JUNE 1992

Litigation Journal

PUBLISHED BY THE LITIGATION SECTION

VOLUME II • NUMBER 4

WHAT'S INSIDE

3 **From the Chair**
By J.C. Van Voorhees

3 **Speaking From Experience**
Beginnings of Oregon CLE
By Randall B. Kester

4 **Recent Significant Oregon Cases**
By Gregory A. Chaimov

4 **Upcoming Seminars**

5 **"Using Deposition at Trial" CLE/Tigard & Sunriver**

Many Thanks . . .

The Litigation Section of the Oregon State Bar would like to express its appreciation for the outstanding performance by Mick Seidl, who served as editor of the *Litigation Journal* the last two years.

Printed on Recyclable Paper

Litigation Journal to Take New Direction

By Dennis P. Rawlinson, Editor, Miller, Nash, Wiener, Hager & Carlsen

We are pleased to announce that we are in the process of recruiting some of the best and brightest members of the bar and bench to provide future articles and to serve on an editorial board for the *Journal.* We are attempting to recruit a cross section from both the plaintiffs' and defendants' bar, from both smaller and larger firms, and from both the greater Portland area and throughout the state of Oregon.

Thus far, we are proud to announce that we have recruited the following members to serve on the editorial board for the *Journal* for a two-year term:

1. **David B. Markowitz,** *Markowitz, Herbold, Glade & Mehlhaf, P.C.*
2. **John E. Hart,** *Schwabe, Williamson & Wyatt*
3. **Robert J. Neuberger,** *Pozzi, Wilson, Atchison, O'Leary & Conboy*
4. **Ronald E. Bailey,** *Bullivant, Houser, Bailey, Pendergrass & Hoffman*
5. **Jan Thomas Baisch,** *Paulson & Baisch, Lawyers, P.C.*
6. **Edwin A. Harnden,** *Lane, Powell, Spears, Lubersky*
7. **The Honorable Janice R. Wilson,** *Multnomah County District Court Judge*
8. **Gregory R. Mowe,** *Stoel, Rives, Boley, Jones & Grey*
9. **Steven H. Pratt,** *Frohnmayer, Deatherage, Pratt, Jamieson & Turner, P.C.*
10. **Frank V. Langfitt, III,** *Ater, Wynne, Hewitt, Dodson & Skerritt*

We are in the process of recruiting additional talented members from both the bar and the bench. One of our objectives will be to feature articles which provide practical, no-nonsense suggestions for day-to-day litigation and trial practice. We trust that with a larger, more diverse base providing articles to the Journal, it will provide a greater benefit to its subscribers. The next edition of the *Litigation Journal* will be the first *Litigation Journal* produced under the new editorial board.

Surviving in Federal Court

By The Honorable Owen M. Panner, U.S. District Court Judge

In the "good ol' days," the lawyers who practiced in federal court were relatively few in number. Legend has it that the word of all of those lawyers was as good as their bond. I filed a case in Portland from eastern Oregon and a Portland lawyer would answer the monthly call for me and explain to the court that the roads were bad and I couldn't get over. Nothing really happened until the case got set for trial. When the setting came, the Portland lawyer would send me a pretrial order to sign and file. Then I'd come down and try the case.

In those days we had Monday "call" days. All the lawyers who had cases in the court showed up for the Monday call and sometimes spent the better part of the day waiting for their cases to be called. I didn't come in from Bend too often, because as I've said, I could usually get the Portland lawyer to answer the call for me.

One Monday I came down on a very

Please continue on next page

Surviving, continued from page 1

important case and sat and listened to the many and varied reasons why lawyers were not ready to go to trial. In those days, Phil Levin was answering the call on a good many of the cases handled by the Pozzi firm. Anytime one of the Pozzi cases was called, Phil Levin would stand up and announce that they were ready for trial whenever Judge Solomon wanted to set it. Judge Solomon would say, "Fine, fine!" Unfortunately, everyone wasn't as prepared as Phil was. One Monday, after numerous excuses by lawyers, Judge Solomon angrily asked Phil Levin to stand up in the crowded courtroom. Nearly all the seats inside the bar and outside the bar were filled with lawyers. Phil obediently rose, and the judge started in. "I want you all to take a good look at Phil Levin. He's always ready for trial anytime I am. He never makes wishy-washy and lame excuses. I want all of you to start doing exactly like Phil Levin does! Stand up and say you're ready for trial whenever I am!"

Those of you who remember Phil Levin know what a fine, quiet, and unassuming lawyer he was. He was embarrassed to death and, as you can imagine, received much good-natured ridicule.

