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W. Eugene Hallman — Professionalism Award

By Mark R. Bocci of Pippin & Bocci

W. Eugene Hallman (left), recipient of the Owen M. Panner Professionalism Award, receives the award from Judge Panner.

Once a year the Litigation Section chooses one of its own to recognize for that which is the cornerstone of what we do and who we are are — the professionalism award. Significantly, the Owen Panner Professionalism Award is named for Judge Panner who throughout his career has demonstrated professional courtesy, competence, and respect to several generations of lawyers.

Gene Hallman of Pendleton was the deserving recipient of the 1999 award. For more than 25 years, Gene has crossed paths (and swords) with plaintiff and defense attorneys alike, having spent about half of his career on each side of the table in both trial and appellate courts. To those of us fortunate enough to have litigated with Gene, he has embodied what is best about litigation practice.

Simply put, he has always put his clients' interests before his own, he has always treated his adversaries with respect and courtesy, he has always respected the bench, and he has always treated opposing parties and witnesses with dignity (even when required to dismantle them).

It is possible to practice law as a superior advocate for our clients and still maintain the necessary respect for our legal system and each other. Gene, like Judge Panner, is one of our finest teachers. ❐

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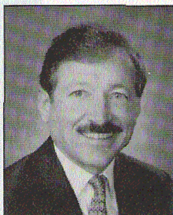
Comments From the Editor

"DON'T GIVE A SPEECH; TALK TO THE JURY"

Dennis P. Rawlinson
Miller Nash LLP

Most of us from time to time have heard the advice, "Don't give a speech . . . talk to the jury." But what does it really mean?

Well, most of us finally figure it out after 20 trials or so, but I have always been puzzled why it seems to be such a secret.



The simple explanation is that we use our eyes differently when we give a speech from the way we do when we talk to a jury.

When you give a speech on a stage behind a podium to a large group in an auditorium or a concert hall or a ballroom, your eyes go from one end of the audience to the other and back and forth. You are giving a speech. This is the way we have been taught to give speeches. This is the way politicians do it.

When we are talking to a panel of jurors, however, if our eyes dart from one end of the room to the other and back and forth, the power of our eyes is diluted. Moreover, we give the impression that we are "giving a speech" or that our remarks are simply memorized.

How do we transform this "speech giving" into "plain talk" to the panel?

Really, it's quite simple. Concentrate on speaking with one juror at a time. Create a relationship. Look at one juror while you make a single point, then think to yourself "thank you," and then move on to the next juror and make your next point.

As you can see, this will cause your eyes to go from one juror to the next but to move only after you've completed the point you are making.

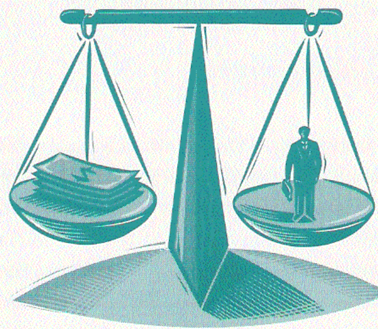
Needless to say, this doesn't mean that you start with juror number 1 and end with juror number 12. It may well be that the first juror who is looking up and makes eye contact with you is juror number 4. After you finish making your point with juror number 4, you may find that the next natural juror to make eye contact with is juror number 8 . . . and so on.

Inevitably, some jurors are less comfortable with full eye contact than others. If you have a juror who is not comfortable with the eye contact, simply look at that juror pleasantly and then move away a little bit more quickly than you would with the others until the juror gets more comfortable with your gaze.

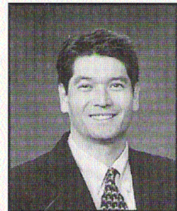
Don't give a speech; talk to the jury. Now that the secret is out, most of us can understand why most politicians do not make good jury-trial lawyers. ❐

Reexamining the Definition of a "Prevailing Party": *The Attorney Fee Conundrum*

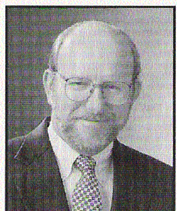
By Paul B. Heatherman of Babb Heatherman, LLP, &
Gregory R. Mowe of Stoel Rives, LLP



The prevailing party in a lawsuit is often entitled to an award of attorney fees, either by statute or contract. The prospect that thousands of dollars in attorney fees might be included in a final judgment compels litigants to select their claims (and counterclaims) carefully, or to avoid litigation. Decisions on claim selection and whether to commence litigation are influenced by litigators' understanding of the concept of "prevailing party." In 1998, the Court of Appeals reinterpreted this term. Although a party might prevail with the larger dollar award, the opponent may still be designated the prevailing party for attorney fee award purposes. In 1999, the Supreme Court rejected the conventional understanding of many litigators when it held that there can be more than one prevailing party in an action.



Paul B. Heatherman



Gregory R. Mowe

These developments warrant examination because of their impact on litigation strategy. This article: (1) explains the Court of Appeals' recent interpretation of the term "prevailing party" for purposes of attorney fee allocation; (2) explores the Supreme Court's holding that there may be more than one prevailing party in an action; and (3) identifies scenarios that lend themselves to multiple prevailing parties and multiple attorney fee awards.

I. "Action" v. "Claim:" The Court of Appeals Reinterprets the Term "Prevailing Party."

Prior to the court's holding in *Newell v. Weston*, 156 Or App 371, *rev den* 327 Or 317 (1998), a party was required to prevail in the action as a whole, as well as on the contract claims within the action, in order to recover attorney fees pursuant to an attorney fee clause in the contract. *See Zidell v. Greenway Landing Devel. Co.*, 89 Or App 525, 528, 749 P2d 1210 (1988). Thus in a dispute over a contract that contained an attorney fee clause, a defendant who prevailed by successfully defending against a plaintiff's claim arising from the contract would not receive an award of attorney fees if the plaintiff obtained relief on another claim. The rationale in *Zidell* and its progeny was that ORS 20.096(5), which provides that the prevailing party is the one "in whose favor final judgment or decree is rendered," required that only one party could prevail for purposes of an attorney fee award, "although both sides may prevail on some claims or counterclaims." *See Meduri Farms, Inc. v. Robert Jahn Corp.*, 120 Or App 40, 44, 852 P2d 257 (1993).

In *Newell*, the plaintiff-landlord filed a breach of lease claim and a statutory claim for clean-up costs from contamination pursuant to ORS 465.255(1). *Newell, supra*, 156 Or App at 373. The lease contained an attorney fee clause, while the statutory claim had no provision for attorney

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Definition of "Prevailing Party"

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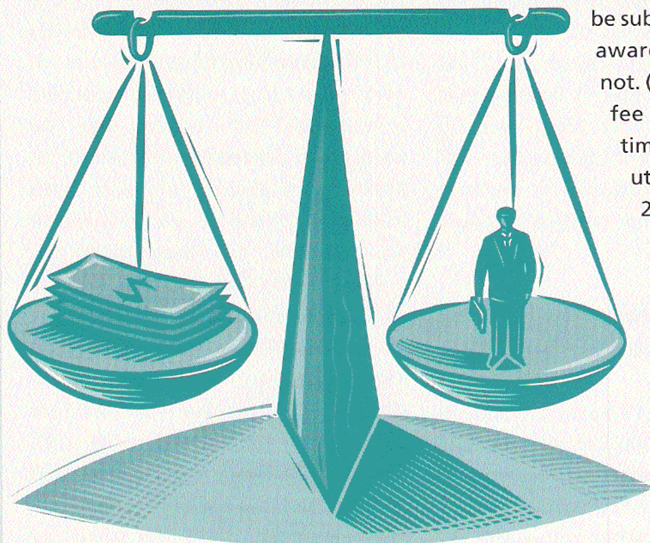
fees. *Id*. The plaintiff prevailed on the statutory claim, but obtained no relief on the breach of lease claim. *Id*. at 374. The *Newell* court revisited *Zidell* and noted that ORS 20.096(5) does not specify whether the prevailing party is the one who prevails in the action or the one who prevails on the claims within the action. *Newell v. Weston, supra*, 156 Or App at 375. The court explained that it was unlikely that the legislature intended to nullify contractual attorney fee provisions by requiring that a party prevail on more than the contract claim itself. *Id*. at 376. The court expressly overruled *Zidell* and held that, for purposes of attorney fee awards, the prevailing party is the one in whose favor judgment is rendered on the claims subject to ORS 20.096, notwithstanding a judgment in favor of the opponent in the action as a whole. *Id*. at 379.

