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In This Issue...

Twilight of the Gunslinger:
The Changing Role of the Civil Litigation Lawyer

By J. Michael Dwyer
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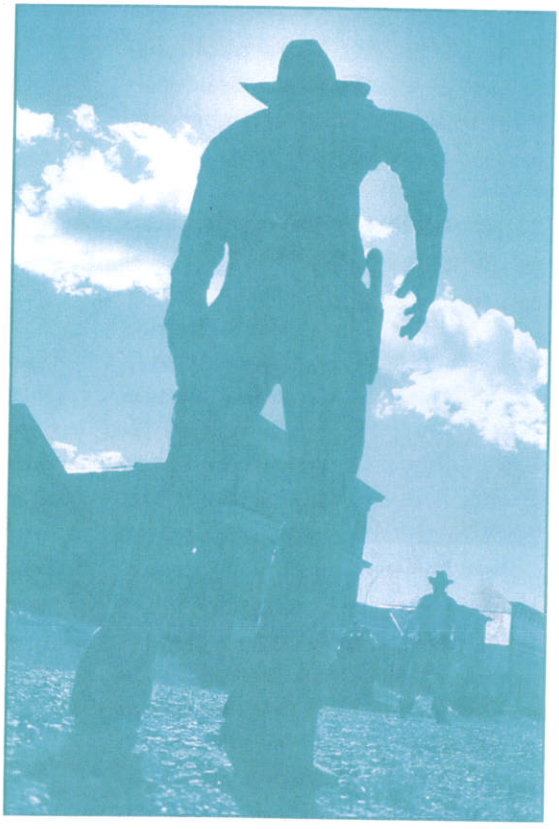

Under the heat of the midday sun he walks into the dusty street and plants his boots. Onlookers peer from darkened storefront windows, holding their breaths. The brim of his hat shields his eyes, which squint down the dusty street at his mirror image. Arms at his sides, his right hand lightly brushes the leather of his holster. He wills his heart not to race. His fingers, sensing the nearness of the revolver's handle, slightly twitch. In a moment he will draw, and learn whether he will live to fight another day.

J. Michael Dwyer

For a trial lawyer in the West, no myth resonates as powerfully as the gunfight. Raymond Burr breathed life into Perry Mason, Gregory Peck into Atticus Finch, but they were mere suit-and-tie versions of Sheriff Matt Dillon, opening each episode of Gunsmoke for twenty years in the service of law and justice by drawing his weapon faster than the villain at the far end of the main street in Dodge City. Today's litigation lawyers may carry laptops and BlackBerrys, but when they speak of preparing for battle, or when brilliant caricatures of lawyers appear on the cover of the ABA's Litigation Journal arrayed in suits of armor, they acknowledge the continuing vitality of this warrior archetype. The gunfight is our Western version of the joust and the duel—both, in their day, accepted forms of dispute resolution.

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FROM THE EDITOR

EFFECTIVE CROSS-EXAMINATION (THINK OF YOUR MOTHER)

BY
DENNIS RAWLINSON
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Cross-examination is perhaps the most challenging aspect of our trial presentations. Unlike Raymond Burr in "Perry Mason" television serials, it's fair to say that we seldom, if ever, force the opposition to concede our claims or dismiss their claims as a result of brilliant cross-examination.

Spend an afternoon at one of the state or federal courthouses watching cross-examinations, and you are likely to witness a number of the techniques listed below, none of which are particularly effective. These traditional techniques and then a proposal for an alternative approach ("remember your mother") are discussed below.

1. Ineffective Cross-Examination Techniques.

Dennis Rawlinson

Assume for purposes of illustration that the witness to be examined is an 85-year-old grandfather who claims that on a dark and rainy night at a poorly lit intersection, he witnessed your client's car (which was attempting to make a left-hand turn in the intersection) run into the plaintiff's vehicle (which was proceeding through the intersection in the opposite direction). Your client admits that he was trying to make a left-hand turn, but that he simply was in the middle of the intersection with his left-turn indicator on, and that the oncoming plaintiff's vehicle crossed the centerline and ran into him.

(a) Useless Niceties.

Many cross-examinations begin with "useless niceties" that rob you of the opportunity to capitalize on the "golden moments" as you begin your cross-examination. When one begins a cross-examination, the fact-finder (be it judge or jury) will be paying the most attention. These golden moments should not be squandered.

