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Expert Witnesses: Not Automatically Protected by the Attorney-Client Privilege or the Work Product Doctrine

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Oregon lawyers should be aware that the relationship between an attorney and an expert witness – whether the expert is expected to testify or not – is not automatically protected by the attorney-client privilege or the work product doctrine.

The Oregon Supreme Court recently addressed the issue of whether an individual retained as a non-testifying expert by one party may be called as an expert witness for the opposing party in the same case. In *State v. Riddle*, 330 Or. 471, 8 P.3d 980 (2000), the Court held that expert opinions and testimony that can be segregated from confidential communications from an attorney fall outside the scope of the attorney-client privilege and the work product doctrine. In such cases, one party may utilize an expert who was previously retained in the same case by the adverse party, provided that the expert's testimony does not relate to confidential communications with the adverse party. This approach to relationships between attorneys and the expert witnesses they retain prevents parties from "buying up" experts or otherwise cloaking expert testimony with the attorney-client privilege or work product protections.

I. State v. Riddle

In *State v. Riddle*, the Oregon Supreme Court addressed the complicated issue of whether an expert witness' opinions and observations that were not communicated to counsel, or were based on non-confidential communications with counsel, are protected under either the attorney-client privilege or the work product doctrine. The specific context in *Riddle* involved an expert who was retained by one party but was not asked to testify, and who was subsequently retained to testify as an expert in the same case on behalf of the adverse party.

In *Riddle*, defendant Douglas Riddle appealed his convictions for criminally negligent homicide, driving while intoxicated, and fourth-degree assault. Riddle had swerved into an on-coming vehicle, killing two of its occupants. At trial, the State called an accident reconstruction expert who testified that the cause of the accident was that Riddle had lost control of his vehicle as a result of taking a turn too fast. Riddle rebutted this testimony with his own expert who testified that the accident occurred when Riddle lost control of his vehicle after his steering mechanism locked. The State then sought to rebut the testimony of Riddle's expert by calling a third expert, Myers, who originally had been hired by Riddle. Riddle sought to prevent Myers from testifying, claiming that Myers' opinion was privi-

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In This Issue

Comments From the Editor

"AVOID PREDEPOSITION INFORMATION OVERLOAD"

Dennis P. Rawlinson
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In recent years, revisions to Federal Rule of Civil Procedure 30(d) and state and local counterpart rules relating to depositions have substantially reduced the impact that an attorney defending at deposition can have on the deponent's testimony.

Objections made during deposition must now be made *concisely* and in a *nonargumentative* and *nonsuggestive* manner. The revised rules now discourage the lawyer who is defending the deposition from giving the deponent any "help" during the deposition.

Dennis Rawlinson

These developments have made it all the more important that a deponent be properly prepared for the deposition. By the time the deposition starts, the deponent needs to be able to proceed independently and without lawyer assistance.

Realizing the foregoing, I continue to be puzzled why most of us tend to prepare our witnesses for deposition by overloading them with information that they cannot digest and cannot possibly remember and that is likely to cause them to perform less effectively than if they had been given no information from us at all. We would do better, I believe, in predeposition preparation to provide our witnesses with a limited number of simple principles rather than launching an avalanche of information and overloading them.

1. Information Overload.

Over the course of our careers, based on our reading and experience, we accumulate a list of principles on what a witness should do in a deposition. So far, so good. Typical principles might include the following:

- Tell the truth.
- Listen carefully to each question.
- Be brief.
- Do not give information that is not asked for.
- Do not guess if you are not certain.
- Make sure you understand the question.
- Take your time.
- Give an audible answer.
- Avoid testifying about the knowledge of others.
- Do not exaggerate.
- If you make a mistake, say so.
- Do not lose your temper.
- Avoid joking and making wisecracks.
- Select the words in your answer thoughtfully and carefully.
- Do not discuss conversations with your lawyer.
- Beware of questions involving distance and time.
- Give your lawyer time to raise objections to questions.
- If there is an objection, do not answer until told to do so.
- Do not let the adverse lawyer fool you with kindness.
- Give complete answers.

We invite our witness to a deposition preparation session on either the morning of or the night before the deposition. We then spend 45 minutes or more lecturing the witness on how to be a good witness, covering these 20 principles and even more.

Inevitably, the witness feels like a worker caught behind a dump truck when the truck bed is lifted, the gate opened, and the contents dumped. The witness experiences information overload.

Moreover, if we look closely at our principles, many of them are inconsistent and in conflict with each other. For in-

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FROM THE EDITOR

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stance, I suspect that all of us have read, heard, or used the following predeposition instructions, which upon careful examination we see are inconsistent or confusing:

1. Give complete answers/do not volunteer information.
2. Be courteous/do not be overly friendly.
3. Be "careful" in your answers/do not try to "outthink" the other lawyer.
4. Take your time/do not take so long that you appear to be making up your answers.
5. Allow time for objections to be raised/probably I will raise no or few objections.
6. Listen carefully to each question/do not overanalyze the question.
7. Do not guess if you are not certain/say with certainty what you know.
8. Tell the complete truth/answer only what you are asked.
9. Give a positive answer/do not exaggerate.
10. Do not be afraid/the questioner will try to hurt you.

The result is that we too often end up with a deponent who is confused and becomes convinced that no matter what he or she does, it will be wrong. Such a witness is usually less effective in deposition than if the witness had never spoken with us.

2. Concentrate on Simplicity.

Instead of "dumping" 20 principles on your deponent before the next deposition, I suggest that you limit your instructions to three or four simple principles. Sure, you can cover a number of other suggestions, but I believe it is best to encourage the witness by saying that he or she will do an outstanding job if he or she simply remembers and practices the three or four principles. If your witness happens to remember some of the other things you discuss with him or her, then fine – but if not, it won't be a problem.

Your objective is to relax the witness, not place him or her like a deer at night on the highway, frozen in the headlights of an oncoming car.

Consider the following three or four principles. It may well be that others or similar principles stated differently will be more effective for you.

- Analyze the question.
- Make sure you understand the question.
- Pause.
- Answer briefly.

A brief explanation of each is set forth below.

a. Analyze the question.

The witness should realize that this is not everyday conversation. The witness should be focusing on the question just as if it were projected on a screen in a slide show. Each word should be analyzed. The witness should not assume or anticipate the context.

The witness should then determine whether the question is fair and understandable. Whether each word in the question is accurate. Whether the question uses language that the deponent might not use or be comfortable in using.

b. Make sure you understand the question.

The witness should understand that he or she has rights. If the question is not fair or understandable, the witness is entitled to have it restated or rephrased or to have the troublesome word or phrase explained or restated.

The witness should proceed with answering the question only when the witness is certain what has been asked.

c. Pause.

This may be the most powerful principle. Pausing allows the deponent to be analytical and consider his or her answer carefully before it is given. It allows the witness to take control in a setting in which the questioner normally has control. The witness can control the pace.

The transcript will not disclose the length of time taken to answer. The deponent should be deliberate in his or her choice of words. The deponent should think about what he or she wants to say and then carefully select the words that express the thought in the best way possible.

The witness should realize that the silence created by the pause before the answer is the witness's "friend." Although silence in everyday conversation is awkward, in deposition, it is the deponent's ally.

d. Answer briefly.

The longer the deponent's answer, the more questions the examiner will think of based on the answer. Moreover, by volunteering more information than was asked, the deponent runs the risk that he or she will be providing to the examiner information that will eventually be used against the deponent.

Often, a one-sentence or even a one-word answer will be sufficient. The witness can summarize, if necessary, to enable the witness to answer in one sentence.

3. Conclusion.

The next time you prepare a witness for deposition, instead of backing up a dump truck containing the 20 deposition principles you have assembled over the course of your career and dumping them on the deponent, thus creating the risk of information overload, keep your instructions simple.

Provide the witness with simple, easily understood principles that the witness can remember easily and that will instill confidence.

This is not to suggest that practicing deposition testimony prior to deposition isn't essential. And this is not to suggest that dialogue is not more effective than lecturing during deposition preparation. But proper deposition preparation begins with simplicity and confidence-building, not information overload.

Try it. ❐

Message From the Chair

Robert J. Neuberger

It is my honor to serve as Chair of the Litigation Section for 2001. The Litigation Section remains vital. It continues to be the largest Section within the Bar. The Section remains strong financially. It continues to run an annual surplus. The Section continues to fulfill its mission of fostering professional education, development, and collegiality.

The publication you are reading is one of the Section's proudest continuing accomplishments. Under the able stewardship of Editor Denny Rawlinson, the Litigation Journal continues to publish three issues annually containing timely articles of interest to litigators.

Denny also continues to lead one of the Section's other crown jewels, the Litigation Institute and Retreat held annually at Skamania Lodge. With the able assistance of program planners, Marie Eckert and Greg Mowe, efforts are well under way for the Ninth Annual Institute and Retreat, which will be held on March 8 and 9, 2002.

Ron Cohen of Phoenix, Arizona, and JoAnne Epps of Temple University in Philadelphia will make a joint presentation on witness preparation on Saturday. Alex Sanders, President of the College of Charleston in Charleston, South Carolina, who is known for his high quality and inspirational presentations, will speak on Friday afternoon. Longtime Litigation Section Institute and Retreat favorite, David Markowitz, will also be joining us Friday afternoon. David will discuss the use of video depositions during discovery and at trial. United States Magistrate Judge Donald H. Ashmanskas will discuss effective oral and written advocacy.

We are indebted to Denny, Marie and Greg for their tireless efforts over the years in planning and presenting this excellent annual CLE event. The program planners are already hard at work on the 2003 program.

The Executive Committee of the Litigation Section, under Denny's guidance, established the Owen M. Panner Professionalism Award four years ago. The award is presented at the Friday evening dinner at the Litigation Section Institute and Retreat. Past recipients have been Judge Panner, the late Don McEwen, Gene Hallman, and Judy Snyder. Litigation Section Committee member Richard Lane has devoted many hours each year writing legal associations and bar groups of interest, soliciting input and nominations for the award. The deadline has passed for nominations for the 2002 award. The Executive Committee chose the recipient of the 2002 award at its next Executive Committee meeting on September 21, 2001. Nominations for future awards may be made at any time, and should be submitted to Richard at 503-228-6600. Copies of the written criteria and procedures governing the selection process are available from Richard.

The Executive Committee establishes four scholarships, based on financial need, for Section members who could not otherwise afford to attend the Litigation Section Institute and Retreat. The Section funded four scholarships for the 2001 Institute and Retreat. The recipients came from a cross section of practice areas, gender, ethnic and other diversity. The Oregon Minority Lawyers Association undertook the administration of the scholarships. The OMLA Board devoted countless hours publicizing the scholarships, soliciting nominations, evaluating applications, and making its decision. The Litigation Section Executive Committee voted to continue the scholarship program, and OMLA has generously agreed to devote the time and effort to administer the program. Applications and nominations for these need-based scholarships should be directed to Anastasia Yu Meisner, a member of the OMLA Board, who may be reached at 503-617-1035.

The Executive Committee's educational efforts also include its biennial program planning and presentation of a practical skills CLE, Fundamentals of Oregon Civil Trial Procedure, to be held on October 19 and 20, 2001. Executive Committee members Theresa Wright and Karen Saul once again are planning this important program.

The Section has expanded its sponsorship of speakers at the Bar Convention. In the past, the Section has been a co-sponsor of a national speaker. This year, the Section is sponsoring two national speakers.

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THE OPINION RULE, KNOWLEDGE RULE, AND ADMISSIONS: Part Two

by John W. Stephens

C. OPINIONS ON ANOTHER'S STATE OF MIND

Probably nothing about the Knowledge Rule and the Opinion Rule prompts more surprise than when lawyers learn witnesses may testify about another's state of mind. They mistakenly believe that "one person cannot possibly know what another's state of mind is." 7 Wigmore, Evidence § 1962, at 140-41 (Chadbourn rev. 1978).

Most lawyers understand that lay witnesses can give opinions on such things as speed and distance, but the Opinion Rule permits much more. In civil actions, witnesses can give their opinions of the state of mind of another so long as the requirements of the Knowledge Rule and the Opinion Rule are met (i.e., the witness actually observed the other person, the opinions or inferences about the other person's state of mind are rationally based on the perception of the witness, and the opinion or inferences about the other's state of mind are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue). Where these requirements are met, this kind of evidence is not speculation.

If you consider the reasons for the Opinion Rule, it is not that surprising that a witness can testify about the state of mind of another. Everyone draws inferences and forms opinions about what others know and believe. These inferences and opinions are an important basis of all human interaction. Corbin noted:

> In an ancient case, Y.B. 17 Edw.IV, 2, Brian, C.J., remarked, perhaps erroneously, that "the devil himself knoweth not the thought of man." Every day experience shows that man himself believes that he can discover the thoughts of another man. This he does by inferences from the other's external expressions, in words, in features, in acts. Such evidence may indeed lead to woeful error; but it is the best we have and we act upon it daily.