From a practice standpoint, a plaintiff (or a defendant filing a counterclaim) can no longer take comfort by prevailing in the action as a whole, for even if a plaintiff wins thousands more than a defendant when both prevail on their respective claims, if the plaintiff's claim is not subject to an attorney fee clause, the victory could be hollow when compared with a judgment for the defendant's attorney fees.

Now that the courts may award attorney fees based on the outcome of the independent attorney fee claims, offers of compromise under ORCP 54 E become more attractive.

A party must also be cautious when filing several claims under alternative theories. The practitioner should first determine which claims will be subject to attorney fee awards, and which will not. (Recall that attorney fee awards can sometimes arise from a statute, *e.g.*, ORS 20.080, 20.098; 79.5070; 90.255; and 652.200.)[1] Although it may be tempting to file as many claims as possible, it might be unwise to file a claim which is subject to an attorney fee award to the prevailing party if the claim has a less than clear likelihood of prevailing.



After *Newell*, use of ORCP 54 E as a potential shield becomes more significant. Now that the courts may award attorney fees based on the outcome of the independent attorney fee claims, offers of compromise under ORCP 54 E become more attractive. A party might attempt to "block" an opponent's entitlement to attorney fees with as many offers of compromise as there are meritorious attorney fee claims.

II. Dual Prevailing Parties: The Supreme Court Finds a Win-Win Situation.

In *Wilkes v. Zurlinden*, 328 Or 626, 984 P2d 261 (1999), the Supreme Court held that there can be more than one prevailing party in an action. In *Wilkes*, the plaintiff contractor filed a claim for breach of the construction contract, which contained an attorney fee clause. *Id*. at 629. The defendant homeowners filed counterclaims for breach of contract and negligence. *Id*. at 630. The court found in favor of plaintiff for defeating defendants' counterclaim and in favor of defendants for defeating plaintiff's claim. *Id*. The court awarded attorney fees to defendants. *Id*.

On appeal, the Court of Appeals held that neither party was entitled to an award of attorney fees. *Id*. The Supreme Court vacated and remanded. *Id*. The Court of Appeals again held that neither party was entitled to attorney fees, and the Supreme Court again allowed review. *Id*. at 631.

In its decision, the Supreme Court reasoned that, even though neither party obtained affirmative relief in the form of a damage award, each party successfully

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Definition of "Prevailing Party"

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defeated the other's claim. *Id*. at 632. The Court went on to interpret "action" in ORS 20.096 to include claims and counterclaims in any contract dispute. *Id*. at 633. The Court concluded that there is nothing in the statute that negates the possibility of multiple prevailing parties in one action. *Id*. The Court reversed and remanded the case to the circuit court, but did not expressly instruct the circuit court to award attorney fees to both parties. *Id*. at 634.

III. A Possible Application of Newell *and Wilkes to the "Apples and Oranges"* Scenario.

Finding a net winner becomes more difficult where both parties prevail, but one or more of the prevailing claims are in equity. How does the court offset a prevailing claim of $10,000 with a prevailing counterclaim for injunctive relief? This issue was addressed in the residential landlord-tenant context in *Amatisto v. Paz*, 82 Or App 341, 728 P2d 42 (1986). There, the landlord prevailed on a rent claim and the tenant prevailed on an eviction counterclaim. *Id*. at 348. The court held that the result was too inconclusive to warrant an award of attorney fees to either party. *Id*.

The viability of *Amatisto* may be questionable after the *Wilkes* decision. Recall that although neither party in *Wilkes* received affirmative relief, it was remanded with instructions that the circuit court designate both parties as the prevailing party. Presumably that meant both parties would receive an award of attorney fees. If parties that fail to obtain affirmative relief against each other are entitled to attorney fees, surely parties who succeed in obtaining affirmative relief against each other should be similarly entitled.[2]

If parties that fail to obtain affirmative relief against each other are entitled to attorney fees, surely parties who succeed in obtaining affirmative relief against each other should be similarly entitled.

The *Newell* decision lends support to this theory. In *Newell,* the Court highlighted that an action potentially includes several claims and counterclaims, and that attorney fees should be awarded on every prevailing claim. *Newell*, *supra*, 156 Or App at 379. Accordingly, perhaps the inability to offset or "net" a prevailing claim for damages with a prevailing counterclaim for injunctive relief should cause courts to grant, rather than deny, attorney fee relief.

If this theory is the law, or will be, then trial courts will be faced with the issue of managing multiple attorney fee awards at the ORCP 68 hearing. The *Wilkes* Court did not provide guidance on this phase. When prevailing claims and counterclaims involve monetary damages, the amounts are easy to offset in order to designate a net award of damages. *See*, *e.g.*, *Carlson v. Blumenstein*, 293 Or 494, 499-501 (1982). Because attorney fee awards are measured in dollars, perhaps they too could be offset prior to entry of judgment.

IV. Conclusion.

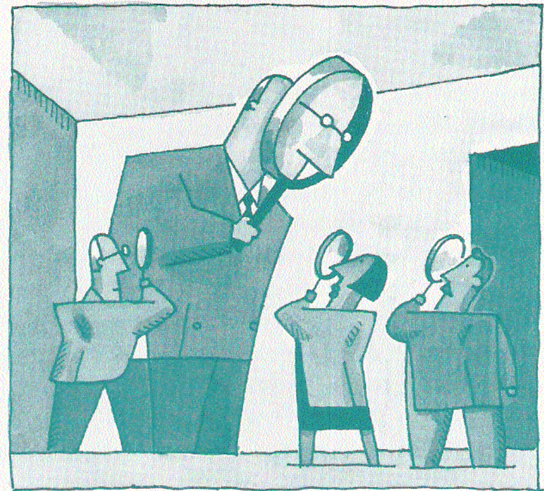
Knowledge of recent "claim" vs. "action" analysis impacts litigation strategy. A codification of *Newell* would help alert the bench and bar to prevailing party analysis for purposes of attorney fee awards. With the prospect of multiple prevailing parties in an action, perhaps ORCP 70 A(1)(a) should also be reviewed to give guidance on how the format of a judgment might be drafted (*e.g.*, a possible clarification that provides separate categories for the party that obtained any affirmative relief from the party that received an attorney fee award).

Any further changes to the manner in which prevailing parties are determined should be adopted in a manner that preserves the ability to utilize ORCP 54 E, the general procedure under ORCP 68C, and the rules that apply in determining the amount of attorney fees. *See*, *e.g.*, ORS 20.075 (general factors in determining amount) and *Bennett v. Baugh* 164 Or App 243, 248, 990 P2d 917 (1999) (rule of attorney fees apportionment in cases with multiple claims). ❒

1 Some statutes provide for attorney fees to the prevailing party, *e.g.*, ORS 90.255, and others are "one-sided;" that is, they provide attorney fees to the prevailing plaintiff (or to the defendant with a prevailing counterclaim), *e.g.*, ORS 20.080.

2 This assumes the prevailing claims are subject to attorney fee entitlement by contract or statute. *See Domingo v. Anderson*, 325 Or 385, 388, 938 P2d 206 (1997) (no common law right to attorney fees without contractual or statutory authority).

Reeves Rejects the "Pretext-Plus" Analysis for Employment Discrimination Cases



By Karin L. Guenther of Tonkon Torp

In 1999, employment discrimination cases comprised 8.6 % of cases filed in federal district courts. Employment cases are already more than twice as likely as other federal cases to go to trial.* With its decision in *Reeves v. Sanderson Plumbing Products, Inc.* 2000 WL 743663 (June 12, 2000), the United States Supreme Court put summary judgment out of reach for yet another large group of employer defendants.