Useless niceties consist of questions and comments like these:

> "Good morning, Mr. Murphy. How are you doing this morning?"

> "Mr. Murphy, I'd just like to ask you a few questions. Could you give me your attention for a little while?"

> "Mr. Murphy, beautiful weather we're having, aren't we, for a state that's noted for its rain?"

(b) Repeating Direct Examination.

After starting the cross-examination by squandering golden moments with useless niceties, the examiner then proceeds to repeat portions of the direct examination, thereby reaffirming and reinforcing the points made on the direct examination—apparently believing that by repeating the direct examination a second time, it will seem less credible. But this tactic almost never works.

> "You testified that my client's vehicle crashed into the plaintiff's vehicle while trying to make a left-hand turn, didn't you?"

> "You claim that my client is the one at fault, don't you?"

> "You claim that you had a clear and unobstructed view of the accident?"

(c) Begging.

Then, after useless niceties and repeating the direct examination, the cross-examiner begins begging the witness to change his story:

> "You can't be sure that my client's car hit the plaintiff's car first, can you?" (The witness asserts that he is sure, despite the begging.)

> "The plaintiff's vehicle could have just as easily veered into my client's lane by three or four inches as my client could have veered into the plaintiff's lane, right?" (The witness denies that this happened.)

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"It all happened so fast, you can't be absolutely certain that my client's vehicle was the one that went over the centerline first, can you?" (The witness is certain.)

(d) Pulling Out the Hatchet and Chain Saw.

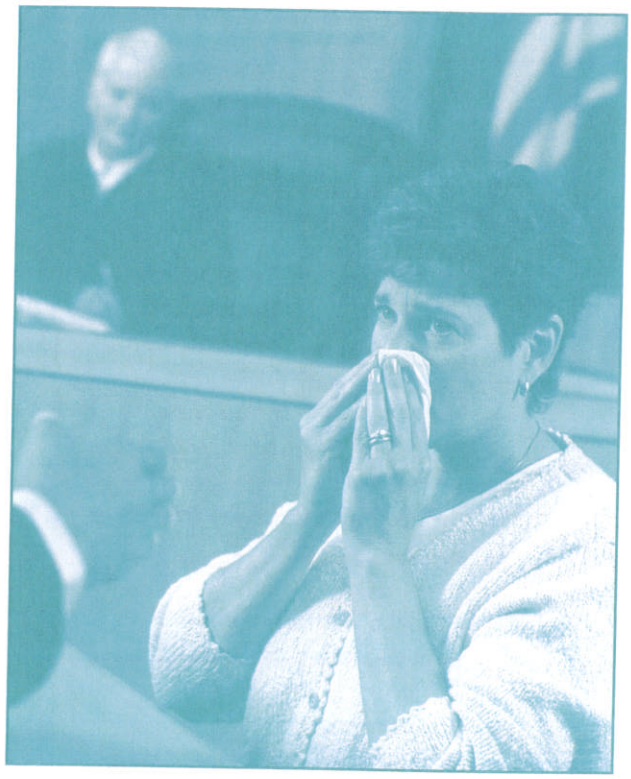
The useless niceties, repeating of the direct examination, and begging are then followed by what I call "pulling out the hatchet and chain saw." (Just like Freddy Krueger and Jason from *Nightmare on Elm Street* and *Friday The 13th* or the demented son in *Texas Chainsaw Massacre*.)

You are going to take no hostages. You are going to use a "hatchet" and a "chain saw" to demonstrate that this elderly gentleman is not only mistaken, but also a liar—that he must have some improper motive, such as an economic interest with the plaintiff.

You pick up the hatchet and start the chain saw. You are ruthless. You maim him. You slash him. You show no mercy. You then sit down and your client leans over and tells you what a marvelous job you did.

Of course, your client is wrong. Your hatchet and chain-saw massacre may have bloodied the courtroom, but it also completely alienated the fact-finder (judge or jury), who was naturally sympathetic to an elderly gentleman undergoing the foreign experience of testifying in a courtroom and being subject to a cross-examination by an experienced lawyer.

Most of us realize over time that these types of hatchet and chain-saw cross-examinations are more likely to hurt our client than persuade the fact-finder. It's surprising, however, how long it takes many of us to put away the hatchet and chain saw and trade them in for a scalpel.