Well, the call days are gone and, with them, the opportunity to see such great public performances by judge and lawyer. Gone also is the opportunity to have lunch or coffee with your opposition on call day and settle the case. Gone are those relaxing trips over the mountains on first Mondays when you couldn't get the Portland lawyer to answer call for you.

These days you get an order when you file your case that sets dates for close of discovery and the lodging of the pretrial order. As long as you get the pretrial order in on time and work out the discovery with your opponent, you don't have to deal with an irascible federal judge. Even if you have a dispute, it can probably be heard on a telephone conference call with the judge in chambers and you and your opponent in your respective offices. And just as soon as you lodge the pretrial order or agree that one is unnecessary, there's a telephone conference call with the judge, and a pretrial conference date and a trial date are set, with your approval. This leaves very little opportunity for you to later crawl out of the trial date and stall the case, as was sometimes done in the "good ol' days."

This unique and antiseptic system was designed by federal judges and "old-time" trial lawyers who decided it was a waste of clients' money to have 150 lawyers sitting in a courtroom the better part of a day on call Monday. Besides, we don't have Judge Solomon to run the call calendar! There is one similarity — poor excuses for not being ready aren't accepted much better now than they were in the "good ol' days."

In spite of all the talk about how lawyers were more trustworthy, cheerful, obedient, thrifty, brave, clean, and reverent in those days, we are fortunate here in Oregon to have an outstanding group of lawyers.[1] With very few exceptions, I continue to see lawyers practicing in federal court who are as good as their word and are very professional. In fact, I think it's getting better in recent years rather than worse.

The Congress, the state legislature, all of the agencies, both federal and state, the schools, the churches, and the homes expect the courts to solve all of their problems in this modern United States. Lawyers and judges, day in and day out, handle the most difficult and important disputes with amazing grace. When you realize that so many of these disputes involve life or death, or nearly so, to clients, and success or failure to lawyers, it's always surprising to me that there is not more bad behavior. Lawyers have many, many opportunities to be devious and dishonest, and yet it happens so seldom. While lawyers receive much criticism, those of you who conscientiously labor in the courts and behind the scenes can be very proud of your profession. It may seem that the practice of law was better in the "good ol' days," but it won't be long until the 1990s will be the "good ol' days"!

Integrity, hard work, and a good sense of humor worked wonders then and work wonders now as well. There's always been a professional way to reproach another lawyer or even a federal judge. I'm reminded of the time Judge Alger Fee was trying condemnation cases for the Malheur Wildlife Refuge in Burns in the forties. He was a fine judge and a strict disciplinarian. Even as those of us sometimes do now, Judge Fee would occasionally become impatient. When he did, he would often tap his lead pencil on the bench in a rapid, steady fashion. Pat Gallagher was equally strong-willed and a very able lawyer from Ontario. He became irritated with Judge Fee's tapping noise and politely inquired as to whether counsel might approach the bench. Permission was granted. On arrival, in a whispered voice, he inquired, "Your Honor, if it's all the same with you, would you mind turning that pencil over and tapping with the eraser instead of the lead?" Sometimes, even today, we federal judges need to be admonished, but only in a *very* polite, professional way!

---

[1] Some of you may remember better than I the exact language of the Boy Scout oath.

The Oregon Litigation Journal is published three times per year by the Litigation Section of the Oregon State Bar with offices at 5200 SW Meadows Road, PO Box 1689, Lake Oswego, Oregon, 97035-0889, 503/ 620-0222.

Articles are welcome from any Oregon attorney. If you or your law firm has produced materials which would be of interest to the 1,200 members of the Litigation Section, please consider publishing in the Oregon Litigation Journal. We welcome both new articles and articles that have been prepared or published for a firm newsletter or other publication. We are looking for timely, practical, and informational articles.

Editor
Dennis Rawlinson
Miller, Nash, Wiener,
Hager & Carlsen
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 224-5858

FROM THE CHAIR

By J. C. Van Voorhees

It has been my privilege to be the Chairman of the Oregon State Bar Litigation Section since the last Bar convention. As you can see in this issue, the Litigation Section has undertaken a major project relating to **Juror Debriefing.**

The purpose of our section is to promote excellence in litigation. The members of the Executive Committee would like to have input from the members of this Section as to the JD project. They would like to have input from you for other projects for this Section to undertake.

Solely from my own perspective over the last several years, it is becoming more and more apparent that litigators are pricing themselves out of the affordable market. Alternative dispute resolution, such as arbitration and mediation, is becoming more popular, primarily due to economic considerations. We should all consider what we can do to change those aspects of litigation that are under our control to reduce costs and fees for our clients.

Since this will be the final newsletter before Janet Schroer takes over as Chair of this Section, I would like to thank you for letting me be of service to you.

