A.142." 369 Or at 758. The dissenting opinion stated that the 2013 amendments to the statute "were adopted to make clear that state and local correctional facilities are not 'places of public accommodation,' in recognition that correctional facilities have unique characteristics and needs that are incompatible with the requirements of the Act." 369 Or at 764 (Garrett, J., dissenting).

Clark v. University of Oregon, 319 Or App 712 (2022)

Plaintiff injured his knee during a visit to the defendant university's basketball program. He brought this negligence action against the university and five of its employees. The trial court granted defendants' motion for summary judgment, concluding that plaintiff's injury resulted from the normal risks of playing basketball and that defendants could not be liable for his injury as a matter of law. The Court of Appeals reversed. The court declined to adopt a rule that "a defendant's duty in the context of an injury that occurs during a sports activity never extends to protecting against a risk that is an element of the sport." 319 Or App at 719. Instead, the court applied the analytical framework of *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1 (1987). The court concluded that "this case presents a scenario different from ordinary participation in a sports activity." 319 Or App at 721. The trial court erred in granting summary judgment for defendants, the court concluded, because it "is squarely within the province of the jury to assess the reasonableness of defendants' conduct and the foreseeability of the risk of harm to plaintiff." *Id.*

Hofer v. OHSU, 319 Or App 603 (2022)

Plaintiff sued defendant OHSU for defamation and medical negligence, alleging that two OHSU physicians falsely stated in plaintiff's medical records that she obtained duplicate prescriptions, breached a medication contract, and lied about methadone prescriptions. The trial court granted OHSU's motion for summary judgment, concluding that the defamation claims were barred by absolute privilege, and there was no evidentiary basis for the negligence claim. The Court of Appeals affirmed. The court concluded that "OHSU is entitled to prevail on its absolute privilege defense" because there was evidence that defendants were carrying out their official duties at OHSU, and no evidence raising a genuine issue of material fact on that question. 319 Or App at 614. The medical negligence claim failed because plaintiff has not alleged or offered evidence "sufficient to connect her physicians' duty to use that degree of care, skill, and diligence used by similarly situated physicians in assessing and treating movement disorders to a specific duty to maintain accurate patient records for the specific purpose of protecting patients from emotional harm that might arise from poor record-keeping practices." *Id.* at 618.

Verardo v. Dept. of Transportation, 319 Or App 442 (2022)

Plaintiff was injured when his car struck a guardrail after he fell asleep at the wheel. He alleged that his injuries were caused by the Oregon Department of Transportation (ODOT)'s negligence in maintaining the guardrail. The trial court granted ODOT's motion for summary judgment; the Court of Appeals affirmed. The court concluded that "ODOT's policy decisions relating to the placement and maintenance of the guardrail end piece that plaintiff hit were entitled to discretionary immunity" under ORS 30.265(6)(c). 319 Or App at 449.

Thomas v. Dillon Family Limited Partnership II, 319 Or App 429 (2022)

Plaintiff was injured when she slipped and fell on water from a leaking refrigerator that had accumulated in her apartment. Plaintiff sued her landlord for damages under the Oregon Residential Landlord and Tenant Act (ORLTA), asserting that defendant's failure to repair the refrigerator made the apartment uninhabitable. The trial court determined that the landlord's comparative fault defense was not available under ORLTA, and a jury returned a verdict in plaintiff's favor. The Court of Appeals affirmed. The court concluded that "the legislature did not intend for the ORLTA to provide a landlord with the right to present a comparative-fault defense in response to a tenant's claim that the tenant was injured as a result of an uninhabitable condition." 319 Or App at 441.