The decision resolved a split in the circuits commonly known as the "pretext or pretext-plus" split. Briefly, the question is what quantum of evidence is necessary for a reasonable jury to be able to draw an inference of discrimination absent direct evidence. The court has chosen the lower of the two standards: the "pretext" standard. That choice will put summary judgment out of reach for employer defendants in many formerly marginal discrimination cases.

Roger Reeves was a 57-year-old man who had spent 40 years as an employee of the employer, Sanderson Plumbing Products, Inc. The employer terminated Reeves and filled his position with younger employees. Reeves had no direct evidence that his age caused his termination.

When the evidence of discrimination is largely circumstantial, courts follow a burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green,* 411 US 792, 93 S Ct 1817, 36 L Ed 2d 668 (1973). Under the "McDonnell Douglas" framework, once a plaintiff has made out a prima facie case of discrimination (for example, a qualified, elderly employee is terminated and his position is filled with a young employee), the defending employer bears a burden of articulating a legitimate, nondiscriminatory reason for the adverse employment action. The employer need not prove its reason; it need only identify a legitimate basis for the challenged action. The burden then shifts back to the plaintiff to show that the employer's proffered reason was pretextual. (Note that this analysis applies only to federal discrimination claims. The Oregon courts have rejected the shifting burden of production scheme for "pretext" claims brought under Oregon law, so the *Reeves* case is unlikely to affect these state law cases. *Hardie v. Legacy Health System,* 167 Or.App. 425, — P.2d ——, 2000 WL 674890, *5 (Or.App. 2000), citing *City of Portland v. Bureau of Labor and Industries,* 298 Or. 104, 114-15, 690 P.2d 475 (1984).)

In this case, Reeves was a qualified member of a protected class (he was over 40 years of age) who was replaced with a younger employee. With that prima facie case in place, the burden of production of a legitimate, nondiscriminatory reason shifted to the employer.

The employer contended that it fired Reeves due to his failure to maintain accurate attendance records of his subordinates. In response, Reeves made a "substantial showing" that the employer's explanation was false. He offered evidence that he had properly maintained records, and gave explanations for the errors cited by the employer.

However, Reeves offered little additional evidence that his age motivated the employer to terminate him. Based on his failure to offer sufficient evidence on that point, the Fifth Circuit below found that Reeves had failed to carry his burden of proof sufficient to survive judgment as a matter of law. The circuit court acknowledged that Reeves "very well may" have offered sufficient evidence that the employer's explanation for its employment decision was pretextual, but this was "not dispositive" of the ultimate issue — namely, whether Reeves presented sufficient evidence that his age motivated the employment decision.

The Fifth Circuit's analysis illustrated the "pretext-plus" school of thought adhered to by the first, second, fourth and fifth circuits. In order to survive summary judgment in those circuits before *Reeves*, a plaintiff had to produce evidence not only that the employer's proffered explanation was false, but also that the

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"Pretext-Plus" Analysis

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plaintiff's protected status played a role in the adverse employment decision. In contrast, the sixth, seventh, eighth, ninth and eleventh circuits required only that a plaintiff produce evidence from which a reasonable jury could infer that the employer's proffered explanation was false.

The Supreme Court rejected the Fifth Circuit's pretext-plus analysis. It confirmed that for a plaintiff to prevail, a fact-finder must still be convinced that the employer's action was motivated by intentional discrimination. But the Court clarified that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."

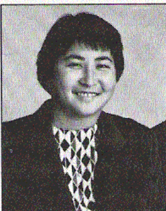
None of this is to say that employers should always dispense with motions for judgment as a matter of law in pretext cases. The Court noted that judgment as a matter of law depends on many factors, including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law."

The Court's choice of the lower standard is, however, a further development in discrimination law away from fact-based predictability, and toward speculation-based risk. For employers, this means that adverse employment actions are only low-risk when supported by objectively provable misconduct or well-documented unacceptable performance. For the federal courts, this means a steady stream of employment cases with less chance for pretrial resolution. ❐

* Statistics taken from the report of the Statistics Division of the Administrative Office of the United States Courts, Thurgood Marshall Federal Judiciary Building, Washington, D.C. 20544, at http://www.uscourts.gov/judbus1999/index.html.

Federal Deposition Practice: **New Time Limits**

By David B. Markowitz
& Lynn R. Nakamoto of
Markowitz, Herbold, Glade
& Mehlhaf, PC



Changes to deposition practice in federal court will likely occur this year. On April 17, 2000, the Supreme Court adopted and transmitted to Congress a set of amendments to the Federal Rules of Civil Procedure, including changes to the discovery rules in FRCP 26, containing the general discovery provisions; FRCP 30, regarding depositions; and FRCP 37, providing discovery sanctions. Absent action by Congress, the new rules will take effect on December 1, 2000, and will significantly change federal discovery practice in Oregon. We focus on the amendment to Rule 30(d) that would impose a presumptive one-day, seven-hour limitation on the deposition of a witness.

A. The amendment to Rule 30(d)(2).

Currently, Rule 30(d)(2) allows district courts to limit the duration of a deposition by order or local rule:

> By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

The amendments to Rule 30(d)(2) will make time-limited depositions a national practice:

> Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or another circumstance, impedes or delays the examination.

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New Time Limits

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B. The genesis of the amendment.

The Advisory Committee on Civil Rules reports to the Standing Committee on Rules of Civil Practice and Procedure of the Judicial Conference of the United States. The Judicial Conference in turn recommends rule changes to the Supreme Court. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 Geo. L.J. 887, 892 (1999) (footnotes omitted). In 1998, the Advisory Committee on Civil Rules first published for comment a draft of its proposed amendments to the rules, including the deposition time limitation in Rule 30(d)(2).

This was not the first time that the Advisory Committee had raised the possibility of presumptive deposition time limits. In 1991, it proposed that depositions be limited to six hours but then dropped the proposal. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. Rev. 747, 766 & n.111 (1998). Instead, as part of the 1993 amendments, Rule 30(d) was amended to impose limits on attorneys' objections and instructions not to answer during depositions. *Id.* at 766; FRCP 30(d)(1). The Advisory Committee had significant concerns about problems the six hour rule might create, including the possible need for a timekeeper to measure the time; disputes regarding division of time between counsel; gamesmanship employing the time limitation; and excessive motion practice because of disputes. The Advisory Committee voted 5-2 to delete the time limit but to authorize local rules imposing deposition time limits. Marcus, *Discovery Containment*, n.111.

In October 1996, the Advisory Committee commenced a comprehensive review of the federal discovery rules, guided by three questions: 1) when fully used, is the discovery process too expensive for what it contributes to the dispute resolution process; 2) are there rule changes that can be made which might reduce the cost and

delay of discovery without undermining a policy of full disclosure; and 3) should the federal rules for discovery, applying to cases involving national substantive law and procedure, as well as to cases involving state law, be made uniform throughout the United States? Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 Tul. J. Int'l & Comp. L. 153, 164-65 (1999). In proposing changes to the discovery rules, the Advisory Committee was able to use comments from prominent, experienced attorneys whom the Advisory Committee consulted in two conferences; written recommendations from bar groups about possible changes in the rules; a legislatively-mandated study of the federal courts' efforts to reduce expense and delay by the Rand Corporation; and a study of 1,000 federal court cases by the Federal Judiciary Center (FJC) on the effects of the 1993 amendments to the rules. The Advisory Committee commissioned the FJC study. *Id.* at 165.

According to the reporter for the 1998 Advisory Committee that recommended the amendments to Rule 30(d)(2), the anecdotal information the Committee received included complaints about the duration of oral depositions. *Id.* at 166. In addition, the FJC found in its survey that depositions cost about twice as much as document production in an average case. Approximately 80% of attorneys surveyed by the FJC thought that the rules should be changed to improve discovery practice, and the favorite change suggested was an increase in judicial regulation of discovery. *Id.* at 167-68. The Rand findings are summarized in James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. Rev. 613 (1998). The FJC results are reported in Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525 (1998).