3 Corbin on Contracts (1960) § 597, at 582, n.5.

In a proper case, a witness's opinion of another's state of mind may be valuable to the jury. The witness may have formed an opinion on the basis of what amounts to careful observations, but may have a hard time describing each observation on which the belief is based. "In everyday life, personal interaction is nuanced and nonliteral, and expressions and tone of voice, posture and glance are crucial, and knowledgeable witnesses can easily satisfy the rational basis and helpfulness criteria in providing interpretive opinions on the mental states of others." 3 Mueller & Kirkpatrick, Federal Evidence (2d ed. 1994) § 346, at 596. In this situation, it makes more sense to permit the witness to offer his or her opinion than to force the witness to describe what for the witness may be undescribable. In *United States v. Petrone*, 185 F.2d 334, 336 (2d Cir. 1950), the judge, presumably Learned Hand, said:

> Nothing is less within the powers of the ordinary witness than to analyze the agglomerate of sensations which combine in his mind to give him an "impression" of the contents of another's mind. To require him to unravel that nexus will, unless he is much practiced in self scrutiny, generally make him substitute an utterly unreal—though honest—set of constituents, or will altogether paralyze his powers of expression.

Courts have permitted witnesses to testify about the motivation of others, *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1466-67 (5th Cir. 1989), and *Bohannon v. Pegelow*, 652 F.2d 729, 731-33 (7th Cir. 1981); the knowledge of others, *United States v. Smith*, 550 F.2d 277, 281 (5th Cir. 1977); and the subjective beliefs of others, *John Hancock Mut. Life Ins. Co. v. Dutton*, 585 F.2d 1289, 1293-94 (5th Cir. 1978).

The following examples illustrate when state of mind testimony comes in.

1. Scenario No. 1

You are defending an action for personal injuries caused by Tom, an independent contractor. You represent Emma, who employed Tom. Emma is now de-

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THE OPINION RULE

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ceased. An issue at trial is whether Emma knew that Tom was incompetent and careless. A witness, Dave, is prepared to testify:

"Emma did not know that Tom was incompetent and careless."

Does this testimony come in? Again, it depends on the foundation.

Other evidence shows that Dave worked for Emma for many years. He knows Emma employed Tom on many jobs over the years. He participated in many meetings with Emma and Tom. He and Emma discussed Tom. He observed how Emma got along with Tom and how Emma reacted to Tom. He had never heard anyone at work, including Emma, say that Tom was incompetent or careless. This opinion testimony probably comes in. Dave has actually observed. His opinion is rationally based on his perception. Dave's opinion is helpful to the jury. It helps determine a fact in issue. Because much of Dave's opinion is based upon his observations of how Emma got along with Tom and how she reacted to Tom, it may be difficult for Dave to describe specifically what it is about Emma's relationship with Tom that leads him to believe that Emma did not know that Tom was incompetent or careless. *John Hancock Mut. Life Ins. Co. v. Dutton,* 585 F.2d 1289, 1293-94 (5th Cir. 1978).

2. Scenario No. 2

This scenario is the same as Scenario No. 1, except Dave is prepared to testify:

"Emma did know that Tom was incompetent and careless."

Does this testimony come in? Again, it depends on the foundation.

Other evidence shows that Dave believes Tom is incompetent and careless and believes that Tom has established a reputation for being so. Dave did not know Emma, but he has heard that she was savvy, that she kept her ear to the ground. This opinion testimony does not come in. It is not rationally based on the perception of the witness. Rule 701(a); *see Visser v. Packer Engineering Associates, Inc.,* 924 F.2d 655, 659 (7th Cir. 1991)(Posner, J.), where the court dismissed the following as "amateur psychoanalysis":

To the extent the Opinion Rule allows testimony in the form of opinion or inference, it relies on the nature of the adversary system to lead to a proper result.

"When the three former board members resigned from Packer Engineering, Kenneth Packer needed to hurt someone immediately. That reaction has been frequently observed by affiant. He [Packer] couldn't immediately hurt the departed so he chose to hurt Visser by depriving him of his cherished goal of a full pension. Kenneth Packer knew Visser's age, knew exactly what he was doing and acted consistent with his pattern of activity in years past. Visser's age was a significant factor in the decision."

3. Scenario No. 3

In a securities action against an accounting firm, you want to prove that the partner in charge of the audit, Alex, knew that when LMNO, Inc. showed a worthless asset at original cost on its financial statement, the financial statement was not presented in accordance with generally accepted accounting principles. You have a former junior accountant, Jack, who is prepared to testify:

"Alex knew that under generally accepted accounting principles a company cannot show a worthless asset at original cost on its financial statement."

Whether this testimony comes in, as before, depends on the foundation.

Foundation No. 1

Other evidence shows that Jack had worked closely with Alex for many years, and particularly on the audit at issue; that he had had ample opportunity to observe Alex, not only as an audit partner generally, but also on the audit at issue; and that Jack was himself familiar with the financial accounting standards applicable to this issue. Jack has formed an opinion about the level of Alex's knowledge of financial accounting standards. The opinion testimony comes in.

The testimony is based on Jack's personal observation of Alex. The testimony is helpful to the determination of a fact in issue. Much of Jack's opinion is based upon his observations of Alex working on audits, and Jack's opinion of the level of Alex's knowledge of financial accounting standards that Jack has drawn from that experience. It may be difficult for Jack to describe sufficiently what it is about working with Alex, and what it is about Alex's knowledge and expertise that would permit the jury to be able to draw its own inference that Alex did or did not know. Jack's opinion on Alex's knowledge is, therefore, helpful. *United States v. Smith,* 550 F.2d 277, 281 (5th Cir. 1977); *United States v. Fowler,* 932 F.2d 306, 312 (4th Cir. 1991).

Other evidence shows that Jack had worked closely with Alex for many years, and particularly on the audit at issue. During that audit, Jack told Alex that LMNO, Inc. was showing a worthless asset at original cost on its financial statement and he mentioned the applicable financial accounting standard. Alex told Jack that he was concerned that if they did not go along with LMNO's treatment, the firm would lose the audit engagement. The opinion testimony does not come in. Yes, the testimony is based on Jack's personal observation of Alex; but the testimony is not helpful. Jack's testimony about what he actually observed is completely understandable without hearing Jack's opinion about what Alex knew. With the benefit of Jack's testimony about his work with Alex and his conversation with Alex, the jury is just as capable as Jack of determining that Alex did or

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did not know. *United States v. Rea*, 958 F.2d 1206, 1219 (2d Cir. 1992).

WHEN KNOWLEDGE, OPINIONS, AND LEGAL CONCLUSIONS DON'T MATTER: SPECIAL RULES FOR ADMISSIONS

The Knowledge Rule and the Opinion Rule usually do not result in the exclusion of admissions. A first-party admission is a statement offered against a party that is the party's own statement made in either an individual or a representative capacity. Beyond first-party admissions there are also what are referred to as authorized admissions, adoptive admissions, vicarious admissions, and admissions of co-conspirators. Rule 801(d)(2).

The common law rules of evidence treated admissions differently from other evidence—they were an exception to the hearsay rule and they were generally not subject to the Knowledge Rule or the Opinion Rule. Rule 801(d)(2) is explicit that admissions are not hearsay. The rules are not as explicit that the Knowledge Rule and the Opinion Rule do not apply to admissions—although under the strict letter of the rules, Rules 602 (Knowledge) and 701 (Opinion) apply only to the "testimony" of a "witness." Admissions are usually out-of-court statements, not testimony of witnesses. The Advisory Committee Notes to Rule 801 say:

> The freedom which admissions have enjoyed...from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

D. KNOWLEDGE RULE DOES NOT EXCLUDE ADMISSIONS

The theory of admissibility of admissions reflected in the federal rules and the Oregon code is not that admissions are inherently trustworthy. Instead, they are admissible as a "result of the adversary system." Advisory Committee Notes, Rule 801. That is, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath." Morgan, Basic Problems of State and Federal Evidence (Weinstein ed. 1976) 241. "It is a judicial counterpart of the aphoristic penalty that one must sleep in the bed he has made. It is a punishment for inconsistency...." Lev, The Law of Vicarious Admissions—An Estoppel, 26 U. Cinn. L. Rev. 17, 29 (1957). It follows from this that the Knowledge Rule does not govern admissions. 2 McCormick on Evidence § 255, at 139-40 (Strong ed. 1999); *United States v. Haldeman*, 559 F.2d 31, 110 (D.C.Cir. 1976); Annot., 54 A.L.R.2d 1069 (1957).

Because the Opinion Rule is only a rule of preference for detailed accounts over broad assertions, and because a lawyer has no opportunity to reframe his or her question when the statement is made out of court, the Opinion Rule is, in the words of McCormick, "grotesquely misapplied" to admissions.

In *United States v. Goad*, 739 F.Supp. 1459, 1462 (D.Kan. 1990), a defendant's admission that a vehicle was stolen was admissible even though the defendant had no personal knowledge whether the vehicle was or was not stolen. In *Mahlandt v. Wild Canid Survival & Research Center*, 588 F.2d 626, 628-30 (8th Cir. 1978), several admissions by defendant's employee that defendant's wolf had bitten a child were admissible even though the employee had no personal knowledge, and substantial evidence was later discovered suggesting the wolf had not bitten the child.

Although the theory behind the admissibility of admissions makes sense when first-party admissions are offered, it is less compelling when vicarious admissions are involved. Where a non-responsible employee is just repeating gossip he or she heard, it is not very satisfying to say "Acme, Inc. has made its bed, now sleep in it." Weinstein and Berger have argued that non-first-party admissions should not be admissible unless the person making the statement had personal knowledge, that "[g]ossip does not become more reliable merely because it is heard in an office rather than a home." Weinstein & Berger, Weinstein's Evidence Manual (2000) § 15.02[6][a], at 15-22; § 15.02[4], at 15-19 (authorized admissions). So far, however, most courts have rejected their argument. Weinstein & Berger, Weinstein's Evidence Manual (2000) § 15.02[5], at 15-22 (vicarious admissions); Weinstein & Berger, Weinstein's Evidence (McLaughlin ed. 2001) § 801.31[1], at 801-53, -56 (adoptive admissions); § 801.34 [2], at 801-74 (admissions of co-conspirators); *Brookover v. Mary Hitchcock Memorial Hosp.*, 893 F.2d 411, 415-18 (1st Cir. 1990). But cf. *Vasquez v. Lopez-Rosario*, 134 F.3d 28 (1st Cir. 1998)(unattributed "hallway gossip" repeated by party-opponents inadmissible because impossible to determine whether original declarant also fit within party-opponent definition).

E. OPINION RULE DOES NOT EXCLUDE ADMISSIONS

Admissions come into evidence even though they are in the form of an opinion. Because the Opinion Rule is only a rule of preference for detailed accounts over broad assertions, and because a lawyer has no opportunity to reframe his or her question when the statement is made out of court, the Opinion Rule is, in the words of McCormick, "grotesquely misapplied" to admissions. 2 McCormick on Evidence § 256, at 141 (Strong ed. 1999); 4 Wigmore, Evidence (Chadbourn rev. 1972) § 1053, at 19-21; *United States v. Haldeman*, 559 F.2d 31, 110 (D.C.Cir. 1976).

Not only are admissions in the form of opinions admissible, but also admissions embracing conclusions of law. McCormick says:

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> These statements normally include an application of a standard to the facts; thus they reveal the facts as the declarant thinks them to be, to which the standard of "fault" or other legal or moral standard involved in the statement was applied. In these circumstances, the factual information conveyed should not be ignored merely because the statement may also indicate the party's assumptions about the law.

2 McCormick on Evidence, § 256, at 141 (Strong ed. 1999). McCormick adds that exclusion of an admission is warranted where a legal principle is so technical as to deprive an admission of significance or the party gives an opinion regarding solely an abstract issue of law. 2 McCormick on Evidence, § 256, at 141 (Strong ed. 1999).

The following examples illustrate how opinions embracing legal conclusions that would otherwise be inadmissible come into evidence when they are admissions.

1. Scenario No. 1

You are in the antitrust action discussed earlier (Part 1 of this article), except now you are trying to prove that Mr. Smith attempted to monopolize a part of the trade or commerce among the several states. We have already seen that a witness may not testify that "Mr. Smith attempted to monopolize a part of the trade or commerce among the several states." If, however, you have a letter from Mr. Smith stating, "My marketing tactics are designed to restrict competition," this letter will come in as an admission. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1143 (7th Cir. 1983).

2. Scenario No. 2

In a personal injury action, a nonparty witness is prepared to testify, without much foundation, that an accident was caused by the defendant's negligence, that it was all defendant's fault. Will this come in? Probably not. Most courts exclude such testimony as evidence that merely tells the jury what result to reach. (These same courts do allow a witness to testify about the factual cause of an accident and, if the witness is qualified, to give an opinion whether the defendant exercised reasonable care.) *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). If, however, the defendant has made the statement, "It's all my fault," this will come in as an admission. Annot., 118 A.L.R. 1230 (1939); *Washington v. Taseca Homes Inc.*, 310 Or. 783, 802 P.2d 70 (1990)(defendant's admission that no carelessness of plaintiff caused the collision was admissible); *see Brookover v. Mary Hitchcock Memorial Hosp.*, 893 F.2d 411, 415-18 (1st Cir. 1990).