Donahue v. Nagel, 319 Or App 275 (2022)

The parties—neighboring landowners—settled their disputes over the use of their respective properties, including the location of the property line. The general outlines of the settlement were memorialized in an email from a mediator. Plaintiffs' counsel then drafted a settlement agreement, which (among other things) required plaintiffs to grant an easement over part of their property. Defendants' counsel proposed adding a sentence—unrelated to the easement—to the draft settlement agreement. Plaintiffs took that response as an opportunity to repudiate the settlement agreement and filed this action for trespass, nuisance, and ejectment. The trial court entered judgment in defendants' favor, concluding that plaintiff had breached the settlement agreement. The Court of Appeals reversed, noting that the settlement agreement, "which included a promise to convey an easement, was never signed by plaintiffs, as would be required by ORS 41.580(1)." 319 Or App at 280. The court concluded that "the trial court erred in determining that the provision relating to the creation of an easement was not within the statute of frauds." *Id.* at 281.

Crockett's Interstate Towing & Transport v. OSP, 319 Or App 25 (2022)

Plaintiff—a towing company—sued the Oregon State Police and Douglas County Sheriff's Department under 42 USC § 1983, alleging that defendants refused to dispatch plaintiff to accidents in Douglas County in violation of an administrative rule that required defendants to use a "nonpreference" tow list. The trial court granted defendants' motion to dismiss; the Court of Appeals affirmed. The court explained that plaintiff's section 1983 claim for violating its due process rights failed because "OAR 257-050-0020(1) does not establish a property or liberty interest for all Oregon tow companies in proper maintenance of the nonpreference tow list." 319 Or App at 27.

George-Buckley v. Medford School Dist. 549C, 318 Or App 821 (2022)

Plaintiff brought claims for breach of contract and quasi-contract, alleging that that the defendant district underpaid her by classifying her job as an "educational assistant" instead of a teacher. The trial court concluded that it lacked jurisdiction because the Employment Relations Board (ERB) had exclusive jurisdiction. The Court of Appeals affirmed. The court noted that plaintiff's job was covered by a collective bargaining agreement (CBA) under the Public Employees Collective Bargaining Agreement Act (PECBA), and that the claims allege conduct that would be an Unfair Labor Practice (ULP). The court concluded that, "because the gravamen of plaintiff's complaint is a breach of the CBA that would constitute a ULP under PECBA, it is an issue within the exclusive jurisdiction of ERB." 318 Or App at 834-35.

F.T. v. West Linn-Wilsonville School District, 318 Or App 692 (2022)

Plaintiff's minor son (F) was sexually abused by a teacher (Peachey) employed by the defendant school district. Plaintiff alleged (among other things) that the district was negligent in failing to investigate rumors about Peachey's risk to minor male students; in retaining and supervising Peachey; and in failing to adequately train its staff on child sexual abuse. The trial court granted the district's motion for summary judgment on the negligence claim, concluding that plaintiff failed to present evidence that the district had prior notice of Peachey's inappropriate relationships with F and other students. A divided Court of Appeals affirmed. The majority opinion saw this as "one of those rare cases where the question of foreseeability was properly withdrawn from the jury." 318 Or App at 706. The court explained that the issue of foreseeability was properly before the court because "one cannot assess the adequacy of the evidence offered to raise a triable issue as to plaintiff's allegations of negligence. . . without addressing whether such negligence created a foreseeable risk of the harm alleged." *Id.* The court concluded that, under the circumstances of this case, "Peachey's criminal assault of F . . . was not foreseeable." *Id.* at 707. The dissenting opinion believed that there was sufficient evidence to avoid summary judgment on foreseeability, noting that plaintiff "presented evidence that the district had a policy identifying 'inappropriate' behavior by teachers and also presented evidence that would allow the inference that the district was aware that Peachey was engaging in conduct with students that would be deemed 'inappropriate' under its own policy, including conduct characterized by the policy as grooming activity." 318 Or App at 710 (Lagesen, C.J., concurring in part, dissenting in part).