Admittedly, we are misled for a while by the positive comments of our clients, who inevitably compliment us after using the hatchet and chain saw. But the compliments are soon forgotten when the fact-finder comes back with a disappointing verdict or judgment.

2. Conduct Your Cross-Examination as Your Mother Would.

Mothers love us regardless of our foibles. Perhaps this underlying affection explains why the questions of a mother are so effective. Mothers do not use hatchets or chain saws; they use a scalpel to get at the truth.

(a) Childhood Experience.

Most of us have had the childhood experience as an underage adolescent of having our parents leave us at home alone for the weekend. We are given strict orders that no friends are to visit, particularly friends of the opposite sex. We are instructed that there is to be no drinking, no cigarette-smoking, no loud music—yet inevitably, there is.

Try as we might to hide, destroy, or mask the evidence, inevitably our parents, upon returning home, talk with the elderly neighbor who sits in her front window and watches your home about what she saw while they were gone. You then come home from school and undergo the following cross-examination by your mother:

"Our neighbor, Mrs. Smith, was home looking out her window last Saturday night when we were out of town. Did you know that?"

"Cars were parked in front of the house?"

"Cars that belong to your friends?"

"There was loud music?"

"Beer?"

"Smoking?"

"Girls?"

You answer "no" to the first question and then "yes" to her questions like a lap dog barking for snacks. Her cross-examination is effective without being "mean-spirited."

(b) Cross-Examining the Witness as Your Mother Would.

You laid the groundwork for trial at the elderly gentleman's deposition by asking questions as if you were conducting a cross-examination (using leading questions) to ensure that you would get the same answers at trial. Applying the same loving yet direct technique as

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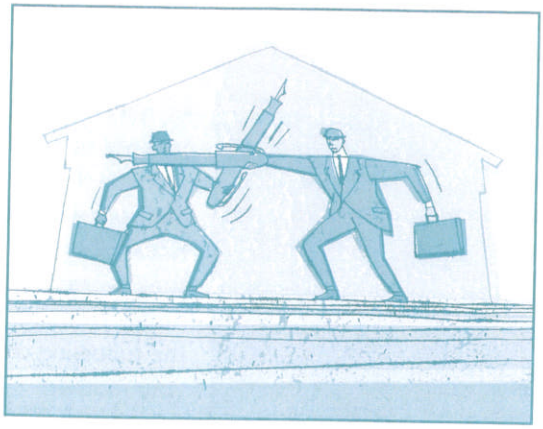
your mother used on you, you now begin your cross-examination of the gentleman:



"It was dark?"

"It was raining?"

"The intersection was dimly lit?"

"You can't see without your glasses?"

"Your glasses were wet from the rain?"

"Your glasses were 'fogged up' at times?"

Plus, your deposition work has allowed you to add an additional "distraction" to the cross-examination of Mr. Murphy:

"Let's talk about your terrier's attempt to eat the remnants of a fast-food wrapper . . . you understand . . . ?"

"You were walking your terrier?"

"Your terrier once ate the remnants of a fast-food wrapper . . . ?"

"It made her ill . . . ?"

"Your terrier had a wrapper in her mouth that night . . . ?"

"You were concerned she would be ill?"

"You love your terrier?"

"You were attempting to pull the wrapper from her mouth?"

"That's when the two cars approached?"

"You were bent over?"

"You were facing away from the intersection?"

"You did not turn around . . . until you heard the crash?"

3. Conclusion.

Next time you have an opportunity to conduct cross-examination (or, for that matter, conduct a cross-examination during deposition in preparation for a trial cross-examination), consider putting away the hatchet and the chain saw and trading them in for a scalpel. After all, Aristotle recognized that "to persuade" we must be "liked." We are more likely to be "liked" without the hatchet and chain saw.