Apparently, the amendment addresses the concern raised by 12% of the attorneys surveyed in the FJC study that too much time was spent on a deposition. Willging, *An Empirical Study*, 39 B.C.L. Rev. at 538-39. The amendment to Rule 30(d)(2) is also part of rule changes designed to impose national uniformity in discovery. Marcus, *Retooling American Discovery*, 7 Tul. J. Int'l & Comp. L. at 169.

C. Rule 30(d)(2) in practice.

A number of district courts have issued local rules limiting the time of depositions since the 1993 amendments to Rule 30(d)(2) went into effect, including the District of Alaska, the Eastern District of Texas, the Eastern District of Wisconsin, the Northern District of Oklahoma, the Northern District of Georgia, and the District of Vermont. Most of the local rules permit six hours per deposition, but some district courts have restricted depositions of non-experts to three hours (Alaska and Vermont). Due to the paucity of reported cases, information regarding the practice in those districts that have limited deposition time is not readily available.

Nevertheless, based on the proposed change to Rule 30(d)(2) and its underlying purpose, we have a number of suggestions for deposition practice under the new amendment. Clearly, the best way to live with the time limitation is to be efficient. The reporter for the 1998 Advisory Committee has written:

> Of necessity any precise durational limitation (like numerical limitations on deposi-

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New Time Limits

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tions and interrogatories) is in some senses arbitrary, and the objective is to avoid unreasonable rigidity. At the same time, the limitation should prompt lawyers to curtail lengthy background inquiry and get to the issues of the case. Judges, presumably, will not look kindly on requests to extend the time where the time already expended has not been used wisely. Indeed, even in the absence of an explicit limitation, such circumstances would provide grounds for limiting the length of a deposition.

Marcus, *Retooling American Discovery*, 7 Tul. J. Int'l & Comp. L. at 173 (footnotes omitted).

In addition, the parties should fully utilize the opportunity to stipulate to different time limitations as allowed by Rule 30(d)(2). Given the 1993 and the recently approved amendments to the civil discovery rules by the Supreme Court, parties will have many negotiation options during discovery. These include, for example, agreement that an equal number of depositions per side may be extended in time; trading depositions of additional witnesses for more hours; and agreement on total hours of time for all depositions that may be allocated in excess of seven hours for any deposition. Stipulations are certainly in order when because of the conduct of the witness or the defending attorney, or any other circumstance beyond the reasonable control of the deposing attorney, the full seven-hour period to conduct the deposition was reduced. The circumstances that may justify a stipulation or an order to extend the duration of a deposition to allow a "fair examination" also include depositions of a key witness, such as a party, where the deponent's testimony will affect many of the key factual issues in dispute, the factual issues are numerous or complex, and the value of the litigation is significant. Those circumstances should prompt a stipulation to avoid needless judicial intervention. ❒

Daubert, Joiner, Kumho Tire, and the Ninth Circuit

By Ronald E. Bailey and
Linda M. Bolduan of
Bullivant Houser Bailey, PC

In the six-year period between 1993 and 1999, the United States Supreme Court decided three cases addressing the admissibility of expert testimony: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] *General Elec. Co. v. Joiner*,[2] and *Kumho Tire Co., Ltd. v. Carmichael*.[3] In the July 1999 issue of the Litigation Journal, Paul T. Fortino of Perkins Coie, LLP addressed the impact of the *Daubert* cases on Oregon law.[4] This article extends that analysis to the Ninth Circuit and federal law.

From *Frye* to *Daubert*

In 1923, the United States District Court for the District of Columbia set forth "general acceptance" as the standard for the admissibility of expert scientific evidence. In *Frye v. United States*,[5] the court opined:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[6]

For some 70 years, in both criminal and civil cases, most federal and state courts followed the *Frye* standard.[7] Then, in 1993, *Daubert* held that the Federal Rules of Evidence, particularly Rule 702, superseded *Frye*.[8]

Under the test outlined in *Daubert*, the federal trial judge has a gatekeeping role to ensure that admitted expert evidence is reliable and relevant under Rule 702, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[9]

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Daubert

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Reliability

Under Rule 702, expert testimony must be based upon "scientific . . . knowledge." The *Daubert* Court determined that the term "scientific" "implies a grounding in the methods and procedures of science."[10] The term "knowledge" similarly implies "more than subjective belief or unsupported speculation."[11]

Conceding that scientific testimony cannot be "'known' to a certainty [because] arguably, there are no certainties in science,"[12] the Court concluded that expert testimony must nevertheless be supported by "'good grounds'" based upon what is known about the topic at issue. Whether expert testimony is based upon scientific knowledge goes to the reliability of the testimony.[13]

Relevance and the "Fit" Requirement

Rule 702's requirement that expert testimony assist the understanding of the trier of fact on a particular issue goes "primarily to relevance." Expert testimony that does not relate to any issue in the case is not relevant and therefore not helpful to the trier of fact.[14]

As a precondition to admissibility, the "'helpfulness' standard [of Rule 702] requires a valid scientific connection to the pertinent inquiry."[15] Such "fit" "is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[16]

The Role of the Gatekeeper

When the trial court is faced with a proffer of expert scientific testimony, the court must make a preliminary determination as to whether the testimony meets the reliability and relevance standards under Rule 702.[17] As explained by the *Daubert* Court:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),[18] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid [and therefore reliable evidence][19] and of whether that reasoning or methodology properly can be applied to the facts in issue.[20]

...the Court emphasized that a trial judge, acting in his or her capacity as a "gatekeeper," must "'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'"

Noting that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test,"[21] the *Daubert* Court suggested four factors for the trial court to consider in determining the admissibility of expert testimony under Rule 702:

1) whether the knowledge can be and has been tested;

2) whether the theory or the technique has undergone peer review and publication;

3) the known or potential error rate and applicable standards for a particular scientific technique; and

4) whether there is "general acceptance" of the theory or technique.[22]

General Electric Co. v. Joiner

In 1997, the U.S. Supreme Court revisited the issue of the admissibility of expert scientific testimony. In *General Elec. Co. v. Joiner*,[23] the Court held that abuse of discretion is the proper standard for an appellate court to apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert.*

In reaching its decision, the Court emphasized that a trial judge, acting in his or her capacity as a "gatekeeper," must "'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'"[24] Thus, in *Joiner*, the Court held that the trial court did not abuse its discretion in excluding testimony where there was "simply too great an analytical gap between the data and the opinion proffered."[25]

The Court rejected the argument that the trial court had committed legal error when it disagreed with the conclusions that plaintiff's experts drew from the studies at issue — that certain animal studies indicated that plaintiff's exposure to PCBs and other chemicals caused plaintiff's lung cancer. Although *Daubert* states that the gatekeeper's "focus, of course, must be solely on principles and methodology and not on the conclusions that they generate,"[26] the *Joiner* Court opined:

> But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.[27]

Kumho Tire Co., Ltd. v. Carmichael

Although Rule 702 applies to the admissibility of "scientific, technical, or other specialized knowledge,"[28] the *Daubert* Court limited its discussion to "scientific ...knowledge" under Rule 702 because that was the nature of the expertise offered in the case.[29] Post-*Daubert* deci-

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sions by the courts of appeal disagreed as to whether *Daubert* also applied to "technical" and/or "specialized knowledge" under the Rule.[30]

In *Kumho Tire Co., Ltd. v. Carmichael*,[31] the Court resolved the issue, expressly extending *Daubert* to testimony based upon "technical" and "other specialized knowledge."[32] To determine the reliability of such technical or "specialized knowledge" testimony, the Court ruled that a trial court "may" consider the factors stated in *Daubert*, [33] opining that some of the *Daubert* factors could be helpful in evaluating the reliability of experienced-based testimony.[34]

However, the *Kumho Tire* Court emphasized that the *Daubert* factors do not constitute a "'definitive checklist or test.'"[35] Pointing out that *Daubert's* description of the Rule 702 inquiry is "'a flexible one,'"[36] the Court agreed with the Solicitor General that

> "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."[37]

The Court concluded that a trial court should consider the *Daubert* factors "where they are reasonable measures of the reliability of expert testimony,"[38] holding that

> whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.[39]

Under *General Elec. Co. v. Joiner*,[40] a court of appeals reviews a trial court's decision to admit or exclude expert testimony under an abuse of discretion standard. *Kumho Tire* makes it clear that this deferential standard applies to the trial court's decision regarding how to test an expert's reliability as well as to the trial court determination as to whether or not that expert's relevant testimony is reliable.[41]

"[t]he factors identified in Daubert may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."