3. Scenario No. 3

In a breach of contract action, defendant denies having any obligation under the contract. An expert is prepared to interpret the contract for the jury and to testify about the defendant's legal obligations under the contract. Will this come in? Probably not. Unless "usage" is an issue, most courts will hold that construction of an unambiguous contract is solely for the judge, and that interpretation of an ambiguous contract is for the jury. *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 508-12 (2d Cir. 1977); *Ristau v. Wescold Inc.*, 318 Or. 383, 387, 868 P.2d 1331 (1994); *Card v. Stirnweis*, 232 Or. 123, 374 P.2d 472 (1962); *Hurst v. Lake & Co., Inc.*, 141 Or. 306, 314-15, 16 P.2d 627 (1933); Charles F. Adams, Contract Litigation: The Role of Judge and Jury and the Standards of Review on Appeal, 28 Will. L.J. 223 (1992). If, on the other hand, you have a letter from one of defendant's employees acknowledging defendant's obligations under the contract, this letter will come in as a vicarious admission. *Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 7-9 (1st Cir. 1986).

When admissions are offered, no one cares much about knowledge or opinion. Here the adversary system takes over and fair or not, the rules provide no evidentiary shield to parties who shoot themselves in the foot with their ignorant opinions.

III. CONCLUSION

Following from the basic rules of relevancy and unfair prejudice, Rules 401 and 403, the Opinion Rule reflects a conviction that a jury is better able to determine whether a fact in issue is more or less probable when it hears detailed accounts rather than broad assertions. Detailed accounts also decrease the danger of unfair prejudice, confusion of the issues, and misleading the jury.

The Opinion Rule also reflects the conviction that, in general, the jury should have all relevant information available to help it determine the facts in issue. Advisory Committee Notes, Rule 704; Rule 402. If, after hearing a witness give the most detailed account practical, the judge believes there is still more information available from the witness, but that it is unrealistic to force the witness to unravel the agglomerate of sensations that combined in his or her mind to form an opinion or inference, then the judge will usually let the witness testify in the form of an opinion or inference. The testimony increases the relevant information available to the jury and thus helps the jury determine the facts in issue. Advisory Committee Notes, Rule 704.

When admissions are offered, no one cares much about knowledge or opinion. Here the adversary system takes over and fair or not, the rules provide no evidentiary shield to parties who shoot themselves in the foot with their ignorant opinions. ❐

TAKING VIDEO DEPOSITIONS — LEGAL ISSUES

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

This article provides an issue-based summary of current procedure governing the taking of video depositions in Oregon state and federal courts. For ease of reference, we may refer to such visual record as a videotape, although current technology permits electronic or digital visual recording. We do not cover practical issues related to videotaping, such as modifying preparation of the deponent or editing video testimony, or to the use of video deposition testimony with respect to various aspects of litigation preparation, court proceedings, or settlement. David Markowitz will address those practical issues on March 8, 2002, in a CLE presentation at the Litigation Section's 9th Annual Litigation Institute & Retreat. As noted below, although ORCP 39 and Fed. R. Civ. P. 30 are the rules generally governing depositions, litigators may have to look beyond those rules for guidance.

Right to videotape.

Both ORCP 39 and Rule 30 provide that a party may videotape deposition testimony. Under ORCP 39 D(2), a deposition is to be recorded stenographically or else pursuant to ORCP 39 C(4), which allows for testimony to be recorded by other than stenographic means. A trial court has no discretion under ORCP 39 C(4) to prohibit videotaping; it is a right. *State ex rel Anderson v. Miller*, 320 Or 316, 318-19, 882 P2d 1109 (1994). However, a court may require stenography "if necessary to assure that the recording be accurate," ORCP 39 C(4), and a party may seek a protective order to prohibit or limit videotaping under ORCP 36 C, *Miller*, 320 Or at 319, or ORCP 39 E.

Prior to 1993, video depositions in federal court actions were not permitted as of right. Since 1993 amendments to Rule 30(b),[1] depositions may be videotaped at the election of a party noticing the deposition. Under Rule 30(b)(2), unless the court orders otherwise, a deposition "may be recorded by sound, sound-and-visual, or stenographic means." As in Oregon courts, a party in federal court may seek a protective order should circumstances warrant it, pursuant to Fed. R. Civ. P. 26(c), *Wilson v. Olathe Bank*, 184 F.R.D. 395, 396 (D. Kan. 1999), or Rule 30(d)(4) once a deposition begins. Thus, in *Paisley Park Enterprises, Inc. v. Uptown Productions*, 54 F. Supp. 2d 347 (S.D.N.Y. 1999), the court ruled that although a videotaped deposition of Prince, a musician and entertainment figure, would be allowed by defendants accused of making unauthorized use of Prince's name, likeness, and other intellectual property, the defendants would have restricted access to the videotape to prevent them from exploiting it for commercial purposes, such as posting on their website.

Proper notice. In both state and federal actions, parties must provide notice of the video recording method if it is to be used. General notice requirements for state court depositions are covered in ORCP 39 C(1). A party need not state that stenographic recording will be used; that is the default method. *See* ORCP 39 C(1) and (4). However, if non-stenographic recording will be used, "the notice shall designate the manner of recording and preserving the deposition." ORCP 39 C(4). By providing that "[u]pon request of a party or deponent and payment of the reasonable charges therefore the testimony shall be transcribed," Rule 39 C(4) appears to allow other parties or the deponent to notify the party taking the deposition that a simultaneous stenographic transcription of the testimony will also be made.

The party taking the deposition must affirmatively state the recording method to be used in federal court depositions. Under Rule 30(b)(2), in addition to other information required by Fed. R. Civ. P. 30(b)(1), the "party taking the deposition shall state in the notice the method by which the testimony shall be recorded." Rule 30(b)(3) provides other parties with the express right to notify the deponent and other parties that they will record testimony by an additional, different method at their own expense.

Dual recordation with stenography. Neither ORCP 39 nor Rule 30 requires the party conducting the deposition to ensure both video and stenographic recording at the same time. In Oregon courts, Rule 39 D(2) allows another party or de-

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ponent to request, and pay for, stenographic transcription.

In federal court, under Rule 30(b)(2), to the extent that a party designates video recording without simultaneous stenographic recording and no other method of recording is cross-designated, any "party may arrange for a transcription to be made from the recording."

However, simultaneous stenographic transcription may assist in selection of testimony and editing. In addition, in federal court, a transcript of pertinent video deposition testimony to be used at trial must be provided to the court in pretrial disclosures under Fed. R. Civ. P. 26(a)(3)(B) and use in motion practice pursuant to Fed. R. Civ. P. 32(c), unless otherwise ordered by the court. Whether to use dual recordation may be influenced by costs, both initial costs and whether the expense is recoverable by the prevailing party through taxation of costs.

Costs of videotaping initially. Under the Oregon rules, by implication, the party noticing the video deposition pays for the videotaping. *See* ORCP 39 D(2) and 39 G(4). Any party or the deponent shall pay for copies of the video, and the party that took the video deposition shall furnish copies. ORCP 39 G(4).

The federal rules expressly address payment for recordation of deposition testimony. The party noticing the deposition pays for the videotaping initially. Rule 30(b)(2). A party who designates an additional method of recordation pays for that record unless the court orders otherwise. Rule 30(b)(3).

Recovery of deposition expenses as a taxable cost.

Under ORCP 68, the "expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute."

Under Fed. R. Civ. P. 54(d)(1), "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs" or they are barred by a rule or statute. Pursuant to 28 U.S.C. § 1920(2), "court reporter" fees "for all or any part of the stenographic transcript necessarily obtained for use in the case" are awarded as costs to the prevailing party absent a statute to the contrary.

The Ninth Circuit has not addressed to what extent the costs of video depositions will be taxed against the losing party in any published opinion.[2] Nationally, courts are divided on how such costs are awarded. Some courts hold that the plain text of § 1920(2) does not permit costs for video depositions at all. Others permit an award of costs for only one method of recordation when both stenography and video were used in a deposition. Other courts allow an award for both because the civil rules require written transcripts to be able to use video depositions in dispositive motions and in trial. *See generally* Kurtis A. Kemper, Annotation, *Taxation of Costs Associated with Videotaped Depositions under 28 U.S.C.A § 1920 and Rule 54(d) of Federal Rules of Civil Procedure*, 156 ALR Fed 311, 321-23 (1999).

Mandated requirements for videographer. Oregon rules do not on their face require that the videographer generally be a person authorized to administer oaths under Oregon law. Although "the deposition shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths," ORCP 38 A(1), and that officer "shall put the deponent on oath," ORCP 39 D(1), the rules do not specify that the deposition must be taken before such as an officer. However, there may be specific limitations on those who may be a videographer, even if there are no minimum qualifications stated in the civil rules.

In 1999, the Oregon legislature enacted a number of statutes relating to the reporting of depositions. First, ORS 45.135 enumerates those who are disqualified from "stenographically" reporting a deposition in a civil action, ORS 45.135(1), and states that any "deposition recorded or reported by a person in violation of this section may not be introduced in evidence or used for any other purpose in a civil action." ORS 45.135(2). Pursuant to ORS 45.138, reporters have certain duties, including personal responsibility "for the accurate and complete recording or reporting of the deposition" and equal treatment for the litigants in the proceeding. Under ORS 45.142, a court reporter must disclose any contract to provide reporting services for depositions for parties or those with a financial interest in the outcome and their attorneys, and a party may object to the reporter. The broad language in ORS 45.135(2) and the use of the terms "recording and reporting" in the other two statutes strongly suggests that a videographer or a person recording a deposition by sound, even if not literally a stenographer, cannot be among those listed in ORS 45.135(1).[3]

The federal rules provide that, unless otherwise stipulated, the deposition must be taken before an officer authorized to administer oaths. Fed. R. Civ. P. 28(a). Rule 30(b)(4) provides that absent agreement, "a deposition shall be conducted before an officer appointed or designated under Rule 28." Under Rule 28(c), the deposition cannot be taken "before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is finan-

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cially interested in the action." Thus, if a party administers the oath, the deposition is not usable. *Ott v. Stipe Law Firm*, 169 F.R.D. 380, 381 (E.D. Okla. 1996). Although it might be argued that Rule 28(c) requires an independent camera operator, a number of courts have concluded that the federal rules do not directly address whether the camera operator must be independent.

In *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 522 (D.C.C. 1975), for example, the court analyzed whether an independent operator was required to preserve trustworthiness and accuracy in light of one of the purposes for allowing non-stenographic recording, namely, cost reduction. The court would not require an independent operator unless there were no other alternatives to guarantee trustworthiness. In *Ott*, one of the plaintiff's attorneys operated the video camera. 169 F.R.D. at 381. The district court agreed that Rule 28 did not prohibit the attorney from doing so, *id.*, and absent any indication of irregularities in the recording, the court would not strike those depositions for which counsel was the videographer. 169 F.R.D. at 382. In *Rice's Toyota World, Inc. v. Southeast Toyota Distributors, Inc.*, 114 F.R.D. 647, 651 (M.D.N.C. 1987), the court similarly ruled that counsel's operation of the camera was not barred by Rule 28, explaining in part that a stenographer is different from someone making a "stationary video recording," who does not engage in interpretation of what people say during the deposition.

Videotaping only a portion of the deposition. Continued depositions occur in state proceedings, and although in federal court, depositions are now presumptively limited in duration and theoretically should be completed in one day, occasions still arise when depositions are continued. An attorney may wish to videotape the continuation of the deposition for a variety of reasons, including capturing conduct by the witness or one of the attorneys observed at the first session of the deposition that will not appear in the stenographic transcript. Can

a party re-designate the method of recordation for the continued portion of the deposition or otherwise choose to videotape only part of a deposition?

Our firm has successfully excluded video recordings from trial when only part of the deposition was videotaped and a timely objection was made at the time of the deposition. *See Barman v. Union Oil Co. of California*, No. CV 97-563-AS (2000) (unpublished ruling on motion in limine available through our office on request). In both Oregon and federal actions, if only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce all of it that is relevant and in fairness should be introduced. ORS 45.260; Fed. R. Evid. 106; Fed. R. Civ. P. 32(a)(4). Our argument is based primarily on the inability to exercise a right to introduce other portions of the deposition that were not videotaped. There are courts that have allowed switching the method of recording, however. In *Riley v. Murdock*, 156 F.R.D. 130, 130-31 (E.D.N.C. 1994), the court denied a motion for protective order to prevent the plaintiff from switching from stenography to video recording of the defendant's deposition, despite the defendant's argument that video would unfairly emphasize those portions of testimony videotaped over those stenographically recorded. The court addressed this by allowing any of the defendants, including the deponent, the choice to repeat questions previously recorded stenographically during the video testimony.