Conduct your cross with the skill, care, and affection of your mother when she cross-examined you as an adolescent. Your client may not be as effusive with his or her praise after the cross-examination has been completed. But instead of running the risk of alienating the jury by filling the jury box with blood, gore, and limbs, you are likely to find that you have persuaded the jury to your point of view. Most clients would trade an opportunity to compliment us on a ruthless cross-examination for a successful outcome. ❐

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

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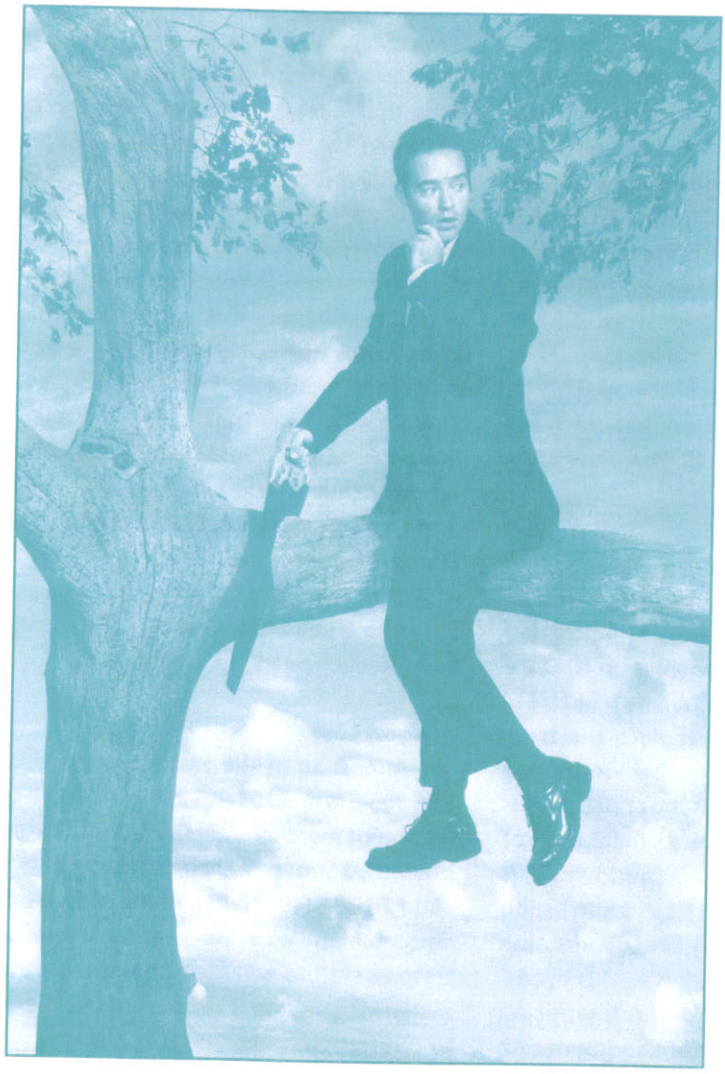
Proper Measure of Damages Under Oregon's Timber Trespass Statute When Ornamental Trees Are Cut and Replaceable

By Phillip Querin and William Miner of Davis Wright Tremaine LLP



Most Oregon litigators, whatever their area of practice, know about Oregon's timber trespass statute. It is widely known and understood that if a person cuts a tree on somebody else's property, the person doing the cutting may be liable for treble the damages assessed. While the concept is easy to remember, what most litigators do not know is that the statute gives no direction as to how the damages should be measured. This article examines the state of the law in Oregon and makes the argument that no single measure of damages is proper in all timber trespass cases, especially when the case involves the cutting of replaceable ornamental trees rather than harvestable timber. Specifically, when ornamental trees are cut, and they can be replaced, it is the replacement value that should be used as the proper measure of damages; otherwise the injured landowner would have no adequate damage remedy.

ORS 105.810 reads:

(1) Except as provided in ORS 477.090 and subsections (4) to (7) of this section, whenever any person, without lawful authority, willfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, or of the state, county, United States or any public corporation, or on the street or highway in front of any person's house, or in any village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town or city, or on the street or highway in front thereof, in an action by such person, village, town, city, the United States, state, county, or public corporation, against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for

Phillip Querin

William Miner

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the trespass. In any such action, upon plaintiff's proof of ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant willfully, intentionally and without plaintiff's consent.

(2) A court may, in its discretion, award to a prevailing party under subsection (1) of this section reimbursement of reasonable costs of litigation including but not limited to investigation costs and attorney fees.

(3) A court may, in its discretion, award to a prevailing plaintiff under subsection (1) of this section reasonable costs of reforestation activities related to the injury sustained by the plaintiff. * * *

Additionally, ORS 105.815(1) provides:

(1) Except as provided in subsection (3) of this section, if, upon the trial of an action included in ORS 105.810, it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was the land of the defendant or the land of the person in whose service or by whose direction the act was done, or that the tree or timber was taken from unenclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages.