Mohabeer v. Farmers Ins. Exchange, 318 Or App 313 (2022)

Plaintiff is a licensed medical doctor practicing in association with First Choice Chiropractic clinics (First Choice). In 2013, defendant (Farmers) filed a federal court action against First Choice and others (including plaintiff), alleging that the clinics and individuals had committed insurance fraud by making false reports with exaggerated findings. That action was eventually resolved; Farmers stipulated that plaintiff would be considered the prevailing party. Plaintiff then filed this action for wrongful use of civil proceedings, alleging that Farmers

brought the federal case with malicious intent and without probable cause. Farmers then filed a special motion to strike under ORS 31.150(1), Oregon's anti-SLAPP statute. The trial court denied the motion; the Court of Appeals reversed. The court noted that "one element of the claim of wrongful use of civil proceedings is an absence of probable cause to prosecute the underlying action." 318 Or App at 318. Here, the court found "ample evidence" in the record that Farmers had probable cause to sue plaintiff, "including affidavits of former clinic employees, who described plaintiff's participation in a scheme to overtreat patients and overbill insurance." *Id.* at 320. Thus, the court concluded that "plaintiff has not met his burden to present prima facie evidence of a lack of probable cause" so the trial court "erred as a matter of law in denying defendants' special motion to strike." *Id.*

Procedure

Eklof v. Persson, 369 Or 531 (2022)

In this post-conviction relief case, the Supreme Court addressed the standards governing motions for leave to amend the pleadings under ORCP 23 A. The court stated that "the gravamen of the inquiry under ORCP 23 A is prejudice to the opposing party." 369 Or at 533. The merit of the proposed pleading "is relevant only insofar as ORCP 23 A permits leave to be denied for futile amendments." *Id.* A futile claim "is one that could not prevail on the merits due to some failing in the pleadings or some unavoidable bar or obstacle." *Id.* at 543-44. For example, the court explained, "a claim over which the relevant court lacks subject matter jurisdiction would be futile because that claim could not proceed to the merits, much less prevail, and no discoverable facts could avoid that bar." *Id.* at 544. The court further concluded that "the court may consider judicially noticeable facts in evaluating motions for leave to amend to the extent that such facts are relevant to determining whether justice requires that leave to amend be granted." *Id.* at 547.

Wave Form Systems, Inc. v. Hanscom, 320 Or App 285 (2022)

Defendant (Hanscom) and two former Wave Form employees started a company, Bedrock Lithotripsey, LLC (Bedrock) to provide equipment and services to hospitals for lithotripsey—which involves using shockwaves to break up kidney stones—in competition with Wave Form. Wave Form sued Bedrock and the two former Wave Form employees but did not initially name Hanscom (Bedrock's managing member) as a defendant. While that action was pending, Wave Form proposed to amend the complaint to add Hanscom as a defendant. Bedrock objected, and a jury ultimately found in Wave Form's favor, awarding a fraction of the damages it sought. Wave Form then filed this action against Hanscom based on the same underlying facts. The trial court granted Hanscom's motion for summary judgment, concluding that the claims were barred by issue preclusion because Hanscom was in privity with Bedrock. The Court of Appeals reversed. The court noted that, under Oregon law, Hanscom was in privity with Bedrock for purposes of claim preclusion, but a party may waive the ability to assert a claim preclusion defense "by acquiescing in split litigation." 320 Or at 292. Here, the trial court erred in granting summary judgment because a reasonable factfinder could conclude that "Bedrock's objection to adding Hanscom to the prior proceeding waived Hanscom's ability to assert the defense of claim preclusion based on his relationship with Bedrock." *Id.* at 294.

Wedemeyer v. Nike Ihm, Inc., 319 Or App 781 (2022)

Plaintiff alleged that she faced multiple forms of employment discrimination during the time she worked as a production manager for defendant Nike. After the claims were resolved in Nike's favor, the trial court awarded Nike its attorney fees. The Court of Appeals reversed, noting that it was "undisputed that defendant failed to allege its right to attorney fees, which is required by ORCP 68C(2)(a)." 319 Or App at 783. The court concluded that the trial court's decision to award fees "amounts to plain error" that the court, in its discretion, chose to correct. *Id.* at 786, 787. The court further concluded that the trial court did not err in concluding that, after plaintiff filed a notice of appeal, it lacked jurisdiction to consider Nike's request to amend its answer to allege the legal basis for recovering attorney fees. The court explained: "although ORS 19.270(1)(a) allows a trial court to decide properly pleaded requests for attorney fees despite an ongoing appeal, that does not include the right to modify the pleadings to allege the right to those fees in the first place." *Id.* at 788.