Notice of Annual Meeting

The Annual Meeting of the Litigation Section of the Oregon State Bar will take place at the convention of the Oregon State Bar. It will be held following the conclusion of Mr. Guastaferro's presentation on Thursday, September 24, 1992, at approximately 11:45 a.m. at the main room of the Seaside Convention Center.

The purpose of the meeting will be to elect a Chair-elect, Secretary, and Treasurer for the Section and to transact such other business as shall come before the Section at that time.

SPEAKING *From Experience*

Beginnings of Oregon CLE

Editor's Note: Each issue of the Litigation Journal features a brief article from a senior member of the Oregon Bar. The authors are asked to comment on changes they have experienced in the practice of law and describe some improvements that our profession needs. This series continues with an article by Randall B. Kester, Cosgrave, Vergeer & Kester.

By Randall B. Kester

The request that I write something about the practice of law in an earlier period happened to coincide with an inquiry by a present member of the Oregon State Bar CLE staff about the origins of the Continuing Legal Education program. In an attempt to fulfill both requests at once, and perhaps also to avoid maundering about the "good old days," I will try to record a little history that might not otherwise be preserved.

In the late 1940s, World War II was winding down, and Oregon lawyers who had served in the armed forces were returning to civilian life. It was recognized that they would be at a disadvantage compared with attorneys whose careers had not been so interrupted; and a movement started to present some refresher courses designed particularly for returning service personnel.

The late Herbert C. Hardy was the spark plug, and he organized some lectures at the Multnomah County Courthouse, sponsored by the Multnomah Bar Association. I do not recall who all of the initial speakers were, but K.J. O'Connell, who was then a professor at University of Oregon Law School, presented the subjects of trusts and mortgages. At that time, I was teaching a class on real property at Northwestern College of Law — when it was only a downtown night law school — and I gave the refresher course on real property.

The idea immediately took hold, and the Oregon State Bar formed a Continuing Legal Education Committee, of which Herb Hardy was the first chairman. The first formal CLE session of the Oregon State Bar was held in 1949 at the annual convention at Gearhart, with four subjects: Tom Stoel and Ralph Bailey talked on taxation; Judge James W. Crawford talked on making a trial court record; Robert Leedy talked on operating a law office for profit; and I talked on wrongful death cases.

The program proved so popular that in 1950, two sessions were scheduled — one in the spring, and one in the fall at the annual convention — and the pattern of two sessions per year has continued. From the beginning, the speakers have used handout exhibits or outlines, which at first were only mimeographed. From that modest beginning has developed the present CLE publications, which now constitute almost an entire law library.

At an early stage, the Committee also made the deliberate decision to use only Oregon lawyers as presenters, rather than "outside experts," and for the most part, that tradition has been followed. Early in

Please continue on page 6

Recent Significant Oregon Cases

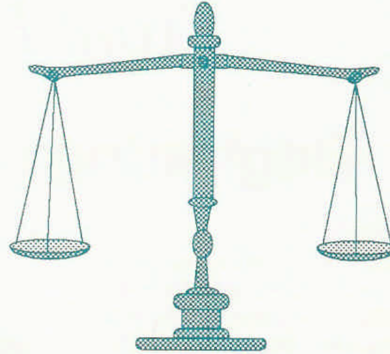
By Gregory A. Chaimov,
Miller, Nash, Wiener, Hager & Carlsen

APPELLATE PROCEDURE

Notice of Appeal

If a party appeals from a defective judgment, ORS 19.033 (4) authorizes the court of appeals to grant the trial court leave to enter an appealable judgment. In *Baugh v. Bryant Limited Partnerships,* 312 Or 635, 825 P2d 1383 (1992), the court of appeals granted leave to enter an appealable judgment and instructed the parties to file amended notices of appeal and cross appeal within 45 days of the entry of the appealable judgment.

The parties filed their appeals within the 45-day period, but more than 30 days after entry of the appealable judgment. Even though it granted the parties 45 days within which to appeal, the court of appeals dismissed the appeals, citing ORS 19.023, which, along with ORS 19.026, requires parties to file notices of appeal within 30 days after entry of judgment. 104 Or App 665, 672, 803 P2d 742



(1990). The court of appeals believed that the 30-day period was a jurisdictional prerequisite that the court lacked authority to modify.

On review, the supreme court reinstated the appeals, holding that the parties did not have to file amended notices of appeal "within a particular number of days after entry of an appealable judgment." 312 Or at 644. The supreme court did, however, authorize the court of appeals to set its own timelines for parties to obtain an appealable judgment or to file an amended notice of appeal.