How videotaping occurs at the deposition. The manner of videotaping depositions can raise a host of concerns for attorneys. Considerations may include the conditions of the room; the backdrop and lighting; camera placement, angle, and movement/zooming; what activity will be "on the record," such as the reading of exhibits by the witness; who will wear a microphone; who will appear on-screen, including the number of cameras; and whether the recording is in color or black and white. The current local practice is to have a color video camera focused on the witness only and set up so that when answering the questions posed, the witness faces the camera, with microphones for the witness and the attorney conducting the deposition. The civil rules provide little guidance in these matters, although a few cases have addressed various practical concerns. *See, e.g., Rice's Toyota World*, 114 F.R.D. at 652 (single stationary camera running continuously with no special lighting); *In re Daniels*, 69 F.R.D. 579, 582 (N.D. Ga. 1975) (no zoom lens).

The Oregon and federal rules appear directed to tampering with or distortion of the recording rather than to its mechanics. Rule 30(b)(4) requires that the videographer make certain identifications at the beginning of each unit of videotape and states that the "appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques." The Oregon rule appears devoid of any practical requirements for the taking of videotaped deposition testimony. However, for any video deposition to be used in an action, the attorney for the party taking the deposition "shall certify under oath that the recording" is "a true, complete, and accurate recording of the deposition of the witness and that the recording has

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not been altered." ORCP 39 G(1).[4]

Should the parties disagree regarding the mechanics or conditions of the videotaping, any objections must be raised at the time of the deposition or else they are waived. "Errors and irregularities occurring at the oral examination in the manner of taking the deposition, . . . in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition." ORCP 41 C(2); *accord* Fed. R. Civ. P. 32(d)(3)(B). This would also apply to improper or bad faith conduct of counsel or others at the deposition. Such behavior during video depositions can lead to sanctions. In one case, after a defense verdict, a federal district court granted the plaintiff a new trial because of defense counsel's bad faith objections during the video deposition of the plaintiff's expert. Because the expert was unable to attend trial, the conduct during the deposition testimony so interfered with that expert's presentation to the jury that it became "a hodgepodge, completely lacking in direction and continuity." *Kelly v. GAF Corp.*, 115 F.R.D. 257, 257 (E.D. Pa. 1987).

Finally, any "errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with under Rules 39 and 40 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained." ORCP 41 D; *accord* Fed. R. Civ. P. 32(d)(4).

To alleviate disputes, parties may wish to specify and stipulate to the conditions under which video depositions will be taken. An example of an order concerning the same can be found in *In re Norplant Contraceptive Products Liability Litigation*, No. MDL 1038, 1996 WL 42053 at *4-*5 (E.D. Tex. Jan. 19, 1996) (procedural order that addresses, among other things, conditions for videotaped depositions, including the application of Rule 28(c) to the videographer, the camera system, simultaneous stenographic recording, and interruptions in camera operation). ❐

1 The amendments and Advisory Committee notes regarding Rule 30 can be found in Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401 (1993).

2 In *Williams v. Rockwell International Corp.*, 116 F.3d 488 (9th Cir. 1997) (unpublished), the Ninth Circuit affirmed an award of costs that included expenses for videotaping depositions.

3 The prohibited individuals are: (a) a party; (b) a person with a financial interest in the outcome of the action; (c) an attorney for a party; (d) an attorney for a person with a financial interest in the outcome; (e) an employee of a party; (f) an employee of an attorney for a party; (g) an employee of a person with a financial interest in the outcome; (h) an employee of an attorney for a person with a financial interest in the outcome; or (i) a person related, by affinity or consanguinity within the third degree, to a party in the action or to a person with a financial interest in the outcome of the action.

4 Surprisingly, there is a Uniform Audio-Visual Deposition Act, 12 U.L.A. 56 (1978). It too lacks standards for recording video depositions, although § 6 of the Act would allow an appropriate body, such as the state supreme court, to set statewide standards, and the committee that prepared the Act recommended uniform standards. The Act has been adopted in North Dakota and Virginia. 12 U.L.A. at 51.

FROM THE CHAIR

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Thomas A. Zlaket, Chief Justice of the Arizona Supreme Court, delivered the Convention's keynote address on Friday, September 21, 2001, at 9:30 a.m. Chief Justice Zlaket was a highly-regarded trial attorney before joining the Arizona Supreme Court in 1992. He enjoys a national reputation, both as a jurist and for his efforts to reinforce the importance of honesty among members of the Bar.

Dick Scruggs, of Mississippi, is well known for his involvement in the national tobacco litigation. He also spoke on September 21, 2001. His presentation, Designing Litigation Strategies, began at 2:30 p.m.

The Litigation Section conducted its annual meeting, including the election of members and officers of the Executive Committee, immediately following the conclusion of Dick Scruggs' CLE at approximately 4:00 p.m., at the Seaside Convention Center Inn, located across the street from the Seaside Convention Center. The Executive Committee conducted a meeting at the same time.

The Executive Committee is working on a number of projects, including consideration of a detailed statement of professional principles, and development of a web page.

The Executive Committee broadly represents the diversity of the Litigation Section, both in practice area and demographics. By the end of 2001, the committee will have met four times around the state, in four separate Congressional districts. All the meetings will have taken place outside of the Portland Metropolitan Area.

I want to thank each of the Executive Committee Members for their efforts on behalf of the Litigation Section: Greg Mowe – Chair Elect, Theresa Wright – Secretary, Karen Saul – Treasurer, Richard Forcum – Past Chair, Dennis Rawlinson – Ex-officio, Kathryn Chase, Susan Eggum, Gene Hallman, Honorable Karla Knieps, Richard A. Lane, Mark Spence, David Terry, and Valerie Wright. ❐

HOW MUCH IS TOO MUCH?

The Evolving Law Governing Judicial Review of Punitive Damage Awards

By Scott G. Seidman and Frank J. Weiss of Tonkon Torp LLP

In its celebrated decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the U.S. Supreme Court definitively established a substantive due process limitation on grossly excessive punitive damage awards. The Court set out three criteria to be considered by courts evaluating whether a punitive damage award is consistent with due process: (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the harm suffered and the punitive damages awarded, and (3) the difference between punitive damages awarded by the jury and the civil penalties imposed in comparable cases. *Id.* at 574-575. The Court, however, did not provide clear guidance on the standard of review to be used by courts analyzing the constitutionality of a punitive damage award in light of these factors.

Scott G. Seidman

Frank J. Weiss

In its celebrated decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the U.S. Supreme Court definitively established a substantive due process limitation on grossly excessive punitive damage awards.

1. The U.S. Supreme Court's Recent Holding on the Proper Standard of Review

The Court took up this unresolved question earlier this year in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, __ U.S. __, 121 S. Ct. 1678 (2001). Leatherman manufactures a multifunction tool kit, described as an improvement on the classic Swiss army knife. Cooper Industries planned on introducing a competing tool and used photographs of a modified version of the Leatherman tool for use in its advertising campaign. Leatherman filed suit in Oregon District Court for unfair competition under the Lanham Act. Ultimately, the jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages. The district court rejected Cooper's argument that the punitive damage award was grossly excessive under *Gore*. The Ninth Circuit upheld the award, concluding that the district court did not abuse its discretion by declining to reduce the award.

The principal issue on appeal before the U.S. Supreme Court was whether the court of appeals applied the proper standard of review in considering the constitutionality of the punitive damage award. The Supreme Court concluded that the wrong standard of review was applied. Rather than using a deferential abuse-of-discretion standard, the Ninth Circuit should have conducted a de novo review of the constitutionality of the punitive damages.

The Supreme Court noted that an independent judicial analysis of the relevant criteria has historically been applied in other cases in which a constitutional violation was predicated on a judicial determination that the punishment is grossly disproportionate to the gravity of the defendant's offense. The Court compared review of whether punitive damages were grossly excessive to the review of decisions concerning the presence of "probable cause" or "reasonable suspicion," and articulated three reasons favoring de novo review of these determinations:

> First, . . . the precise meaning of concepts like "reasonable suspicion" and "probable cause" cannot be articulated with precision; they are fluid concepts that take their substantive content from the particular contexts in which they are being assessed. That is, of course, also a characteristic of the concept of gross excessiveness. Second, the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are

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> to maintain control of, and to clarify, the legal principles. Again, this is also true of the general criteria set forth in *Gore*; they will acquire more meaningful content through case-by-case application at the appellate level. Finally, de novo review tends to unify precedent and stabilize the law.

Leatherman, 121 S. Ct. at 1685 (citations and internal quotations omitted). De novo review was found to provide predictability and uniformity. "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Id.* (citations omitted).

The Court further reasoned that, unlike the measure of actual damages suffered, which presents a question of historical fact, the level of punitive damages is not a "fact" to be tried by a jury. Because a jury's award of punitive damages is not a finding of fact, de novo appellate review of the constitutionality of a punitive damage award was found to be consistent with the Seventh Amendment's Reexamination Clause.

2. The State of the Law in Oregon

The latest word in Oregon on the standard of review to be applied when reviewing a punitive damage award is the Oregon Supreme Court's opinion in *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537 (2001). In *Parrott*, the jury awarded $11,496 in compensatory damages and $1,000,000 in punitive damages to a purchaser of a used Suburban that was found to have undisclosed defects. The trial court ruled that the punitive damage award was excessive and reduced it to $50,000. The appellate court reversed the trial court's reduction of punitive damages and remanded with instructions to grant the defendant's motion for a new trial unless plaintiff filed a remittitur of punitive damages in the amount of $300,000. Both parties appealed this decision to the Oregon Supreme Court.

Parrott blessed the rational juror standard and announced that the *Gore* factors were simply part of the equation in determining whether a punitive damages award is consistent with what a rational juror might award.

As enunciated by the court, "[t]he primary issue on review was the appropriate standard for post-verdict judicial review of a punitive damages award in Oregon in light of the Supreme Court's decision in *BMW of North America v. Gore*." *Id.* at 541. Prior to *Gore*, Oregon courts utilized a "rational juror" standard to determine if a punitive damage award was unconstitutionally excessive. This standard was announced in *Oberg v. Honda Motor Co.*, 320 Or. 544, 549 (1996), where the court held that a "jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue."

In *Parrott*, the defendant argued that the due process analysis articulated by the Supreme Court in *Gore* supplanted Oregon's rational juror standard. The *Parrott* court disagreed. Instead, the court concluded that the *Gore* decision did not impact the level of deference to be given to a jury's punitive damage award. The court concluded:

> [T]he rational juror inquiry survives as the standard for post-verdict judicial review of an award of punitive damages in Oregon under the Fourteenth Amendment. A jury's punitive damages award is not "grossly excessive" – and, therefore, will not be disturbed on review – if it is within the range that a reasonable juror would be entitled to award in light of the record as a whole. Combining the factors announced by the Supreme Court in *Gore* with those announced by this court in *Oberg* (state), the range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct.

Parrott, 331 Or. at 555 (citations omitted). In short, *Parrott* blessed the rational juror standard and announced that the *Gore* factors were simply part of the equation in determining whether a punitive damages award is consistent with what a rational juror might award. Accordingly, under *Parrott*, judicial review of punitive damage awards is highly deferential. A reviewing court is obligated to uphold the award as long as it is an amount that could be awarded by a rational juror.

3. What Does *Leatherman* Mean for Judicial Review of Punitive Damages in Oregon?

No Oregon court has analyzed the

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impact of the U.S. Supreme Court's decision in *Leatherman* on the Oregon rational juror standard. *Leatherman* could revolutionize judicial review of punitive damage decisions in Oregon, but it also might have virtually no effect at all.

On the one hand, *Leatherman* seems to call into question the continuing vitality of the rational juror standard where there is a constitutional challenge to a punitive damage award. In the absence of a due process challenge, a jury's punitive damage award will be considered a fact determination entitled to deference. But the question of whether the award is constitutionally excessive is one of law. *Leatherman* comes down strongly in favor of independent, non-deferential, judicial review of this question. The decision cites the benefits of an independent judicial review as (1) giving meaning to the fluid concept of gross excessiveness; (2) permitting the courts to clarify the *Gore* criteria by giving meaning to the legal concepts over time; and (3) stabilizing and unifying the law. The due process limitation on punitive damage awards was found to be best served by an independent review that would assure predictability and uniformity, rather than permitting the process to be governed by a "decisionmaker's caprice."

Although the *Leatherman* decision addressed only the standard to be applied to appellate review of a trial judge's refusal to reduce a punitive damage award, it is easy to see how the rationale could be applied across all levels of judicial review. If the goal is to achieve uniformity and predictability, there is little benefit in requiring a trial court to uphold an award so long as it is in an amount that a "rational juror" could approve of.

The analysis is even starker when applied to appellate review. Requiring an appellate court to uphold a punitive damage award if it comports with what a reasonable juror might do, regardless of the court's own view about whether the award comports with the due process standard articulated in *Gore*, would seriously undermine the benefits that the Court sought to achieve in *Leatherman*. Independent judicial scrutiny would be sacrificed in favor of deference to what a reasonable juror might do. Such deference would not vary significantly from application of the abuse-of-discretion standard that the Court explicitly disapproved in *Leatherman*.