McNeil v. Geico Casualty Co., Inc., 319 Or App 458 (2022)

Plaintiff was injured in a motor vehicle accident with an uninsured driver. Defendant (Geico) accepted her claim for uninsured motorist (UM) benefits, and the parties arbitrated the damages issue. The arbitration award exceeded the UM policy limits; Geico then sought to reduce the amount owed by offsetting personal injury protection (PIP) benefits it had paid against the UM policy limits. Plaintiff objected, contending that the PIP offset must be applied against the total arbitration award, not the UM policy limits. Geico ultimately agreed. Plaintiff then brought this action to recover her attorney fees, contending that Geico's position brought it out of the safe-harbor protection of ORS 742.061(3). The trial court disagreed, granting Geico's motion to dismiss. The Court of Appeals affirmed. The court concluded that, under the PIP benefits offset statute, ORS 742.542, the issue of "the application of a PIP offset is necessarily an issue of 'the damages due the insured' and not an issue of claim coverage." 319 Or App at 462. Thus, Geico "did not leave the safe harbor of ORS 742.061(3) as a matter of law." *Id.* at 463.

McCoy v. Popma, 318 Or App 600 (2022)

Plaintiff sued defendant for injuries he allegedly suffered in an automobile accident. The jury initially returned a verdict finding that defendant's negligence was a cause of damages to plaintiff but awarding zero damages. The trial court concluded that the verdict was inconsistent and instructed the jury to

redeliberate pursuant to ORCP 59 G(4). The jury then returned a defense verdict. The Court of Appeals affirmed. The court explained that none of the cases cited by plaintiff required the trial court "to accept a partial verdict and send the jury back to deliberate on a discrete issue" (here, the amount of the damage award). 318 Or App at 607. Instead, "the proper course was to resubmit the entire claim to the jury for clarification rather than risk accepting an unintended answer by the jury." *Id.*

Heritage Properties v. Wells Fargo Bank, 318 Or App 470 (2022)

Plaintiff alleged that defendant breached the covenants of the warranty deed by failing to convey marketable title to a manufactured home plaintiff purchased from defendant. After defendant failed to appear at the arbitration hearing, the arbitrator awarded damages including $40,000 for the value of the manufactured home. Plaintiff's petition to confirm the award was granted by the trial court. Defendant then moved to vacate the judgment under ORCP 71 after discovering that plaintiff had received title to the manufactured home for a fee of $55. The trial court granted the motion; the Court of Appeals affirmed. The court explained that ORCP 71 B(1)(c) was amended in 2010 "to allow intrinsic as well as extrinsic fraud to form a basis for relief from judgment by motion." 318 Or App at 482. The court determined that the 2010 amendment "did not 'abridge, enlarge or modify the substantive rights of any litigant' as prohibited by ORS 1.735(1)." *Id.* at 485. Finally, the court concluded that relief on the grounds of fraud was justified here because plaintiff "concealed facts and made misrepresentations throughout the case to both the arbitrator—including, at times, when plaintiff was unopposed in the arbitration—and the trial court." *Id.* at 486.

Myhre v. Potter, 318 Or App 391 (2022)

Nearly nine years after prevailing on a breach of contract claim in arbitration, plaintiff filed a petition to confirm the arbitration award. The trial court denied the petition, concluding that it was time barred because it was filed after the statute of limitations for contract actions had expired. The Court of Appeals reversed, concluding that "a petition to confirm an award initiates a special statutory proceeding that does not contain a limitation on the time period, after an arbitration award, within which the petition must be filed." 318 Or App at 401.