Thus, the cutter's state of mind becomes relevant for purposes of calculating damages; if she can prove she reasonably believed she owned the underlying land, then the damages to be assessed would be doubled rather than trebled. However, the question remains, what is the plaintiff's measure of damages?

For those defending a timber trespass lawsuit, the starting point is *Hampton v. Portland Gen. Elec.*, 268 Or 121, 124, 519 P2d 89 (1974). (Action in trespass to recover damage resulting from electric company's severance of trees on a strip of plaintiff's property). *Hampton* is often cited for the proposition that the proper measure of damages under Oregon's timber trespass statute is the diminution in the value of the property. However, this measure of damages can be wholly inadequate (*i.e.*, resulting in nominal or no damages) if mechanically applied to trespass cases involving ornamental trees which can be replaced. The following scenarios are instructive.

Scenario #1

Landowner A owns 100 acres of land which has thousands of mature and merchantable trees growing on it. Once the trees are severed, similarly sized trees cannot be planted to replace the trees that were removed. In other words, it is impossible to plant 100-foot tall Douglas Firs. Landowner B owns a similar tract of land that is adjacent to Landowner A's property. Landowner B begins harvesting the trees from his own land. During the harvesting, Landowner B's employees[1] mistakenly enter onto Landowner A's property and sever 10 of Landowner A's trees from his property.

Scenario #2

Landowner A owns a 3,000 square foot home in Bend. Landowner B owns a home and lot of similar size adjacent to Landowner A's home. Thirty years ago, Landowner A planted 20 "ornamental" trees along the property line but on her side of the property. During those 30 years she pruned and cared for the trees. The 20 trees that Landowner A planted are replaceable with similarly sized trees. Landowner B does not like the way the 20 trees look from his side of the property. Without consulting Landowner A and without obtaining a survey, Landowner B cuts down all of the trees.

In Scenario #1, the damage analysis in *Hampton* will lead to a measure of damages that adequately compensates the damaged landowner. Because the trees are merchantable, the land has an easily measured value both before and after the cutting. In Scenario #2, attempting to determine the difference in the fair market value of a residential property with 20 trees versus without 20 trees is very difficult, if not impossible. This is because most appraisers will say that while having the trees may be a nice amenity, their presence or absence is difficult to measure based upon available comparable market data. The diminution in the fair market value of the property (what the land is worth with the trees, versus without the trees) will usually be at or near zero.

Oregon Law

Almost all of the cases arising under ORS 105.810 and 105.815 involve the actual cutting of merchantable timber. As noted in *United States v. Firchau*, 234 Or 241, 251, 380 P2d 800 (1963), the "enhanced damages" scheme allowed under the timber trespass statute is ". . . to compensate the owner whose land is trespassed upon and to put tree cutters on notice that they cut beyond their boundaries at their peril." *Id.* (citing several cases).

The *Firchau* case is cited in many subsequent Oregon timber trespass cases for the proposition that the proper measure of damages is "the before-and-after value" of the land. *Firchau*, 234 Or at 247. *See also*

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Hampton, 268 Or at 124; *Savelich Logging v. Preston Mill Co.*, 265 Or 456, 464, 509 P2d 1179 (1973); *Ken Hood Construction Co. v. Pacific Coast Construction, Inc.*, 201 Or App 568, 582, 120 P3d 6 (2005). However, the facts of *Firchau* and several other cases following it deal with mature, merchantable timber, for which "stumpage", *i.e.* the value of the uncut timber[2] is used for the loss-in-value calculation. *Firchau*, 234 Or at 248-49. (*See Savelich Logging and Gerdes supra*). The reason for this approach is clear: As explained in *Firchau*,

> . . . where the trespasser severs mature, merchantable timber, a practical measure of such damages is the stumpage value of the standing timber. Stumpage ordinarily has a definite market value. . . . Since the law favors certainty in such matters, however, other authorities say that in the case of mature, marketable timber, stumpage is the primary measure of damages . . . .

Id. at 248-49.