EVIDENCE

Trial Court Findings

The proponent of hearsay evidence must ensure that a trial court makes findings on statutory prerequisites before admitting the out-of-court statements. *State v. Renly,* 111 Or App 453, ___ P2d ___ (1992). OEC 803 (18a) (b) permits a court to admit a child victim's out-of-court statement about sexual abuse if the proponent of the evidence establishes certain prerequisites.

In a criminal trial, the proponent must show "that there is corroborative evidence of the act of sexual conduct and of the alleged perpetrator's opportunity to participate in the conduct." In *Renly,* the court of appeals reversed the defendant's conviction because the trial court failed to make "the required findings [about corroboration] on the record" before admitting the hearsay evidence. 111 Or App at 468.

Please continue on next page

Schedule of Events and Seminars

The following is a selected schedule of seminars which may be of particular interest to members of the Litigation Section.

- **JULY 10, 1992,** Oregon State Bar, *Using Depositions in Court,* Embassy Suites, Tigard, Oregon.
- **JULY 17, 1992,** Oregon State Bar, *Using Depositions in Court,* Sunriver, Oregon.
- **JULY 17, 1992,** Oregon State Bar, *Fundamentals of Dissolution of Marriage,* Oregon Convention Center, Portland, Oregon.
- **JULY 24, 1992,** Oregon Law Institute, *Family Law Practice,* Oregon Convention Center, Portland, Oregon.
- **AUGUST 6-8, 1992,** Oregon Trial Lawyers Association, *Annual Convention,* Sunriver, Oregon.
- **AUGUST 14-15, 1992,** Legal Management Section of Oregon State Bar, *Legal Management Conference,* Sunriver, Oregon.
- **SEPTEMBER 23-26, 1992,** Oregon State Bar, *Annual Meeting,* Seaside, Oregon.
- **OCTOBER 16, 1992,** Oregon State Bar, *Elder Law,* Oregon Convention Center, Portland, Oregon.
- **OCTOBER 30, 1992,** Oregon State Bar, *Ethics,* Oregon Convention Center, Portland, Oregon.
- **NOVEMBER 13, 1992,** Oregon Association of Defense Counsel, *Fall Seminar,* Oregon Convention Center, Portland, Oregon.
- **NOVEMBER 20, 1992,** Oregon State Bar, *Bankruptcy,* Oregon Convention Center, Portland, Oregon.
- **DECEMBER 4, 1992,** Oregon State Bar, *In House/Government Ethics,* Oregon Convention Center, Portland, Oregon.
- **DECEMBER 11, 1992,** Oregon State Bar, *Torts,* Embassy Suites, Portland, Oregon.

Proof of Character

The proper way to elicit character evidence depends upon the substance rather than the form of the question asked of the witness. OEC 405(1) provides generally that a party may prove a person's character by reputation or opinion testimony, but not by reference to specific instances of conduct. In *State v. Marshall,* 312 Or 367, 370, 823 P2d 961 (1991), the attorney asked the witness: "'Is there any particular kind of lie which [the victim] has a reputation for telling?'" The court of appeals held that the question was proper because it expressly asked for "reputation." 102 Or App 147, 151, 793 P2d 336 (1990). The supreme court, however, disagreed. It found that the question:

> "was not focused on a generalized description of the victim's character trait for veracity. Rather, by focusing on a 'particular kind of lie,' the substance of the question was directed at a specific instance or series of specific instances in which the victim acted in a particular manner." 312 Or at 373.

TRIAL

Bifurcation and Exclusion of Parties

Bremner v. Charles, 312 Or 274, 821 P2d 1080 (1991), demonstrates that discretion means different things to different judges. The trial judge bifurcated the liability and damages phases of a negligence trial and excluded a plaintiff (a brain-damaged child who was unable to meaningfully participate in the proceedings) from the courtroom during the liability phase. The court of appeals held that the trial court abused its discretion in both instances. First, the court of appeals said that bifurcation put the plaintiffs "at a disadvantage" because, among other things, they could not present "the devastating nature of [the child's] damages to the jury." 104 Or App at 80. The court of appeals also ruled that the trial court should not have excluded the child because "seeing [him] might enable the jurors to understand better the evidence as it was presented in the courtroom." 104 Or App at 81.

Reviewing the same record, the supreme court came to a different conclusion. It ruled that "[p]laintiffs have not pointed to anything in the record that indicates that the bifurcation order improperly limited their efforts to prove their claims of negligence." 312 Or at 280. The court then adopted a rule for excluding a party from trial:

> "We adopt the standard that a plaintiff who is unable to comprehend, meaningfully participate in the proceedings, or assist his or her lawyer in the presentation of a case, may be excluded from the liability portion of a bifurcated trial if the trial court, in the exercise of informed discretion, determines that the party's presence would be unfairly prejudicial." 312 Or at 284.