If the goal is to achieve uniformity and predictability, there is little benefit in requiring a trial court to uphold an award so long as it is in an amount that a "rational juror" could approve of.

On the other hand, *Leatherman* may have little impact on the standard of review in Oregon. The only Oregon court to mention the *Leatherman* decision to date discussed it in a footnote. *See Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 302 n. 5 (2001). In *Waddill*, the court of appeals upheld a $1,000,000 punitive damage award, finding that it was within the range that a reasonable juror could award under the criteria identified in *Parrott*. The court refused the defendant's request to file a memorandum on remand addressing, among other things, the then-new *Leatherman* decision. The court of appeals held that additional briefing relating to *Leatherman* was unnecessary, in part because the court concluded that it had reviewed the punitive damage award in the manner dictated in *Leatherman*. The court of appeals plainly believed that *Leatherman* had no impact on the viability of the rational juror standard and did not obligate it to independently consider the *Gore* criteria without reference to what a reasonable juror might do. Instead, it seemed to conclude that *Leatherman* was satisfied by conducting de novo review of the trial court's decision that the award was within the range that could be awarded by a rational juror. In other words, the court of appeals need only consider if, as a matter of law, a reasonable juror could have approved the award.

The *Waddill* court may well have thought that an award that passes the rational juror test by definition could not be grossly excessive. However, it can equally be argued that a punitive damages award may at once be both rational and grossly excessive. In *Parrott*, for example, a reviewing court could decide that a rational juror might find a $1 Million award an appropriate punishment for selling a vehicle without disclosing it had a "flagged" title. At the same time, such a "rational" award might also be constitutionally excessive, if it were grossly out of proportion to any previous award in comparable cases or to any civil fines possible under applicable statutes, such as Oregon's Unfair Trade Practices Act. Has the defendant been placed on notice consistently with the U.S. Constitution that a $1 Million punishment might result from its actions, and has the defendant been treated consistently with other defendants in similar circumstances? Juries are not asked, and are not in a position, to consider comparable punishments or sufficiency of notice in their deliberations. If *Waddill* is any indication, however, Oregon courts may well be inclined to read *Leatherman* narrowly, such that the decision will have very little, if any, practical impact on the review of punitive damages in Oregon, unless the U.S. Supreme Court says otherwise.

4. Conclusion

Oregon has been the source of much of the U.S. Supreme Court's recent jurisprudence on the constitutionality of punitive damage awards. In *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331 (1994), the Court held that Oregon's

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denial of review of the size of punitive damage awards violated the Fourteenth Amendment's Due Process Clause. The *Leatherman* case itself arose out of Oregon's Federal District Court. Oregon's rational juror standard will certainly be subject to review in the courts of this state and could well join its Oregon ancestors as the subject of Supreme Court scrutiny one day. For now, the impact of *Leatherman* on the review of punitive damages in Oregon remains unclear, and it may take years for the issue to be finally resolved. ❐

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THE IMPACT OF HIPAA ON LITIGATION PRACTICE

By Kelly T. Hagan of Schwabe, Williamson & Wyatt, PC

Buried in the hundreds of pages of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") are a handful of paragraphs anticipating federal regulation of health care privacy. Five years after HIPAA's enactment, the federal privacy rules are final, and health care providers, insurers and others in the health care industry have two years in which to comply.

And so do their attorneys. Effectively all attorneys who use individually identifiable health information ("IIHI") are subject, albeit indirectly, to HIPAA's privacy rules. The rules will work substantial changes in how attorneys use, disclose, and handle medical records and other forms of IIHI. Relationships with clients will be encumbered by new ethical and practical burdens. State laws governing medical privacy, civil procedure and legal process will be scrutinized for conformity with federal law. State laws and procedures found wanting under federal privacy standards will be preempted.

The Bush administration promises "modifications and clarifications" of the Clinton-era privacy rules. As the following suggests, we could use some. But the administration's decision to move ahead with implementation, rather than to delay and substantially revise the rules as industry groups urged, signals a continued federal commitment to the general outlines of HIPAA's privacy regulations. It appears therefore that HIPAA is here to stay. The following provides a glimpse of the HIPAA rules and their likely impact on litigators and other attorneys who use IIHI in their practices.

HIPAA 101

HISTORY

HIPAA's core objective is to standardize and streamline electronic data transfer in the nation's health care system. In October 2002, the nation's providers, insurers, government agencies and data processing vendors literally will be speaking the same language for the first time.

HIPAA's goal of expanding and efficient access to patient information also raises privacy concerns. Accordingly, Congress in 1996 decreed that if it failed to adopt patient privacy legislation by August 1999, then the Department of Health and Human Services ("DHHS") must propose administrative rules to protect privacy in the more efficient electronic environment that HIPAA envisions for the health care system. Congress failed to pass privacy legislation and Secretary Donna Shalala duly proposed administrative rules in November 1999. Tens of thousands of comments on the proposed rules were received. Originally scheduled to become effective February 21, 2000, the comment period was extended to February 17, 2001, and then reopened by the Bush administration for a month in March 2001. The rules ultimately became final April 14, 2001. Covered entities must be in compliance with the rules by April 13, 2003.

SCOPE AND APPLICATION

Covered Entities. The rules apply directly to "covered entities": health care providers, health plans, and health care clearinghouses. "Health care provider" includes health care facilities, licensed practitioners, and suppliers of health care services or supplies. "Health plan" includes private insurers, public health pro-

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grams, HMOs, health care service contractors, Medicare + Choice organizations and most insured or self-insured group health plans. Workers' compensation insurers are not covered entities, although they predictably will come into possession of IIHI. "Health care clearinghouse" includes billing services, repricing companies and other information services suppliers.

Protected Information. The rules protect IIHI in any form: oral, written, or electronic. Information need not be labeled with an individual's name to be identifiable. It is sufficient that the information, either alone or in combination with other information, permits an individual's identity to be determined.

Preemption: HIPAA does not preempt the field of patient privacy. No federal law is affected; other federal laws regulating privacy also must be obeyed. State law that is contrary to and less stringent than HIPAA in protecting patient privacy is preempted. The result is a patchwork quilt of federal and state regulations, with a federal floor and additional layers of state protection. State laws affording heightened protection to sensitive records, such as HIV test information, are preserved.

Sanctions. HIPAA authorizes both civil and criminal penalties for privacy violations. Civil penalties of $100 per violation up to $25,000 annually for each privacy standard are authorized. Corrective action may cure unknowing violations if undertaken within 30 days of actual or imputed knowledge of the violation. Criminal sanctions range from $50,000 to $250,000 per violation and prison terms of up to ten years, with sanctions escalating for violations committed under false pretenses or for pecuniary gain.

Security Rules. HIPAA also requires that IIHI be securely maintained and transmitted. HIPAA security rules, although not yet final, will work in parallel with the privacy rules. The proposed security rules provide for "chain or trust" agreements much like the business associate agreements discussed below, but are focussed on data security and integrity.

KEY CONCEPTS

Consent. Patients must consent to the use or disclosure of IIHI by health care providers for purposes related to treatment, payment and "health care operations." Health care operations include the use of legal services by the covered entity. A provider may condition treatment on the individual's consent.

Authorization. Patient authorization is required for any use or disclosure not permitted by consent; that is, any use or disclosure unrelated to treatment, payment or health care operations. Authorization is more difficult to obtain and requires more detailed explanation of the uses to which IIHI will be put.

Minimum Necessity. Covered entities generally may use or disclose only the minimum amount of IIHI necessary to achieve the purpose of the use or disclosure. The most notable exceptions to this restriction are IIHI shared between health care providers for purposes of treatment and disclosures authorized by the patient.

Patient Rights. Patients enjoy a panoply of rights: to notice of their rights, to access their own health information, to seek amendment and correction of that information, to an accounting of disclosures for purposes other than treatment, payment and health care operations. Patients also must be given the opportunity in some circumstances to restrict or to request restrictions on the use or disclosure of their IIHI.

Business Associates. Persons or organizations that are not themselves "covered entities" nonetheless routinely obtain and use IIHI in rendering services to or on behalf of covered entities. These vendors of services or products are called "business associates" in the privacy rules. Examples include collection agencies, transcription services, and copying companies. Attorneys also fall into this category, as do accountants, compliance consultants, auditors and other professionals receiving IIHI from covered entities in their work.

Recognizing a huge gap in HIPAA's coverage, DHHS determined to regulate business associates indirectly: the privacy rules prohibit covered entities from disclosing IIHI to business associates without first obtaining specific contractual commitments safeguarding patient privacy. Business associates must: (i) only use or disclose IIHI as permitted under the agreement and not in a manner forbidden by the privacy rules if the business associates were a covered entity; (ii) use appropriate safeguards to prevent impermissible uses or disclosures of IIHI; (iii) report violations of contractual or legal

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requirements to the covered entity; (iv) impose the same requirements on agents and subcontractors; (v) provide IIHI access and accountings of disclosures to patients; and (vi) make its records relating to IIHI available to DHHS. These contract elements are mandatory, but they are not exclusive. Risk-shifting and indemnity provisions are possible additional subjects for negotiation.

On termination of the business associate relationship, a business associate must, if feasible, return or destroy all IIHI and retain no copies. Otherwise a business associate must observe all legal and contractual duties so long as it retains IIHI.

Covered Entity Liability for Business Associate Violations. A covered entity is liable for civil monetary penalties for violations of patient privacy by a business associate if the covered entity knows of a pattern of such violations. The covered entity has an affirmative duty to investigate credible evidence of business associate violations.

Private Right of Action. HIPAA does not create a federal right of action for violation of the privacy rules, although administrative complaints may be filed with the Secretary of DHHS. A proposed requirement that patients be identified as third-party beneficiaries in business associate agreements was removed in the final rule. The final rule leaves the issue of third-party beneficiary status for patients to "existing law." The commentary states, however, that "[t]he business associate requirements are intended to protect the subject of the information."

HIPAA FOR LITIGATORS

THE CLIENT RELATIONSHIP

Attorneys are Business Associates. Attorneys receiving IIHI from covered entities in the course of their representation are business associates. The covered entity therefore must obtain a business associate agreement prior to disclosing IIHI to counsel. If the attorney is engaged directly by the covered entity, then the covered entity must propose a business associate agreement. Who drafts the agreement, who advises the client concerning its terms, and whether to include supplemental provisions in the agreement are issues posing practical and ethical problems for the attorney.

Liability Insurers. In the insurance defense context, it is unclear whether a liability insurer is a business associate of the health care provider. This is an issue ripe for clarification by the Bush administration. Assuming however that liability insurers are business associates, an attorney hired by an insurer is a contractor or agent of the insurer for HIPAA purposes. Assuming further that the provider has obtained the required business associate agreement with the insurer, the insurer is required in turn to obtain the same contractual assurances from the attorney. Thus, insurance defense counsel will likely enter into two agreements, one with the insurer and one with the insured.

Contract Terms. The terms of a business associate agreement (or subcontract) are important for a number of reasons. First and foremost, the agreement defines the attorney's permissible use and disclosure of IIHI, and therefore must be drafted broadly enough to allow the attorney to provide adequate representation. Thus, for example, the agreement should provide for disclosure of IIHI in the preparation of witnesses or experts. Business associate agreements that do not provide adequate latitude to the attorney may represent malpractice or ethical pitfalls, even if drafted by someone other than the attorney.

Second, the disclosure of IIHI to an attorney by the covered entity may be no more than is minimally necessary for the purposes of the representation. Authorized disclosures by the attorney to others must be restricted in the same way. The client is permitted to depend on the attorney's professional judgment as to what IIHI is minimally necessary for purposes of the legal services rendered.

Third, the business associate relationship entails restrictions and duties on the part of counsel that may implicate ethical duties. For example, the business associate's duty to make "internal practices, books, and records relating to the use and disclosure of protected health information . . . available to the Secretary [of DHHS] for purposes of determining the covered entity's compliance [with the privacy rules]" may impinge on the attorney-client privilege. The privacy rules' provision for the vicarious liability of covered entities for business associates' wrongful use or disclosure of IIHI means that risk-shifting, and therefore the attorney's self-interest, is an implicit issue in every business associate agreement.

Scope of Consent . . . and Representation. A literal reading of the privacy rules suggests that a health care provider

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may disclose IIHI to counsel, and counsel may use IIHI, only if the patient's prior consent has been obtained. As a practical matter, this consent would take the form of a reference in the consent instrument to a much lengthier form of notice of the provider's privacy policies, which would include the disclosure of IIHI for legal services. Even so, it is not a great way to start out a therapeutic relationship, and hopefully the Bush administration will clarify or modify the need for consent in self-defense situations. Until then, however, counsel in an ongoing attorney-client relationship with the provider should confirm first that the provider's forms of consent and notice permit disclosure to and use of IIHI by attorneys defending claims by a patient or others. A malpractice trap awaits attorneys accustomed to reviewing patient records as the first step in evaluating the client's legal position.