Moody v. Dept. of Human Services, 318 Or App 16 (2022)

The Court of Appeals held that the "mailbox rule" in ORCP 10 B does not extend the 60-day period specified in ORS 183.484 for filing a petition for judicial review of an agency order in other than a contested case. Thus, a petition filed within 63 days of the date of mailing is not timely.

Sandhu v. Kumar, 317 Or App 788 (2022)

In 2008, plaintiff and defendant entered into a partnership agreement to operate a convenience store and gas station. Plaintiff filed a bankruptcy petition in 2009 but did not list his partnership interest in the petition. In 2015, plaintiff filed this action seeking to dissolve the partnership and liquidate its assets. The trial court granted defendant's motion to dismiss, concluding that plaintiff was judicially estopped based on his actions in the bankruptcy proceeding. The Court of Appeals affirmed, but for a different reason, concluding that plaintiff lacked standing to wind up the partnership. The court explained that, under the bankruptcy code, "plaintiff's partnership interest does not belong to him; rather, the partnership interest belongs to the bankruptcy trustee." 317 Or App at 793.

Evidence

State v. Aranda, 319 Or App 178 (2022)

The Court of Appeals held that, before evidence of a prior conviction may be used as impeachment evidence under OEC 609(1)(a), the Due Process Clause of the Fourteenth Amendment to the United States Constitution required the trial court determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under OEC 403.

Lawrence v. Oregon State Fair Council, 318 Or 766 (2022)

Plaintiff slipped and fell on wet bleachers while attending the Oregon State Fair. At trial, plaintiff offered evidence that another person had slipped on the same bleachers a few minutes after plaintiff's fall. The trial court initially excluded the evidence under OEC 403. However, during trial, the trial court ruled that defendant had "opened the door" to that evidence, but nonetheless excluded the evidence, concluding that the "form" of the evidence—self-serving testimony from plaintiff and his family members—would not be appropriate. Plaintiff did not object to the trial court's rejection of the evidence based on its "form" or otherwise request that the trial court clarify its ruling. The jury returned a defense verdict. The Court of Appeals affirmed, concluding that plaintiff's claim of error on the evidentiary ruling was not preserved for appeal. 318 Or App at 771.

National Collegiate Student Loan Trust v. Gimple, 318 Or App 672 (2022)

Plaintiff sought to recover on a defaulted student loan defendant obtained from the original lender, Bank One. The trial court excluded evidence submitted by plaintiff—including the original Bank One loan agreement, and an agreement assigning the loan from Bank One to the plaintiff—concluding that the exhibits were not admissible under the business records exception to the hearsay rule, OEC 803(6). As a result, the trial court denied plaintiff's motion for summary judgment and granted defendant's cross-motion. The Court of Appeals affirmed, applying *Arrowood Indemnity Co. v. Fasching,* 369 Or 214 (2022). The court explained that, under *Arrowood*, the testimony seeking to lay the foundation for the business records exception must "include information about the practices of the business that initially made and kept the record." 318 Or App at 681. Here, nothing in the affidavit plaintiff submitted in support of its

motion demonstrated that the affiant "had knowledge of the record making process of Bank One." *Id.* at 682.

Miscellaneous

City of Portland v. Bartlett, 369 Or 606 (2022)

The Supreme Court held that four documents prepared more than 25 years ago by the Portland City Attorney for the mayor and two city commissioners subject to the attorney-client privilege "must be disclosed" under a 1979 amendment to the public records law codified in ORS 192.390. 369 Or at 608.

Bialostosky v. Cummings, 319 Or App 352 (2022)

The Court of Appeals held that defendant—an elected member of the West Linn City Council—was a "public body" subject to the Oregon Public Records Law, ORS 192.311-192.478, and that notes she made during her work as a councilor are public records subject to disclosure.

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