Ninth Circuit Applications of the Daubert Trilogy

To date, *Daubert*, *Joiner*, and *Kumho Tire* form the Supreme Court's statement on the application of Federal Rule of Civil Procedure 702 to the admissibility of expert testimony in the federal courts. These cases teach that Rule 702 imposes on the trial court the role of gatekeeper. This "basic gatekeeping obligation" applies not only to the "scientific" expert testimony that was at issue in *Daubert*, but to "all expert testimony."[42]

The objective of the gatekeeper role is to

> make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes an expert in the relevant field.[43]

In fulfilling the responsibilities of gatekeeper, the trial court has broad discretion in determining how to test an expert's reliability and in deciding whether or not that expert's testimony is reliable. To determine an expert's reliability in a particular case, the trial court *may* apply the *Daubert* factors to the extent they constitute "reasonable measures of reliability."[44] Given the trial court's broad latitude to make these reliability determinations, a court of appeals' review of those decisions is limited to a deferential abuse of discretion standard.

Following *Daubert* and its progeny, the Ninth Circuit requires the trial court to act as a gatekeeper to determine the reliability and relevance of "all expert testimony."[45] The appeals court has noted that those cases holding that *Daubert* does not apply to "non-scientific" testimony are no longer good law after *Kumho Tire*. However, the court does point out that these cases "are still good law to the extent that they permit the admission of expert testimony on the basis of the expert's 'knowledge, skill, experience, training, or education,' which is consistent with *Kumho Tire*."[46]

The Ninth Circuit emphasizes that the trial court has "broad discretion" in determining whether to admit or exclude expert testimony and in deciding how to test the reliability of an expert.[47] Consequently, the *Daubert* factors are "not intended to be exhaustive nor to apply in every case."[48] Rather, the trial court may consider those factors where they are "reasonable measures of the reliability of proffered expert testimony."[49]

Noting the liberal construction of Rule 702, the court has listed those factors that a trial court should generally consider in determining the admissibility of expert opinion testimony:

- Whether the opinion is based on scientific, technical, or other specialized knowledge;
- Whether the expert's opinion would assist the trier of fact in understanding the evidence or determining a fact in issue;
- Whether the expert has appropriate qualifications – i.e., some special knowledge, skill, experience, training or education on that subject

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matter; . . .

- Whether the testimony is relevant and reliable; . . .
- Whether the methodology or technique the expert uses "fits" the conclusions; . . . [and]
- Whether its probative value is substantially outweighed by the risk of unfair prejudice, confusion of issues, or undue consumption of time...[50]

The Ninth Circuit reviews evidentiary rulings for abuse of discretion and does not reverse those rulings absent "some prejudice."[51]

SOME EXAMPLES

- *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000).

In *Bernal*, environmental groups brought an action under the Endangered Species Act, 16 U.S.C. §§1531-1543, seeking to enjoin the construction of a school complex on land that contained potential habitat for the endangered pygmy owl. The trial court denied plaintiffs' motion for a permanent injunction. Plaintiffs appealed, contending, *inter alia*, that the trial court erred in excluding evidence from Dr. Anthony Povilitis, a conservation biologist, and Mary Richardson, an employee of the federal Fish and Wildlife Service and an expert on pygmy owls.

On appeal, the Ninth Circuit affirmed, holding that the trial court had not abused its discretion in excluding the proffered expert testimony.

Dr. Anthony Povilitis. In his proposed testimony, Dr. Povilitis would have given background information on conservation biology and pygmy owls in general. He did not propose to provide specific information about the particular pygmy owls on the land at issue or in the general area. The appellate court found that "most" of Dr. Povilitis' proposed testimony was covered by other experts, and, moreover, the plaintiffs had not shown any prejudicial effect from the exclusion of his testimony.[52]

The trial court had concluded that the government's interest in avoiding "an undue burden" on its employees outweighed the utility of Richardson's testimony.

Mary Richardson. In her proposed testimony, Richardson would have testified as to whether the construction of the school complex and a student parking lot would be likely to harass or harm the pygmy owls at the site. However, Richardson's supervisor stated that she has a policy against Fish and Wildlife Service ("FWS") biologists testifying at a trial between private litigants because of the biologists' heavy workload and because "the policy ensures that staff biologists can give their best scientific opinion on an issue without concern that they may have to testify in litigation."[53] The trial court had concluded that the government's interest in avoiding "an undue burden" on its employees outweighed the utility of Richardson's testimony. Based upon the FWS' policy of not allowing their biologists to testify in private litigation, the Ninth Circuit held that the trial had not abused its discretion in excluding Richardson's testimony.[54]

- *U.S. v. Hankey*, 203 F.3d 1160 (9th Cir. 2000).

In *Hankey*, defendant was convicted of distributing, and conspiring to possess with intent to distribute, an illegal drug. On appeal, defendant contended that the trial court had erred in admitting a police gang expert's testimony on gangs' "code of silence."

The Ninth Circuit disagreed, holding that the testimony had been properly admitted. The court first noted that the trial court had conducted "extensive voir dire to assess the basis for and the relevance and reliability of" the expert's testimony.[55] The trial court learned that the expert was a police officer for 21 years and had been working undercover since 1989. In addition, the expert had received formal training in gang structure and organization, taught classes about gangs, and had "extensive personal knowledge" regarding the gangs at issue in the case. The expert based his testimony regarding the "code of silence" upon his current and past communications with gang members and gang officers.

Finding that the trial court could not have been more diligent in assessing the relevance and reliability of the expert's testimony, the court of appeals pointed out that the *Daubert* factors were "simply" not applicable to the kind of testimony at issue, "whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it."[56] The appellate court, noting that the trial court had "probed" the extent of the expert's knowledge and experience, held that the lower court had not abused its discretion "in determining how best to conduct an assessment of the expert testimony."[57]

In reaching its conclusion, the Ninth Circuit opined:

> Here, the witness had devoted years working with gangs, knew their "colors," signs, and activities. He heard the admissions of the specific gang members involved. He had communicated and worked undercover with thousands of other gang members. This type of street intelligence might be misunderstood as either remote (some dating back to the late 1980s) or

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> hearsay (based upon current communications about "retaliation" and "code of silence"), but FRE 702 works well for this type of data gathered from years of experience and special knowledge.
>
> Certainly the officer relied on "street intelligence" for his opinions about gang membership and tenets. How else can one obtain his encyclopedic knowledge of identifiable gangs? . . . [The expert] was repeatedly asked the basis for his opinions and fully articulated the basis, demonstrating that the information upon which he relied is of the type normally obtained in his day-to-day police activity.[58]

- *Cabrera v. Cordis Corp.*, 134 F.3d 1418 (9th Cir. 1998).

In *Cabrera*, plaintiff brought a products liability action against the manufacturer of a brain shunt (to remove excess fluid), alleging that silicone components in the shunt caused plaintiff's autoimmune illness and that the shunt was defectively designed. The trial court excluded the testimony of plaintiff's four medical experts, who would have testified as to causation.

On appeal, the Ninth Circuit held that the trial court did not err in excluding the testimony.