Less clear is the obligation of counsel retained solely for purposes of professional liability defense. Insurance defense counsel presumably is not retained to advise the provider regarding its obligations when disclosing IIHI. Arguably, the obligation to ensure proper consent rests exclusively with the provider or the provider's liability insurer. Cautious insurance defense counsel, however, may wish to ensure that adequate consent is in place, thereby protecting the client and the insurer from additional claims or penalties.

Attorney Self-Interest. A conflict of self-interest may develop between attorney and client with respect to the business associate agreement, particularly in the context of an existing attorney-client relationship. Insurance defense counsel can be reasonably confident that insurers will propose a form of business associate agreement. Smaller covered entities, however, such as an individual physician, may or may not have a form of business associate agreement to propose to counsel. Where no insurer is involved, the attorney may be asked to draft or evaluate a business associate agreement. The latter prospect may require "full disclosure" and the attorney's confirmed recommendation that the client seek independent legal advice. DR 10-101(B). It also bears noting that it is not ethical to negotiate with the client a business associate agreement that limits the attorney's liability for malpractice without full disclosure and independent representation of the client. DR 6-102.

Termination. A mandatory term of the business associate agreement is that, upon termination of the relationship, the business associate must return or destroy all IIHI, and retain no copies. This will represent a change in case closure procedures for some attorneys.

DISCOVERY AND LEGAL PROCESS

Covered entities may disclose IIHI without patient consent or authorization in some situations, including judicial and administrative proceedings. But these exceptions to HIPAA's general rule of nondisclosure require notice to the patient or other means of protecting privacy interests.

Court Orders. The order of a court or administrative tribunal permits disclosure of IIHI. But the covered entity may disclose only the IIHI expressly contemplated by the order.

Subpoenas, Discovery Requests, and Other Legal Process. The privacy rules permit a covered entity to disclose IIHI pursuant to subpoenas, discovery requests, or other legal process only after obtaining "satisfactory assurances" that the requesting party has made a reasonable effort to provide written notice of the request to the patient or to obtain a "qualified protective order." "Satisfactory assurances" of notice means a written declaration and documentation of a good faith effort to provide the patient with written notice sufficient to permit the patient to raise objections to the tribunal, the patient's failure to raise a timely objection or the resolution of such objection by the tribunal. "Satisfactory assurances" of efforts to obtain a protective order means a written declaration and documentation of an order submitted either jointly by the parties or by the requesting party. A "qualified protective order" prohibits the use of IIHI for any purpose other than the proceeding and provides for the return or destruction of IIHI after the case has closed, with no copies retained. Disclosures pursuant to subpoenas, discovery requests and other process are subject to the "minimum necessity" standard; *i.e.*, only IIHI expressly

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called for by the request may be disclosed or made available to the requesting party.

***Ex Parte* Contacts.** Since *State ex rel Grimm v. Ashmanskas*, 298 Or. 206, 690 P.2d 1063 (1984), many in the malpractice defense bar have asserted a right to meet with willing treating physicians on an *ex parte* basis. While plaintiffs may be deemed to waive the physician-patient evidentiary privilege by deposing treating physicians, voluntary disclosures by physicians are inconsistent with HIPAA's general prohibition of unauthorized disclosures. It therefore seems likely that HIPAA will end the practice of *ex parte* interviews.

ORCP 55. The relationship of the privacy rules to ORCP 55H and 55I is complex. ORCP 55H(2) defers to federal law protecting hospital records: "[I]f disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requirements of the pertinent law have been complied with and such compliance is evidenced through an appropriate court order or through execution of an appropriate consent." This provision is likely intended to take account of drug and alcohol treatment or mental health records, which require consent or a court order for disclosure. Nonetheless, ORCP 55H(2) is not so limited, and a literal reading suggests the need for an appropriate court order or consent evidencing compliance with HIPAA's demand for "satisfactory assurances." This result is obviously impractical and should be examined by the Advisory Committee formed by the 2001 Oregon Legislature.

ORCP 55I does not reference other state or federal law. Thus, the preemption question is whether ORCP 55I supplies the required "satisfactory assurances" of notice. Presumably, fourteen days' prior service of the subpoena on the patient, and proof of service, is adequate notice and documentation. See ORCP 55I(2). What ORCP 55I does not do is require assurances that the patient has not raised a timely objection or, alternatively, that such objections have been resolved by a court or agency. These assurances easily may be added to the proof of service.

CASE PREPARATION

Patient Right of Amendment. HIPAA extends the familiar patient right to access medical information to a right to request that IIHI be supplemented or corrected. The privacy rules contemplate a documented exchange between patient and provider, the upshot of which often will be the provider's explanation of why the patient's requested amendments have not been made. This exchange and explanation becomes a part of the medical record, and must generally be sent with the medical record when disclosure of related IIHI is made.

Although patients always could request changes in IIHI, the privacy rules require for the first time that the health care provider state in writing its reasons for refusing to do so. Creative plaintiff's counsel may use the patient's right of amendment as a prelitigation device to lock in providers' factual positions. Accordingly, counsel for health care providers should be consulted in responding to requests for amendment.

Patient Right of Accounting. HIPAA creates a wholly new right in patients: the right to demand an accounting by health care providers of disclosures of IIHI for purposes of treatment, payment and health care operations. Such a request could be an effective new tool for uncovering or confirming the existence of relevant medical records and information.

CONCLUSION

Call me HIPAA-critical (sorry), but we are all a long way from fully appreciating the impact of the privacy rules. Each new exploration of the rules seemingly reveals new layers of complexity. The good news is that we have a year and a half to come into compliance. The bad news is that we may need it. ❐

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Pro Bono Representation in Death Penalty Cases

Upholding Our Commitment to Fairness

By Per A. Ramfjord[1]

At the core of our judicial system is a commitment to the fair and adequate representation of all criminal defendants. Nowhere is this more true than in death penalty cases. As Justice Blackmun has written, "When we execute a Defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after fair trial. ***"[2]

Unfortunately, our reliance on this fundamental premise is all too often misplaced, particularly in states where a large number of capital murder cases are now prosecuted, such as Texas, Alabama and Florida. Many attorneys representing defendants in these states are underfunded, undertrained, inexperienced and overworked. Others are just plain incompetent. The resulting horror stories include cases in which people have been sentenced to death who were represented by attorneys who slept through trial, were addicted to drugs, had not bothered to read the state's death penalty statute or simply failed to present a defense. In essence, the imposition of the death penalty in these cases has turned not on the nature of the crime or the background of the defendant so much as on the failures of their counsel.[3]

This problem has been exacerbated by the difficulty many capital murder defendants face in obtaining adequate representation during the post-conviction phase of their cases, when many errors are addressed for the first time. There still is no constitutionally-guaranteed right to counsel in post-conviction proceedings and literally hundreds of death row inmates are without counsel and potentially without hope of having their proper day in court.

These issues may seem far away from Oregon but the reality is that they are of national dimensions and attorneys here and elsewhere can and must help. Recognizing this, the American Bar Association has formed a post-conviction Death Penalty Representation Project that is specifically aimed at encouraging firms across the country to become involved in representing death row inmates in obtaining post-conviction relief. My own firm, Stoel Rives LLP, has participated in this program and is currently representing an inmate in Alabama, Timothy Scott Cothren.

Mr. Cothren was convicted of capital murder in 1996 for allegedly killing a convenience store clerk during a robbery. At the time of the offense, Mr. Cothren was 19 years old. He had no adult criminal record, but his life had been extraordinarily difficult. After having excelled in school as a young boy, his world had fallen apart. His mother verbally and physically abused him and eventually abandoned him for drugs. His biological father rejected him and his stepfather threw him out. He dropped out of school at the age of 15 and began living on his own, moving from place to place among friends. By the time he was 19, he had lived in 22 separate locations and descended into a state of emotional disturbance and heavy drug and alcohol abuse.

Mr. Cothren was arrested several days after the offense in the neighboring state of Louisiana. Following his ar-

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rest, he gave a number of statements to the police that ultimately formed the linchpin of the State's case. He was tried in less than four days and his conviction was affirmed by both the Alabama Court of Criminal Appeals and the Alabama Supreme Court.

When we became involved in Mr. Cothren's case, nearly six years had passed since the offense occurred and nearly three years had passed since his trial. Our first task was to earn Mr. Cothren's trust. He was residing at the time in Holman State Penitentiary, an imposing, white-washed facility situated among the open cotton fields of southern Alabama. My partner, Stephen Walters, and I made the initial trip, along with an investigator we had retained, David Lehr. Upon arriving at the prison, we were admitted through electronically-locked gates and asked to empty our pockets and remove our shoes in a check for contraband. We were then led into a large locked room with paint-scratched benches bolted to the floor and barred windows looking into the corridor leading in and out of the cell block. After a few minutes of waiting, during which we began to appreciate just how noisy the prison was, with its slamming gates and yelling prisoners, Mr. Cothren was brought into the room in handcuffs and a white jumpsuit. We introduced ourselves and began the long process of forming a relationship with someone who was more accustomed to rejection than acceptance.

Over the next few months, we spent hundreds of hours poring over the record and interviewing Mr. Cothren, his family, his friends, attorneys, other lawyers, experts, jurors and various individuals connected with the case. We also retained a mental health expert and firearms expert to assist in evaluating and presenting key evidence. Finally, we relied on numerous associates and paralegals to do wide-ranging legal research and to participate in the interviews, all of which they undertook with a high degree of enthusiasm and dedication.

What we learned during these months was that Mr. Cothren suffered from the same type of ineffective representation that has regrettably plagued so many death penalty cases. As is typical in capital cases, Mr. Cothren had been appointed two lawyers. However, they were forced to work for perversely low rates and provided little in the way of resources. Under Alabama law in effect at the time, the most they could receive was $40 per hour for in-court work and $20 for out-of-court work with an overall cap of 50 hours on out-of-court time. The funds they were provided for an investigator were similarly limited and were exhausted after one assignment, leaving nothing for many of the most critical pre-trial tasks, such as reviewing the forensic evidence, obtaining witnesses to corroborate the basic defense theory or locating witnesses to testify during the penalty phase of the trial. Funds for a mental health expert were equally difficult to obtain and were approved so late that it was difficult to prepare the witness for trial.

Faced with this lack of funds and resources, it is unfortunately not surprising that Mr. Cothren's trial counsel spent little time actually preparing for trial. Excluding travel to and from the courthouse, Mr. Cothren's lead counsel spent a mere 12 hours on pre-trial preparation up to the weekend before trial. Mr. Cothren's second-chair attorney, who was primarily responsible for the pretrial investigation, hardly did more, expending 27.5 hours outside of travel during the same time period.

What little time the second-chair attorney spent on the case was also compromised by the fact that he was acutely depressed as a result of marital problems and was drinking excessively throughout the period leading up to the trial. Numerous witnesses with whom we spoke, including the second-chair attorney's secretary, fellow attorneys and a local bartender, stated that he was regularly intoxicated and not functioning normally. Indeed, his condition was so severe that it resulted in an emergency suspension from the Alabama bar shortly after Mr. Cothren's trial and disbarment a year later for failure to attend to various client matters.

As might be expected, these considerations severely impaired the effectiveness of Mr. Cothren's counsel and dramatically compromised the fairness of his trial. One of the most glaring errors we discovered was that Mr. Cothren's second-chair attorney, who was in charge of the investigation, misplaced a transcript containing sworn police testimony showing that the statements Mr. Cothren made to the police—which were the linchpin of the State's case—should have been suppressed. This transcript was originally generated because Mr. Cothren was initially bound over on charges in Mississippi, where a suppression hearing was held before Mr. Cothren's Alabama trial counsel were appointed. At this initial suppression hearing, the arresting officer repeatedly testified that, in response to questioning at the time of his arrest, Mr. Cothren had said "I don't want to answer that until I talk to an attorney." This testimony was confirmed by the officer's arrest report, which stated that "Cothren said he wanted to speak to his lawyer before answering questions." From this, it was clear that Mr. Cothren had unequivocally invoked his right to counsel. Moreover, there was no question that the police were bound by this invocation, given that the officer who processed Mr. Cothren testified at the same hearing that Mr. Cothren never said that he wanted to talk to the police, much less that he wanted to re-initiate questioning.

Following this initial suppression hearing but prior to any ruling on the admissibility of his statements, Mr. Cothren was transferred to Alabama. Recognizing the key importance of the Mississippi testimony, one of the attorneys from the Mississippi hearing made sure that a copy of the transcript was delivered to Mr. Cothren's second-chair counsel in Alabama. Unfortunately, however, Mr. Cothren's second-chair attorney simply "misplaced" the transcript and "forgot" about it.

This loss proved to be critical because

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when the officers came to Alabama to testify in a second suppression hearing, they changed their stories. Rather than testifying that Mr. Cothren said, "I want to talk to an attorney," the arresting officer now testified that Mr. Cothren said, "I think I want to talk to an attorney." Similarly, the officer who processed Mr. Cothren suddenly recalled asking Mr. Cothren if he would be willing to speak with the officers from Alabama and Mississippi, to which Mr. Cothren supposedly replied, "Yeah, no problem."