This approach of using the stumpage value of the standing trees before the cutting as acceptable evidence of the loss in value to the freehold is consistently found in subsequent Oregon cases citing to *Firchau*. *See Gerdes*, 88 Or App at 67. ("The basis for calculation of damages in a timber trespass case is diminution of value of the land. One measure of damages is the stumpage value of the standing timber"). Similarly, in *Pedro v. January*, 261 Or 582, 494 P2d 868 (1972), the Oregon Supreme Court, citing *Firchau*, replied to the respondents' arguments that in a timber trespass, the proper measure of damage was the "depreciation in value of the real property" by noting:

> . . . [t]he only evidence in the record is the net value of the timber which was removed. The net value of the timber removed is sufficient evidence upon which to award damages. The depreciation in value of the property caused by the removal of the timber could be *more* than the net value of the timber but could not be *less*.

Id. at 598. (Emphasis added by the Court).

This approach of equating damage to the freehold with stumpage is similarly reflected in the Oregon State Bar's Damages CLE: "Diminution may be measured by the stumpage value of the standing timber. *United States v. Firchau, supra*, 234 Or at 248-249." DAMAGES, ch. 21 (Oregon CLE 1998 & Supp. 2002).

The approach outlined in the Oregon CLE and *Firchau* will provide an adequate damage remedy in cases that are similar to Scenario #1 above. However, in cases similar to Scenario #2 above, when a defendant cuts ornamental trees located on residential property rather than merchantable timber on forest land, there is little or no value to 20 ornamental trees *after* they are cut down. Therefore, a different analysis is warranted.

Diminution in value is not the sole measure of calculating damages in a timber trespass case.

The question is whether the *sole* means of calculating damages in a timber trespass case is to establish the loss in value of the property based upon stumpage value, before and after a defendant's improper cutting.

Oregon law suggests not. First, there do not appear to be any Oregon cases which state unequivocally that the loss in value is the *only* method of calculating damage in a timber trespass case. In fact, it is clear from *Firchau* and its progeny that the value of the severed merchantable trees is sufficient evidence of damage.

Moreover, in *Firchau*, the defendant argued that the cost of mitigation (the resale value of the cut timber) should be set off against the stumpage value (the value of the trees attached to the land) *before* applying the statutory multiplier. In *Firchau*, the timber was more valuable cut than still attached to the land (i.e. the timber severed was worth $2,204.90 but the stumpage was $1,913.50). This approach would have resulted in no monetary award to the plaintiff since there was no loss in value and 3 times 0 is still 0 [*i.e.*, $1,913.50 - $2,204.90 = ($291.40)].

In rejecting this approach, which would have allowed the defendant to have escaped any liability, the Court wrote: "To hold otherwise would, in practical effect, repeal most of the statutory scheme. . . ." *Firchau*, 234 Or at 251. Otherwise, a culpable defendant in a timber trespass case could avoid any liability whatsoever. But as noted in *Firchau*, ". . . the legislative purpose expressed in ORS 105.810 and 105.815 . . . [is] to compensate the owner whose land is trespassed upon and to put tree cutters on notice that they cut beyond their boundaries at their peril." *Id.*

In a case where ornamental trees are severed (as in Scenario #2 above), a different damage analysis is needed to satisfy the legislative purpose of ORS 105.810 *et al.* Where the trees are replaceable and the damage to the land is only temporary, the replacement value may be an adequate measure of damages under Oregon law.

Permanent versus temporary damage to property.

In Oregon, injury to real property is

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characterized as either "permanent" or "temporary." These characterizations focus on the state of the damaged property rather than the kind of relief that is justified. *See Hudson v. Peavey Oil Company*, 279 Or 3, 11, 566 P2d 175 (1977). An injury may be deemed "permanent in the sense that it [cannot] be repaired or rectified by any practical means, that it [is] likely to persist for an undetermined but significant period of time, and that the property's value to a prospective purchaser would be significantly affected." *Id.*

In timber trespass cases, where mature merchantable timber is cut, there is no question that in the eyes of the law, the injury is "permanent"—thus, loss in value to the freehold is the acknowledged measure of damages. In cases such as *Firchau* and others, the stumpage value, i.e. value of the standing trees before severance, is used to establish loss in value. This approach works because it is simple, straightforward, and capable of easy calculation, *i.e.*, Damage = (quantity of trees cut) X (stumpage value). However, this approach is unworkable and inappropriate where the damage to the freehold is *not* permanent, *i.e.*, the trees are *not* merchantable but *are* replaceable.