Dr. Saul Puszkin. Dr. Puszkin is a Ph.D. in neuroscience. He examined two tissue slides from plaintiff under a microscope. One showed no foreign bodies. The other showed a reaction to a "foreign" particle. Puszkin did not test the slide for the identity of the foreign particle to determine if it were silicone. He did not do the test because he was not asked and because, to do the test, he would have had to take the prepared slide apart. In his report, he "'never talked about silicone.'" Moreover, Puszkin was not aware of a report by a pathologist who had examined the tissue and found that the foreign body was not silicone, but keratin, a compound naturally occurring in the human body.

The appellate court opined that testimony connected to litigation and the lack of peer-reviewed supporting research did not alone make Dr. Brautbar's testimony inadmissible.

The Ninth Circuit agreed with the trial court that Puszkin's testimony was not relevant and "'not, in and of itself, helpful to the trier of fact under F.R.E. 702.'"[59] Moreover, because the pathologist had tested the same tissue and found the same foreign body reaction, and, in addition, had identified the particle, the appellate court concluded that Puszkin's testimony, to the same effect but without the identity of the foreign particle, was "'needless presentation of cumulative evidence'" under Rule 401.[60]

Dr. Aristo Vojdani. Dr. Vojdani has a Ph.D. in immunology. He testified that he had tested plaintiff's blood and found silicone antibodies. The trial court noted that only Vojdani used the blood test at issue. That test had never been peer-reviewed, and Vojdani had no records of the development of the test because his records were destroyed in an earthquake. Although Vojdani testified that several other labs perform silicone antibody tests, he did not know if they performed the same test that he used. Furthermore, there is no generally accepted blood test for silicone antibodies, and "(although this is not dispositive), the Federal Drug Administration does not recognize any silicone antibody test at all."[61] The appellate court agreed with the trial court that Vojdani's testimony was unreliable because there was no foundation for the test and Vojdani "could not point to some objective source . . . to show that [he has] followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in [his] field."[62]

Dr. Nachman Brautbar. Dr. Brautbar is an internist. He was proffered to testify that the silicone in plaintiff's shunt caused her disease. He examined plaintiff, but did not take blood or urine samples and did not know the silicone composition of the shunt at issue or of any shunt on the market. "'One very significant fact'" was that Dr. Brautbar developed his testimony expressly for the litigation.[63] Moreover, he identified no peer-reviewed supporting research.

The appellate court opined that testimony connected to litigation and the lack of peer-reviewed supporting research did not alone make Dr. Brautbar's testimony inadmissible. However, in the instant case Brautbar had to, but did not, identify any objective source that would show that he followed a scientific method practiced by at least some other experts in the field. The court therefore held that Brautbar's testimony did not satisfy either *Daubert* or Rule 702.

Dr. Pierre Blais. Dr. Blais has a Ph.D. in physical chemistry. He was plaintiff's design defect expert. However, he testified that

> he had never tested any shunts; that he had never published any articles on shunt composition or design; that no peer-reviewed articles supported his views; that no research shows clinical problems resulting from silicone toxicity in a hydrocephalus shunt; and that no articles existed regarding degradation of the shunt.[64]

Moreover, Blais stated that relevant information

> "was essentially left unpublished and unlearned. It was not conveyed to the medical community

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on average. It is what we call an aficionado's knowledge . . . it has simply been kept very closed to manufacturing circles and has not been shared with the medical community."[65]

Based upon Blais' own testimony, the appellate court found that Blais was relying upon underground knowledge, unknown to the scientific community. Holding that the trial court had not abused its discretion in excluding Blais' testimony, the appellate court opined that Blais' opinion, based upon such "unsubstantiated and undocumented information is the antithesis of the scientifically reliable expert opinion admissible under *Daubert* and Rule 702."[66]

Lust By and Through Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594 (9th Cir. 1996).

In *Lust*, plaintiff brought a products liability action against the manufacturer of Clomid, a fertility drug, alleging the mother's ingestion of the drug caused her child's birth defect. The trial court excluded the testimony of plaintiff's expert on causation.

On appeal, the Ninth Circuit held that the trial court had not erred in excluding the testimony because the testimony did not meet the *Daubert* standards.

The expert proposed to testify that Clomid was a human teratogen (i.e. caused birth defects in humans) that caused the birth defect at issue. His conclusion was based upon human epidemiological studies that reported a positive association between Clomid and various birth defects; studies that reported the drug to have a mutagenic effect on humans; and animal studies that reported the drug to be teratogenic in four animal species.

However, the expert admitted that he was not a teratologist, a geneticist, or an embryologist. He further admitted that no human epidemiological or animal studies had found a positive association between Clomid and the birth defect at issue. Moreover, a 1984 article that first expressed his theories was never peer-reviewed and was based upon research conducted in preparation for expert testimony in a different case concerning a different drug manufactured by defendant.

Although [the expert] published the 1984 article prior to this litigation, he was at that time already a professional plaintiff's witness. It is not unreasonable to presume that [the expert's] opinion on Clomid was influenced by a litigation-driven incentive.

Considering these facts, the appellate court focused on the "'very significant fact'" that the expert has developed his opinions for purposes of litigation:

> Although [the expert] published the 1984 article prior to this litigation, he was at that time already a professional plaintiff's witness. It is not unreasonable to presume that [the expert's] opinion on Clomid was influenced by a litigation-driven incentive.[67]

The Ninth Circuit pointed out that the expert could have convinced the trial court that his methodology was scientifically sound if he had shown the trial court some objective source "demonstrating that his method and premises were generally accepted by or espoused by a recognized minority of teratologists. But he failed to do so."[68]

Finally, the appellate court addressed plaintiff's contention that the trial court had focused on the expert's conclusions rather than on his principles and methodology in violation of *Daubert*. The court pointedly disagreed:

> [The expert's] conclusions did arouse the district court's suspicion, but that is to be expected. When a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the district court should be wary that the method has not been faithfully applied. It is the proponent of the expert who has the burden of proving admissibility. To enforce this burden, the district court can exclude the opinion if the expert fails to identify and defend the reasons that his conclusions are anomalous.[69]

See also:

Sanchez v. Crown Equipment Corp., 141 F.3d 1178, No. 96-56543, 1998 WL 84152, at *1 (9th Cir. Feb. 27, 1998) (unpublished disposition) (in products liability case involving injury allegedly resulting from defendant's forklift, holding that *Daubert* did not apply to bar admissibility of plaintiff's forklift expert because his proposed testimony was based upon his experience and/or training, not on scientific methodology).

Lopez v. Wyeth-Ayerst Laboratories, Inc., 139 F.3d 905, No. 97-15143, 1998 WL 81296, at *1 (9th Cir. Feb. 25, 1998) (unpublished disposition) (in case involving injury allegedly resulting from defendant's flu vaccine, holding that trial court did not err in excluding testimony of plaintiff's medical experts because experts, although they relied upon "widely accepted scientific methodologies for proving causation," failed to adequately link methodologies to facts of the case and further failed to draw "a sound scientific link" between their conclusions and the studies relied upon).

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Additional Cases:

U.S. v. 0.59 Acres of Land, 109 F.3d 1493, 1496 (9th Cir. 1997) (in eminent domain case, holding that survey on effect of electromagnetic fields from power lines prepared by a non-witness of unknown qualifications would not meet *Daubert* standard for scientific evidence).

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1142 (9th Cir. 1997) (in false advertising action, holding that, where defendants cannot demonstrate that plaintiffs cannot show that expert's testimony is based on "'the scientific method, as it is practiced by (at least) a recognized minority of scientists in the[] field'" as a matter of law, court will not exclude testimony under *Daubert*).

Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066 (9th Cir. 1996), *cert. denied*, 519 U.S. 1108, 117 S.Ct. 942, 136 L.Ed.2d 831 (1997) (in action under Endangered Species Act, holding that appropriate time to raise *Daubert* objections is at trial).