The obvious explanation for these changes was that the officers were trying to avoid the suppression of Mr. Cothren's statements. Indeed, the first change—from saying "I want to talk to an attorney" to "I think I want to talk to an attorney"—was a transparent response to the United States Supreme Court's recent holding in *Davis v. United States*[4] that requests for counsel must be unequivocal to be effective. That decision, which altered existing law, was issued in the very time period between the Mississippi and Alabama suppression hearings. Likewise, the second change—from denying that Mr. Cothren ever discussed talking with the police to stating that he volunteered to do so—was plainly aimed at allowing the State to argue that Mr. Cothren had consented to the reinitiation of questioning even if his first request for counsel had been valid.

Because Mr. Cothren's trial counsel did not have the transcript of the Mississippi proceedings, however, they were unable to bring these discrepancies to light during the Alabama suppression hearing. As a result, the trial court accepted the officer's Alabama testimony as well as the State's arguments that Mr. Cothren's request for counsel was equivocal under *Davis* and that he had invited further questioning after his arrest. Had this not occurred and had Mr. Cothren's statements been suppressed, the centerpiece of the State's case would have been removed, making a capital conviction extremely difficult to obtain.

This, however, was not the only error committed by Mr. Cothren's counsel. Another glaring deficiency was the nearly total failure to investigate or present critical evidence supporting the primary defense in the case, which was that Mr. Cothren lacked the necessary intent to establish murder. This defense rested primarily on Mr. Cothren's intoxication and emotional distress at the time of the offense. Yet, the only evidence that Mr. Cothren's attorneys presented on this issue was the testimony of an expert witness who had been retained less than one month before trial and who had concluded, based on a single interview, that Mr. Cothren had consumed a significant quantity of drugs and alcohol before committing the robbery. But given that there was no corroboration for this conclusion, the State was able to destroy the evidence with a single question: "Q: Is it possible, Doctor, that the defendant lied to you? A: Sure." A capital murder defendant's word is worth little, if anything, without support.

Another glaring deficiency was the nearly total failure to investigate or present critical evidence supporting the primary defense in the case, which was that Mr. Cothren lacked the necessary intent to establish murder.

Had Mr. Cothren's lawyers even spoken with the individuals who were with him shortly before the offense, this need not have happened. During our investigation, we discovered numerous witnesses who had been with Mr. Cothren and who were able to testify that he was emotionally distraught after being thrown out by his girlfriend and that he had engaged in a multi-day drug and alcohol binge. In fact, the last person to see him at the apartment where he had lived on the night of the offense informed us that not only was Mr. Cothren extremely intoxicated, he was "talking weird" in a manner that could not be explained by alcohol alone. Because of trial counsel's failure to do any substantive investigation, however, this evidence was never brought out at trial.

The same failure to investigate also left Mr. Cothren without any ability to rebut the State's evidence that he had acted intentionally. As already observed, the allegations against Mr. Cothren involved the shooting of a convenience store clerk during a robbery. The State argued at trial that Mr. Cothren must have acted in cold blood because the victim had been shot twice and the gun involved in the shooting had to be held in a special way to fire and had to be manually reloaded before each shot was fired. The prosecution reiterated this theme multiple times throughout the trial, beginning in the opening statement, when the District Attorney remarked:

> "A unique thing about this gun, about this pistol, it's a .25 automatic which means it fires every time you pull the trigger. But this one doesn't. You will see this gun. The handle on the right side is broken so is [sic] won't eject the shell. It will only fire once.
>
> "What does that mean to you? It means this, for a man to shoot the gun a second time, he had to physically put another bullet in the chamber. This man, after watching the man shot, physically ejects the shell, puts another shell in the chamber, leans over the register and, bam, [shoots again]." (Tr at 605-06.)

Mr. Cothren's trial counsel made no attempt to rebut this extraordinarily prejudiced argument or cross examine the testimony on which it was based. Again, however, had they made even a minimal effort, they easily could have proved the argument false. In fact, the State's own forensic evidence expert had

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submitted a report showing that the ejection mechanism on the gun worked properly. When we interviewed the State's expert after the original trial, he also stated that it was not difficult to fire the gun even though the grip was missing and that the gun did not have to be "manually re-chambered" before being re-fired. Additional testing by an independent expert confirmed both of these facts and that the gun could be re-fired quickly in a nervous reaction as opposed to requiring any deliberation. Again, however, the problem was that Mr. Cothren's counsel never took any of these steps and never presented any of this evidence to the jury.

If these failures in the guilt phase of Mr. Cothren's trial were not enough, his counsel also failed to present any compelling evidence during the penalty phase of the trial. Although Mr. Cothren's attorneys had a stated objective of showing that Mr. Cothren was intoxicated at the time of the offense and of humanizing Mr. Cothren before the jury, they did virtually nothing to locate the witnesses who could provide testimony supporting these goals. As already noted, they presented no testimony during the guilt phase to corroborate Mr. Cothren's intoxication or the emotional crisis he was suffering. Nor was such evidence presented during the penalty phase, where it could have been used to help explain to the jury what had occurred. There was also no compelling evidence presented regarding Mr. Cothren's background. Indeed, the little evidence that was provided was confined to a few witnesses who were not prepared until moments before they took the stand and who ended up providing testimony that was so incomplete and inaccurate that it made Mr. Cothren's background appear comparatively uneventful. As a result, both the judge and the jury were left with absolutely no explanation of how the offense could have been committed, other than as a cold-blooded act, even though a wealth of evidence was available that could have been used to prove otherwise.

Following our investigation, we incorporated these and many other deficiencies we discovered into a petition for post-conviction relief filed with the same judge who presided over Mr. Cothren's original trial. We then presented evidence in a hearing that extended over six days, nearly twice as long as the initial trial. This hearing was held in the same large, white marble courthouse where Mr. Cothren had originally been tried.

...there is a continuing and desperate need for lawyers, both to take on individual cases and to bring to light the ways in which the current system can sometimes undermine the most fundamental principles on which our judicial system relies.

As the hearing commenced, with Mr. Cothren sitting between us, we began the painstaking task of laying out the evidence through more than 25 witnesses. Much of the testimony involved uncovering unpleasant facts—about the errors committed by Mr. Cothren's counsel, about the depression and substance abuse of his second-chair attorney and about the extraordinary hardships and challenges that Mr. Cothren had faced throughout his life. Many of the witnesses providing testimony on these subjects became emotional and unable to control their tears. Nonetheless, when we were done, we felt we had presented a wealth of evidence that should have been part of Mr. Cothren's original trial nearly three years earlier.

The Court apparently agreed and, after several months, issued a ruling granting Mr. Cothren a new trial. We could not have been more gratified. When we informed Mr. Cothren by telephone, he was rendered speechless with tears and renewed hope. Yet we know that the story is far from over. The State has already appealed and there are many more challenges ahead.

Our motivation to overcome these challenges, however, is strong and is grounded not only in Mr. Cothren's case, but in a desire to bear witness to and change the way in which death penalty cases are tried. Our own experience confirmed the importance of adequate representation for capital defendants as well as shortcomings that are all-too-frequently apparent in the current system. Our experiences also made clear that if, as a nation, we are committed to imposing the death penalty, we must also be committed to developing a process that can fairly sort out those who are deserving of such punishment from those who are not. This means not only achieving an accurate determination of guilt or innocence in each case, but also a proper assessment of whether the balance of aggravating and mitigating factors in each case make such a penalty appropriate. The current system is failing to meet this basic requirement in far too many cases, largely because of the ineffectiveness of counsel appointed to represent individual defendants. Until more is done to cure this problem, there is a continuing and desperate need for lawyers, both to take on individual cases and to bring to light the ways in which the current system can sometimes undermine the most fundamental principles on which our judicial system relies. ❐

1 Mr. Ramfjord is a partner and Chair of the Litigation Department with Stoel Rives LLP in Portland, Oregon. He was formerly an Assistant United States Attorney in Washington, D.C.

2 *McFarland v. Scott*, 512 US 1256, 1264, 114 S Ct 2785, 129 L Ed 2d 896 (1994).

3 Bright, Stephen B., *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L.J. 1835 (1994).

4 512 U.S. 452, 114 S Ct 2350, 129 L Ed 2d 362 (1994).

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Northwestern School of Law of Lewis & Clark College

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Upcoming Schedule
Please check our website (www.lclark.edu/~oli) for up-to-date program information, as topics and details are subject to change.

FROM TAKE-OFF TO LANDING:
Mastering the Civil Appeal
Thursday, October 25, 2001
8:45 - 3:30 p.m.
Oregon Convention Center, Ptld.
5.75 MCLE Credits

This program is designed for lawyers who do appellate litigation every day or only infrequently. Presented in a format that encourages questions from the audience, appellate judges and expert appellate practitioners will talk about every aspect of the appeal, beginning with the decision to appeal. Veteran practitioners and newcomers alike will benefit from the mock oral argument between lawyers-for-a-day Judge Stephen S. Trott and Justice W. Michael Gillette before Judges Susan P. Graber and Virginia L. Linder and Justice R. William Riggs. And in his continuing effort to demonstrate that judges are human, Judge Trott, who doubles as an accomplished magician, will perform magic for the group. This promises to be an interesting and informative day, an opportunity to meet the judges and network with your colleagues.

THE ETHICS OF BILLING PRACTICES:
Cash & Carry?
Friday, November 2, 2001
9 a.m.- 12:00 noon
Oregon Convention Center
3 Ethics (or 2 Ethics and 1 Child Abuse) MCLE Credits

It is not enough for lawyers to keep up with high-tech changes in practice. They must also keep up with the all-important if sometimes less glamorous world of billing for and collecting fees. This program will address issues ranging from the receipt of client equity as a means of payment to the use of so-called "value billing" in the form of "non-refundable" or "flat" fees to contemporary issues in hourly billing by both lawyers and nonlawyers. In addition, you will hear about recent developments regarding Oregon's Code of Professional Responsibility and how to recognize the danger signs in reporting child abuse.

ETHICS IN THE ELECTRONIC ERA:
Running to Keep Pace in Modern Times
Friday, November 2, 2001
1:15 - 4:15 p.m.
Oregon Convention Center
3 Ethics MCLE Credits

Perhaps it all began with the fax machine. Perhaps not. Whatever the starting point, the 21st century lawyer faces extraordinary ethical and practical challenges due to the increasing speed of practice, the increasingly national and even global scope of practice and constant client demands that lawyers do more with less.

KILLER CROSS-EXAMINATION:
Featuring Roger Dodd and Larry Pozner
Thursday, November 15, 2001
8:30 - 4:15 p.m
Oregon Convention Center, Ptld
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Great lawyers "testify" at every trial through carefully crafted leading questions. They dominate the courtroom on cross-examination and evoke the emotion that drives their theory of the case. You will learn these techniques from two of the country's leading trial lawyers, Roger J. Dodd and Larry Pozner.

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ETHICS & CIVIL LITIGATION:
Movie Magic and Hollywood Ethics featuring Steven O. Rosen
Friday, December 7, 2001
8:30 - 1:00 p.m.
Oregon Convention Center, Ptld
2.5 General *and* 2 Ethics MCLE Credits

The drama of the courtroom is often compared to the drama of film with its suspense, comedy, stars, and bit players. This unique program effectively combines legal education with Hollywood entertainment as it examines litigation strategies and tactics, using courtroom scenes from various films. The carefully selected clips show men and women as trial attorneys presenting argument of a discovery motion, preparing a witness for trial testimony, delivering an opening statement, conducting voir dire, examining and cross-examining witnesses, and presenting closing arguments. Each clip shows lawyers at their best and is followed by a discussion of the litigation techniques and ethical issues illustrated in that clip. The program provides practical training for the advocate.

Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

I. Claims for Relief.

• A lessee of a building destroyed by fire was not liable to the lessor on a negligence claim premised on the doctrine of *res ipsa loquitur,* the Court of Appeals held in ***Wilson v. Cooke,*** 174 Or. App. 426 (2001). The defendant lessee operated a woodworking business in the building; the evidence established that the lessee's normal practice was to turn off all power to the building at the power source at the end of the day. Three hours after the last employee left the premises, the building was in flames and was ultimately destroyed by fire. The State Fire Marshal concluded that the cause of the fire was unknown. The plaintiff lessor contended that the court should have applied the doctrine of *res ipsa loquitur* to infer that the fire was caused by defendant's negligence. The Court of Appeals disagreed, affirming the trial court's finding that "a fire in a woodshop (even where the power is turned off) does not necessarily result in a conclusion that it is more likely than not that it was started by Defendant's negligent means." 174 Or. App. at 432.