Unlike the court of appeals, the supreme court found "no suggestion that jurors' observations of [the child] would have helped them to understand the evidence." 312 Or at 284. The supreme court, therefore, reinstated the jurors' verdict for the defendants.

Tigard and Sunriver are Sites for "Using Depositions at Trial" CLE

In July, the Oregon State Bar will present a CLE program entitled "Using Depositions at Trial" live at two locations. On Friday, July 10, the program will be held at the Embassy Suites Hotel in Tigard from 9:00 a.m. to 12:15 p.m. On Friday, July 17, the program will be held at the Great Hall Complex in Sunriver from 2:00 to 5:15 p.m.

Deposition expert David Markowitz will show how to effectively use depositions at trial, from opening statement through closing statement. Topics include: what to tell the jury about the deposition process; how to edit a videotaped deposition for trial; reading the deposition as substantive evidence; introducing part of a deposition; refreshing witness recollection; impeachment; perpetuation depositions; motions; and much more.

The program has been approved for 3.5 Practical Skills or general MCLE credits. Regular preregistration is $75; new lawyers, law students, and legal assistants preregistration is $45; Season Ticket holder preregistration is $15. To register, call the CLE Registrar at 684-7407 or toll-free in Oregon 1-800-452-8260, ext. 407.

Call CLE Registrar at 684-7407 or 1-800-452-8260, ext. 407, to register!

LITIGATION SECTION EXECUTIVE COMMITTEE

EXECUTIVE BOARD

Chair
JAMES C. VAN VOORHEES
Minturn, Van Voorhees,
Larson & Dixon

Chair-Elect
JANET SCHROER
Schwabe, Williamson & Wyatt

Treasurer
THOMAS C. HOWSER
Cottle & Howser, P.C.

Secretary
JANE N. BOLIN
Johnson, Clifton, Larson & Bolin

Past Chair
STEPHEN F. ENGLISH
Bullivant, Houser, Bailey,
Pendergrass & Hoffman

EXECUTIVE BOARD MEMBERS AT LARGE

TIMOTHY J. HELFRICH
Yturri, Rose, Burnham, Bentz & Helfrich

CAROL HEWITT
Lindsay, Hart, Neil & Weigler

JAMES D. HUEGLI
Attorney at Law

JOSEPH W. MUCH
Spooner & Much

DENISE L. STERN
Samuels, Yoelin & Weiner

MARTIN E. STONE
Slack, Stone & Gillespie

ROBERT C. WEAVER, Jr.
Garvey, Schubert & Barer

LITIGATION JOURNAL
Dennis Rawlinson, Editor
Miller, Nash, Wiener,
Hager & Carlsen

Oregon State Bar
Section on Litigation
P.O. Box 1689
Lake Oswego, OR 97035-0889

BULK RATE
U.S. Postage
PAID
Portland, Oregon
Permit No. 341

Speaking from Experience, *continued from page 2*

the CLE history, the Bar provided professional staff to assist the Committee, and that has become a major function of the Bar office.

Herb Hardy continued as chairman of the CLE Committee through 1950; and he was followed by Thomas H. Tongue III in 1951, me in 1952-53, Donald S. Richardson in 1954, Thomas B. Stoel in 1955-56, and John Bledsoe in 1957-58. That's as far as my notes go.

Herb Hardy's leadership in starting the CLE program, and nurturing it through its formative years, was recognized by the Oregon State Bar when it honored him with its first Award of Merit in 1951.

No history of CLE beginnings in Oregon would be complete without mention of its interplay with the Oregon federal courts. At the spring session in 1951, the Committee put on "A Day in Federal Court," demonstrating in skit form a typical call calendar, motion calendar, and pretrial conference, in the manner that was then the practice. Judge James Alger Fee, who was then Chief Judge of the U.S. District Court for Oregon, was so delighted with the performance that he arranged to have it presented at the Ninth Circuit Judicial Conference in Santa Barbara, California, later that year, and then again at the National Judicial Conference in Yellowstone Park. It was also repeated at the annual meeting of the Interstate Bar Council in Portland in 1952.

In the beginning, some concern was felt that lawyers might be unwilling to share their "tricks of the trade," particularly in subjects relating to practice and procedure. That concern has not been warranted, and it has been a tribute to the professionalism of Oregon lawyers that they have gladly shared their expertise, even with potential adversaries. And the time and effort required in preparing and presenting a CLE subject is truly *publico* in the highest tradition.