Wettlaufer v. Mt. Hood R. Co., 77 F.3d 491, No. 95-35016, 1996 WL 48400 (9th Cir. Feb. 6, 1996) (unpublished disposition) (in negligence case against railroad, holding that, under *Daubert's* "fit" prong, trial court should have inquired whether there was a valid scientific connection between plaintiff's expert's qualifications as biomechanical engineer and his testimony on what forces could cause the specific injury sustained by plaintiff).

Conclusion

The *Daubert* Court viewed its decision as "a liberalization, not a tightening, of the rules controlling the admissibility of expert testimony."[70] Nevertheless, the Court recognized that "'[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'"[71] Based upon that observation, the Fourth Circuit Court of Appeals has properly cautioned that "given the potential persuasiveness of expert testimony, proffered evidence that has a greater potential to mislead than to enlighten should be excluded."[72] ❐

[T]he Fourth Circuit Court of Appeals has properly cautioned that "given the potential persuasiveness of expert testimony, proffered evidence that has a greater potential to mislead than to enlighten should be excluded."

1 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

2 *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

3 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

4 *See* Paul T. Fortino, *The Wheel Turns: Kumho Tire extends Daubert Analysis from "Junk Science" to "Soft Science,"* Vol. 18, No. 2, Litigation Journal 1 (July 1999).

5 *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

6 *Frye*, 293 F. at 1014.

7 *See Daubert*, 509 U.S. at 586 ("In the 70 years since its formulation in the *Frye* case, the 'general acceptance' test has been the dominant standard for determining the admissibility of novel scientific evidence at trial.").

8 *Id.* at 587.

9 Fed. R. Evid. 702 (1998).

10 *Daubert*, 509 U.S. at 590.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 591 (citation omitted).

15 *Id.* at 591-92.

16 *Id.* at 591.

17 Noting that the *Frye* decision focused exclusively on "'novel'" scientific techniques, the *Daubert* Court commented that it did not restrict Rule 702 to apply only to "unconventional" evidence. *See Daubert*, 509 U.S. at 592 n.11.

18 Rule 104 states:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Fed. R. Evid. 104(a) (1998).

19 The *Daubert* Court commented: "In a case involving scientific evidence, evidentiary reliability will be based upon scientific validity." *See Daubert*, 509 U.S. at 590 n.9.

20 *Id.* at 592-93 (footnotes omitted).

21 *Id.* at 593.

22 *Id.* at 593-94. The Court was "confident that federal judges possess the capacity to undertake this review." *Id.* at 593.

23 *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

24 *Joiner*, 118 S.Ct. at 520 (Breyer, J., concurring) (citation omitted).

25 *Id.* at 519.

26 *Daubert*, 509 U.S. at 595.

27 *Joiner*, 118 S.Ct. at 519.

28 Fed. R. Evid. 702 (1998).

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29 *Daubert*, 509 U.S. at 590 n.8.

30 *Compare Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) (holding that *Daubert* criteria are "equally applicable to 'technical, or other specialized knowledge'" under Rule 702) *with United States v. Webb*, 115 F.3d 711, 716 (9th Cir.), *cert. denied*, 522 U.S. 974, 118 S.Ct. 429, 139 L.Ed.2d 329 (1997) (holding that *Daubert's* standards "simply do not apply" to experts with specialized knowledge).

31 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

32 *Kumho Tire*, 526 U.S. at 141.

33 *Id.*

34 *Id.* at 151.

35 *Id.* at 150 (quoting *Daubert*, 509 U.S. at 591).

36 *Id.* (quoting *Daubert*, 509 U.S. at 594).

37 *Id.* (quoting Brief of the Solicitor General for United States as *Amicus Curiae* 19).

38 *Id.* at 152.

39 *Id.* at 153 (citation omitted).

40 *General Elec. Co. v. Joiner*, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

41 *Kumho Tire*, 526 U.S. at 152.

42 *Id.* at 147.

43 *Id.* at 152.

44 *Id.* at 153.

45 *U.S. v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (citing *Kumho Tire*, 119 S.Ct. at 1175-79).

46 *Hankey*, 203 F.3d at 1169 n.7.

47 *Id.* at 1168 (citing *Kumho Tire*, 119 S.Ct. at 1175-76).

48 *Id.* (citing *Kumho Tire*, 119 S.Ct. at 1178).

49 *Id.* (citing *Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 606, 618 (5th Cir. 1999) ("Whether *Daubert's* suggested indicia of reliability apply to any given testimony depends on the nature of the issue at hand, the witness's particular expertise, and the subject of the testimony. It is a fact-specific inquiry.") (internal citations omitted)).

50 *Id.* (citations omitted).

51 *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927-28 (9th Cir. 2000).

52 *Bernal*, 204 F.3d at 928.

53 *Id.*

54 *See id.*

55 *U.S. v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000).

56 *Hankey*, 203 F.3d at 1169 (citing *Kumho Tire*, 119 S.Ct. at 1175).

57 *Id.*

58 *Id.* at 1169-70.

59 *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1421 (9th Cir. 1998) (citing trial court).

60 *Cabrera*, 134 F.3d at 1421-22 (citing Fed. R. Evid. 403).

61 *Id.* at 1422.

62 *Id.* (citation and internal quotations omitted).

63 *Id.* The court noted that Dr. Brautbar advertised his services on the World Wide Web as an expert for plaintiffs in cases involving silicone breast implants. *See id.*

64 *Id.* at 1421.

65 *Id.* at 1423 (quoting Blais).

66 *Id.* at 1421.

67 *Lust By and Through Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 597 (9th Cir. 1996).

68 *Lust*, 89 F.3d at 597.

69 *Id.* at 598.

70 *See Cavallo v. Star Enterprise*, 100 F.3d 1150, 1158 (4th Cir. 1996), *cert. denied*, 522 U.S. 1044, 118 S.Ct. 684, 139 L.Ed.2d 631 (1998).

71 *Daubert*, 509 U.S. at 595 (citation omitted).

72 *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (citation omitted).

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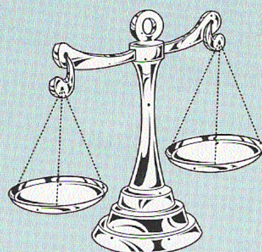


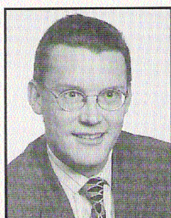
Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

Claims for Relief

Contracts

A stipulated judgment is not a "contract" that gives rise to an action for breach of contract, the Supreme Court held in *Webber v. Olsen*, 330 Or. 189 (2000). Instead, the parties are limited to the remedies provided by law for enforcement of a judgment.



The Court of Appeals reaffirmed in *McComas v. Bocci*, 166 Or.App. 150 (2000) that a "promise made after the creation of a contract and arising in the course of its performance is gratuitous and establishes no duty unless it is supported by new consideration." 166 Or.App. at 156. A claim for specific performance of an oral contract for the mutual exchange of interests in real property is not barred by the Statute of Frauds where one party has fully performed, the Court of Appeals concluded in *Parthenon Construction & Design, Inc. v. Neuman*, 166 Or.App. 172 (2000).

And in two breach of contract actions involving the enforcement of "unambiguous" terms, the Court of Appeals reversed a judgment for the defendant in one case, and affirmed a judgment for the defendant in the other. In *Houston Equity Corp. v. Gehrt*, 166 Or.App. 365 (2000), defendant signed an earnest money agreement to purchase plaintiff's mobile home park, and later signed a written addendum that removed a condition providing that defendant and his attorney had a right to review and approve the plans and specifications for the mobile home park. The trial court held that the addendum was ambiguous as to whether defendant intended to relinquish his right to have the documents reviewed by his attorney. The Court of Appeals reversed, holding that addendum "unambiguously established that the review condition had been removed" even though the earnest money agreement "refers to both defendant's and his attorney's review and the addendum refers explicitly only to defendant's review." 166 Or.App. at 369.