• In ***Gregory v. Lovlin,*** 174 Or. App. 483 (2001), the Court of Appeals declined to adopt an absolute ban on the assignment of legal malpractice claims. The Court acknowledged that the majority rule would have prohibited the assignment of legal malpractice claims in all circumstances (174 Or. App. at 489), but the Court elected to follow the minority rule. Under that rule, the validity of an assignment depended upon "the circumstances of the individual case." 174 Or. App. at 492. The Court concluded that, where "the assignee has a bona fide interest in the claim and when none of the evils that may flow from such an assignment is present," the claim may be validly assigned. 174 Or. App. at 492-93.

• It does not always pay to be neighborly, the plaintiff in ***Colmus v. Sergeeva,*** 175 Or. App. 131 (2001) discovered. In that case, the plaintiff's next door neighbors left their dog on leash in their backyard on the 4th of July. When the dog "became agitated" by fireworks exploding in the neighborhood, plaintiff walked onto the driveway and reached over the fence in an attempt to comfort the animal. A loud firecracker exploded, and the dog "lashed out at plaintiff and bit off the end of her nose" (but not to spite her face). 175 Or. App. at 134. Plaintiff sued, but the trial court entered summary judgment in favor of defendants. The Court of Appeals affirmed, holding that plaintiff was legally considered a "trespasser" so that the defendant landowners could be held liable only if the injury had been inflicted willfully or wantonly. 175 Or. App. at 135.

II. Procedure.

• Preservation of error continues to be a perilous area for attorneys. In ***Bennett v. Farmers Ins. Co.,*** 332 Or. 138 (2001), the Supreme Court held that defendant was not entitled to a new trial because it had failed to sufficiently object to a jury instruction. Defendant had offered a proposed instruction on whether mutual assent was required to validly modify a contract, but the trial court declined to give the instruction, and the Supreme Court agreed, finding that defendant's proposed instruction "misstated the law." 332 Or. at 154. The Court then found that comments made by defendant's counsel in support of defendant's proposed instruction did not count as an exception to the instruction that was given on contract modification (which did not mention the element of mutual assent). Thus, the Court held that because defendant "neither offered an alternative jury instruction concerning mutual assent that was correct in all respects nor separately excepted to the trial court's omission of an instruction on that subject," defendant had effectively failed to object to the jury instruction error for purposes of a motion for new trial under ORCP 64B(6).

• In ***Baker v. Infratech Corp.,*** 174 Or. App. 452 (2001), the Court of Appeals held that plaintiff's pretrial motion to strike an affirmative defense did not count as an exception to the jury instruction given on the issue, so plaintiff's assignment of error on the instruction was not preserved for appeal. 174 Or. App. at 457.

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• An action becomes "pending" for purposes of ORCP 21A(3) when the complaint is filed, not when service is effected, the Court of Appeals held in ***Webb v. Underhill,*** 174 Or. App. 592 (2001). As a result, the trial court erred in failing to dismiss a later-filed action on the grounds that another action was "pending" between the same parties even though service was effected first in the later-filed action.

• A notice of appeal filed within thirty days after entry of judgment but before the trial court had ruled on a "motion for order setting aside judgment" was filed too soon to confer appellate jurisdiction, the Supreme Court held in ***Welker v. TSPC,*** 332 Or. 306 (2001). The Court concluded that plaintiff's motion was, in effect, a motion for a new trial under ORCP 64, and that, under ORS 19.255, the time to take an appeal did not begin to run until the trial court ruled on the motion or the motion is deemed denied. 332 Or. at 310-11.

III. Limitation of Actions.

• The "discovery rule" for determining when the statute of limitations begins to run does not apply to products liability actions, the Supreme Court held in ***Gladhart v. Oregon Vineyard Supply Co.,*** 332 Or. 226 (2001). The Court acknowledged that the discovery rule would have applied under prior law, but the law changed in 1977 when the legislature codified a civil action for products liability. The 1977 statute specified that a product liability action must be brought "not later than two years after the date on which the death, injury or damage complained of occurs." ORS 30.905(2). The Supreme Court concluded in *Gladhart* that, for purposes of this statute, the injury occurs "when the harm or damage happens, whether or not the plaintiff discovers those consequences within the ensuing two-year period." 332 Or. at 229.

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leged under the attorney-client privilege or protected as attorney work product.

The State was aware of Myers' connection to the defense, and learned of Myers' theory of the accident during informal settlement negotiations with Riddle's original attorney, Bouck. Myers asserted that his opinion was not based on any communication with Bouck or on anything that Riddle had said. Bouck testified *in camera* and stated that he had retained Myers to analyze accident data and give his opinion about what had caused the accident. Bouck and Myers had visited the accident scene to take measurements and gather data. According to Bouck, Myers stated he would form his opinion based on these measurements and his observations. The trial court ruled that Myers could testify but "could not mention any prior connection with the defense, . . . refer to any statements made by defendant or to information that came from defendant, [or] . . . refer to any statements that he had made to Bouck."[1] Riddle appealed his conviction, arguing that Myers' opinion regarding the cause of the accident was privileged under either the attorney-client privilege or the work product doctrine. The Oregon Court of Appeals held that Myers' opinion was protected by the attorney-client privilege.

The Oregon Supreme Court reversed, holding that "the lawyer/expert relationship does not automatically disqualify an expert who was retained by one party from testifying for some other party."

The Oregon Supreme Court reversed, holding that "the lawyer/expert relationship does not automatically disqualify an expert who was retained by one party from testifying for some other party."[2] Identifying the key issue to be whether the expert witness' testimony can be segregated from privileged communications or attorney work product, the Court indicated that the rules governing attorney-client privilege protect not the *relationship* between an expert and an attorney or client, but rather the *communications* between those parties.[3] Mere employment of an expert does not create a privileged relationship. Similarly, expert opinions and observations do not constitute confidential communications protected under the attorney-client privilege *"solely"* because they were communicated to the attorney who retained the expert.[4] The Court declared that no absolute privilege arising out of either the attorney-client privilege or the work-product doctrine exists "that prevents an expert whom a litigant has employed to investigate a factual problem from testifying for the other side as to the expert's thoughts and conclusions that are segregated from confidential communications."[5] But where the expert's opinion is integrated with attorney-client privileged communications such that the expert opinion cannot be segregated from confidential communications, the Court should not admit the expert testimony. Specifically, the "expert is disqualified from testifying . . . if his or her opinion discloses, either directly or indirectly, or is based on, any confi-

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dential communication between the lawyer, the client, and/or the expert."[6]

II. Riddle's Implications

Riddle represents a sensible balance between the search for a just, informed outcome and the need to protect attorney-client communications and attorney work product. By contrast, a blanket prohibition on testimony of experts by virtue of their retention by one party could lead to inequitable results.

Consider the following hypothetical. Product liability litigation, as one example, often involves highly technical information regarding the product in question and its development. Depending on how specialized the product is, the most qualified expert witnesses may also be the individuals who developed the product. These individuals will possess both technical expertise and factual information regarding the product's development. If the Court were to deem all testimony of the expert witness to be protected by either the attorney-client privilege or the work product doctrine, the party retaining the expert in the hypothetical would effectively be empowered to exclude evidence that is otherwise admissible. The party would thereby be able to control access to factual information. If the retaining party were to choose not to call the expert witness, the factual information regarding the product and its development would be unavailable. Given Oregon's rules preventing discovery of expert witnesses, the party who originally retained the expert would at the least be able to impede its opponent from obtaining such factual information pre-trial, limiting access to information to that which the opponent could procure at trial.

In this hypothetical, the expert witness possesses information regarding product development that is non-privileged, whether communicated to counsel or not, regarding observations, not as a technical expert, but as a fact witness. A blanket rule would lead to the undesirable result that the witness would be prevented from testifying even as to his non-privileged, non-expert observations. By contrast, the rule enunciated in *Riddle* allowing for the segregation of confidential from non-confidential communications draws a sensible distinction between expert testimony based on privileged communications and information and opinions otherwise possessed by the witness.

Another potential consequence of a blanket application of the attorney-client privilege or the work product doctrine is the possibility that wealthy litigants could "buy up" all available expert testimony.

Another potential consequence of a blanket application of the attorney-client privilege or the work product doctrine is the possibility that wealthy litigants could "buy up" all available expert testimony. If the attorney/expert relationship automatically fell under the umbrella of privilege or work product, then a litigant with adequate resources could retain as non-testifying experts all experts in the field related to their case. The opposing party then would be unable to hire those experts to testify even as to matters outside the scope of the expert's confidential communications with the original party—even testimony regarding factual observations.

By allowing the segregation of opinions communicated to counsel from opinions not communicated to counsel or otherwise not confidential, the Oregon Supreme Court adequately balances the attorney-client privilege and the work product doctrine against the need to provide access to non-confidential information. Certainly, where the expert's opinions have both been confidentially communicated to counsel and are inseparable from those communications, the opinions must be protected as privileged. In many cases, however, the expert witness will possess opinions or factual information serving as the basis for those opinions—*i.e.* the foundational knowledge and expertise that makes the witness an expert, as well as observations regarding the facts of the case—that can be distinguished from privileged communications.

III. Potential Limitations to Riddle's Application

The *Riddle* Court emphasized that its ruling was limited to the holding that one party's retention of an expert does not *automatically* disqualify the expert from testifying for another party in the same trial.[7] In other words, the ruling was limited only by the caveat that in some cases an expert retained by one party will be disqualified from testifying for the opposing party. This disqualification will occur only when the desired testimony cannot be segregated from confidential attorney-expert communications.

One attempting to avoid the applicability of *Riddle* might argue that *Riddle* should be limited to criminal cases. How-

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ever, Oregon Evidence Code (OEC) 503, which governs attorney-client privilege, applies without distinction to all attorney-client relationships, whether in the context of civil or criminal work. The *Riddle* Court did not limit its application of OEC 503 to only the criminal context. If anything, attorney-client privilege should be more stringently applied in the criminal context given the liberty interests at stake. Any rule limiting that privilege in a criminal case should therefore apply in civil cases as well.

Another potential limitation to the applicability of *Riddle* is the fact that it dealt with expert testimony at trial rather than during discovery. The *Riddle* Court differentiated the application of the work product doctrine during discovery and at trial. Riddle argued that under ORS 135.805(1)(a), [8] which codifies the work product doctrine in criminal cases, work product includes any opinions formed by an expert retained by an attorney in connection with the attorney's preparation of the prosecution or defense. In declining to apply that statute, the *Riddle* Court, relying on the statute's "specific, limited scope," rejected the argument that the protection of information from discovery necessarily means protection from disclosure at trial.[9] However, the Court was examining the applicability of that specific criminal statute, not generally whether the work product doctrine applied to the case at bar such that the expert testimony should be disallowed. The Court's reasoning – that "the independent thought of an expert [does not] become the work product of the attorney who hires the expert" – should apply equally to discovery as it does to testimony at trial.[10] Likewise, the Court's discussion of attorney-client privilege applies to the privilege in general, and is not limited to testimony at trial.

The "limited" nature of the *Riddle* Court's ruling referred not to a limitation based on whether the case is civil or criminal nor on whether the case is at trial or in the discovery stage. The Court's "limitation" merely clarified that the attorney-expert relationship does not automatically give rise to the protections of privilege or work product.

IV. Other Jurisdictions

Although the Oregon Supreme Court's "segregation" approach in *Riddle* is consistent with the law of some other jurisdictions that have addressed the issue of the relationship between expert testimony and the attorney-client privilege and the work product doctrine, the *Riddle* Court acknowledged that it is in the minority by adopting this approach.[11] Nevertheless, many Courts hold that expert testimony is not *per se* protected under attorney-client privilege or the work product doctrine. As the Oregon Supreme Court did in *Riddle*, these Courts engage in a factual analysis of the specific case at bar. Those Courts implicitly, if not explicitly, examine the nature of the communications between the expert witness and attorney and determine whether the testimony covers privileged information.[12]

V. Conclusion

Oregon attorneys should be aware when retaining expert witnesses or consultants that expert opinions and observations do not automatically fall under the attorney-client privilege or the work product doctrine. Care should be taken when hiring expert witnesses and consultants – attorneys cannot simply assume that communications will be protected – and it may be advisable to have the expert agree, in the engagement letter, that the expert will not work for the opposition in any capacity with respect to the given case. If the expert's opinions and observations can be segregated from confidential communications, and the expert is not contractually obligated to not work for the opposition, opposing counsel may be allowed to hire the expert to testify regarding those opinions and observations. ❐

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1 *Riddle*, 330 Or. at 475.

2 *Id.* at 487.

3 *Id.* at 477.

4 *Id.* at 477 (emphasis in original).

5 *Id.* at 486.

6 *Id.* at 487.

7 *Id.* at 487.

8 ORS 135.855(1)(a) states that in criminal prosecutions "[w]ork product, legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the attorneys, peace officers or their agents in connection with the investigation, prosecution or defense of a criminal action" are not subject to discovery.

9 *Riddle*, 330 Or. at 484.

10 *See Id.* at 486.

11 *Id.* at 486 n.5.

12 *See, e.g., Morris v. State of Maryland*, 477 A.2d 1206, 1211 (1984); *Jasper Construction, Inc. v. Foothill Junior College Dist.*, 91 Cal.App.3d 1, 17 (1979).

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