In *Alphonse v. CNF Service Co., Inc.*, 166 Or.App. 387 (2000), the Court of Appeals affirmed a summary judgment in favor of defendant on a claim for breach of an employment contract. The plaintiff sought to recover severance pay after her employer eliminated her position. The employer declined to pay the severance package it had previously offered because it offered plaintiff another position with the company that she declined to accept. The trial court (affirmed by the Court of Appeals) ruled in favor of the employer, holding that the unambiguous terms of the severance package offer "is that an employee whose position is outsourced is not entitled to severance pay * * * if employment with defendants is not terminated due to an offer of continuing employment in a new position." 166 Or.App. at 394.

Finally, in *Nike, Inc. v. Northwestern Pacific Indemnity Co.*, 166 Or.App. 312 (2000), the Court of Appeals reversed a summary judgment in favor of defendant on a claim for breach of an insurance contract covering losses due to employee theft. In that case, Nike sought to recover losses it incurred as a result of the actions of a man named Su (no relation to the boy in Johnny Cash's song). Su managed Nike's Taiwan sales accounts. He gave unauthorized discounts and other benefits to his personal friends, leading to his indictment for breach of fiduciary duty, a criminal offense under Taiwanese law. The insurance company sought summary judgment on Nike's claim under the policy, arguing that the claim had been brought after the two-year limitation period for bringing the action.

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The trial court agreed, holding that Nike had "discovered" the loss sufficient to trigger the limitations period when it filed a complaint with the Taiwanese prosecutor that led to Su's indictment. The Court of Appeals reversed, holding that a genuine issue of material fact existed, precluding summary judgment, on the dispute "as to when the information known to the employer crosses the less-than-bright-line between suspicion of the employee's intent and knowledge of that intent." 166 Or.App. at 629.

Other Claims.

A nonviable fetus is not a "person" for purposes of Oregon's wrongful death statute, the Court of Appeals held in *LaDu v. Oregon Clinic, P.C.*, 165 Or.App. 687 (2000).

A "drinking buddy" may sue a convenience store and tavern under ORS 30.950 and common law negligence for serving alcohol to his visibly intoxicated cohort, the Supreme Court held in *Grady v. Cedar Side Inn, Inc.*, 330 Or. 42 (2000). The court expressly rejected, in a case of first impression in Oregon, the "complicity doctrine" that precluded recovery in other jurisdictions. 330 Or. at 47.

And a voluntary disclosure statement given in the course of a sale of property does not give rise to a "special relationship" between buyer and seller sufficient to give rise to liability for negligent misrepresentation in an arms' length sales transaction. *Cameron v. Harshbarger*, 165 Or.App. 353 (2000).

Procedure

Effecting service in Oregon of a summons and complaint in an action pending in another state that was eventually dismissed may be sufficient to subject an out-of-state corporation and its attorney to the jurisdiction of the Oregon courts. *Portland Trailer & Equipment v. A-1 Freeman Moving*, 166 Or.App. 651 (2000). A plaintiff must reasonably attempt to learn where defendant works in order to effect office service, in addition to attempting personal service at defendant's residence, before relying on service through the Motor Vehicles Division. *Burton v. Krueger*, 165 Or.App. 460 (2000).

Statements in an affidavit offered in opposition to a motion for summary judgment are properly disregarded where "the affidavit fails to demonstrate either that the statements were not hearsay or that they fell within an exception to the hearsay rule."

The Court of Appeals dismissed an appeal from a directed verdict granted by the trial court on plaintiff's punitive damage claim after the plaintiff accepted payment of the compensatory damage award in *Talbert v. Farmers Inc. Exchange*, 166 Or.App. 599 (2000). The court explained that, even if the trial court erred in dismissing the punitive damage claim, "the only appropriate remedy would be to retry the entire case," a remedy that was no longer available to plaintiff "because he already has received the benefit of the judgment in the underlying claim." 166 Or.App. at 606.

Statements in an affidavit offered in opposition to a motion for summary judgment are properly disregarded where "the affidavit fails to demonstrate either that the statements were not hearsay or that they fell within an exception to the hearsay rule." *Andrews v. R.W. Hays Co.*, 166 Or.App. 494, 499 (2000). An affidavit submitted under ORCP 47 E in opposition to a motion for summary judgment was found to be sufficient to create a genuine issue of material fact in *Brownstein, Rask, Arenz v. Pearson*, 166 Or.App. 120 (2000), a decision which limited the rule of *Moore v. Kaiser Permanente*, 91 Or.App. 262, *rev denied*, 306 Or. 661 (1988) regarding the specificity of an ORCP 47 E affidavit.

And a circuit court reviewing an agency order in a noncontested case may consider evidence that was not part of the record before the agency, at least in instances where "the first opportunity that a party might have to make a record" is in the circuit court. *Norden v. Water Resources Dept.*, 329 Or. 641, 648 (2000).

Limitation of Actions

The Court of Appeals, applying the "discovery" rule, held that giving a tort claim notice to a public body does not "necessarily" mean that the statute of limitations begins to run. *Uruo v. Clackamas County*, 166 Or.App. 133 (2000). While "the fact that a plaintiff has sufficient information to give a tort claim notice will usually mean that he or she also has sufficient information to say that his or her cause of action has accrued[,]" a plaintiff "may introduce evidence to call that logical inference into question and thus create an issue of fact as to the significance of the tort claims notice." 166 Or.App. at 139.

The statute of limitations starts to run before a plaintiff has confirmation that

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her doctor's conduct was outside the standard of care required of a physician, the Court of Appeals held in *Greene v. Legacy Emmanuel Hospital*, 165 Or.App. 543 (2000). In that case, plaintiff went in for an outpatient abortion and ended up spending 11 days in the hospital after her colon was perforated. The court concluded that "a reasonable person in plaintiff's position would have known of a substantial possibility of malpractice when informed of the nature of the complication." 165 Or.App. at 549-50.

Attorney Fees

Parties seeking to recover attorney fees under ORS 20.080 must be careful in framing their pre-litigation demand letter as a result of two recent Court of Appeals decisions. In *Schwartzkopf v. Shannon the Cannon's Window*, 166 Or.App. 466 (2000), the Court of Appeals held that a demand letter sent to defendant's insurer was insufficient in the absence of evidence demonstrating that the insurer "was, in fact, acting as an agent for defendant at the time." 166 Or.App. at 471.

And in *Beers v. Jason Enterprises*, 165 Or.App. 722 (2000), the Court of Appeals reversed the trial court's denial of attorney fees where plaintiff's attorney sent two demand letters, and filed two separate lawsuits, seeking $4,000 damages in each case on claims of false imprisonment and malicious prosecution after plaintiff was acquitted of a shoplifting charge. The Court of Appeals held that "plaintiff is entitled to attorney fees on one, but not both, of her consolidated claims" (165 Or.App. at 728) because "the most reasonable view of the demand letter is that it was a single, pre-suit demand seeking $4,000 for a single claim, not $4,000 for two claims." 165 Or.App. at 726. ❐

Oregon State Bar

Calendar of Events

SEPTEMBER 15

A Blockbuster Term: Recent Supreme Court Constitutional Law Developments
9 a.m. – 5 p.m.
Embassy Suites Hotel, Portland, Oregon
7 MCLE credits
National authorities and constitutional scholars review how recent Supreme Court decisions may affect your practice.

SEPTEMBER 20

Child Abuse Reporting
Noon - 1 p.m. OR 4 - 5 p.m.
Oregon State Bar Center
1 Ethics credit
Learn what your duty to report child abuse is, when the duty applies, what abuse is, and how to report it.

SEPTEMBER 22

Problem Solving in Elder Law Practice
8:30 a.m. – 4 p.m.
Oregon Convention Center
5 MCLE credits and 1 Ethics credit
This program will give you straightforward, nuts-and-bolts advice on how to approach and solve your elder law clients' problems.

Watch for these fall OSB CLE programs:

- Administering Trusts in Oregon
- Tax Planning for Small Businesses
- Fundamentals of Collecting Money Judgments
- Computer Law
- Fundamentals of Business Law

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