In Oregon, when the damage suffered to real property is "temporary," that is, when the injury "is reasonably susceptible of repair," the damages are "better measured by the loss of use or rental value during the period of the injury, or the cost of restoration, or both depending on the circumstances." *Hudson*, 279 Or at 10. *See Ore. Mutual Fire Ins. Co. v. Mathis*, 215 Or 218, 334 P2d 186 (1959) (temporary damage appropriate when fire partially destroyed courthouse); *Lemon v. Madden*, 216 Or 539, 546, 340 P2d 977 (1959) (temporary damages appropriate when fire destroyed fence dividing property).

The law in Oregon is clear that in cases other than timber trespass, when one causes a temporary injury to land, *i.e.*, an injury that can be cured, the appropriate measure of damages is replacement value. *Id.* Furthermore, a replacement value approach in cases similar to Scenario #2 above is appropriate because ". . . the overriding purpose of ORS 105.815 is to award to the victim of the trespass adequate damages." *Kinzua Lbr. Co. v. Daggett et al.*, 203 Or 585, 606-07, 281 P2d 221 (1955).

Replacement value should be used.

Oregon case law is not so rigid as to refuse to recognize compensable damages in cases similar to Scenario #2 above. In *Hanset v. General Construction Company*, 285 Or 101, 589 P2d 1117 (1979), the Oregon Supreme Court held that under the facts of that case, the *cost of repair*—not diminution of value—was a proper measure of damages. In *Hanset*, the plaintiff sued defendant construction company for damages resulting from defendant's blasting operations. Although there was no dispute that defendant's activities caused the damage, defendant asserted that the home's diminution of value—not the cost of repair—was the proper measure. In rejecting defendant's argument, the court, citing to *Mathis*, *supra*, stated:

> . . . since the allowance of damages is to award just compensation without enrichment, there is no universal test for determining the value of property injured or destroyed and . . . the mode and amount of proof must be adapted to the facts of each case.

Hanset, 285 Or at 104 citing *Mathis*, 215 Or at 225.

Some of the factors the *Hanset* court looked to in establishing the proper measure of damages included ". . . whether the property can be repaired; whether the damage is to an improvement as opposed to damage to the land itself; and whether the determination of the diminution in value would be difficult and uncertain." *Id.* at 105 citing *Mathis,* 215 Or at 226.

Additionally, the *Hanset* court placed greater value on real property that was personal to the owner. Quoting with approval from the Restatement of Torts, the *Hanset* court stated:

> . . . where a building *such as a homestead is used for a purpose personal to the owner*, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, where a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition even though the market value of the premise has not been decreased by defendant's invasion.

Id. at 105-06 citing to Comment b, to 4 Restatement, Torts § 929 (1939) (at 661-662). (Emphasis added).

In cases such as Scenario #2 above, where the landowner planted and cared for ornamental trees and where

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it can be argued that the trees had a personal value to the plaintiff a replacement value approach is warranted. Furthermore, with reference to the repairs sought by plaintiffs in *Hanset,* the Court observed that the damages

> . . . simply entail the restoration of the homes to their condition immediately prior to the defendant's activities. The plaintiffs are concerned with *living in rather than selling* their homes and, in all fairness, they should have the right to recover the reasonable cost of the necessary repairs without being subjected to the artificial burden of establishing that the diminution in the salable value of their homes was in a corresponding amount.

Id. at 106-07 citing *Berg v. Reaction Motors Div.*, 37 NJ 396, 181 A2d 487, 495 (1962). (Emphasis added.)

While *Hanset* is not a trespass case, the same principles should apply to cases similar to Scenario #2 above. Specifically, in cases where the damage to real property is temporary, and the thing damaged is personal to the owner, replacement value is the proper measure of damages.

Other Cases

It should be noted that *Moss v. Peoples Calif. Co.*, 134 Or 227, 293 P2d 606, (1930)—which preceded *Firchau*—can be cited for the proposition that the proper measure of damages for "ornamental trees" is the diminution of value of the underlying land. However, a close reading of *Moss* does not support such a restrictive interpretation. First, in *Moss,* the parties had *stipulated* that the measure of damages was the injury to the freehold. *Id.* at 231. Second, the technology currently available to replace large, mature trees was not available in 1930 when *Moss* was decided. Today there are companies with available machinery and technology to replant large ornamental trees.

Moss does not endorse loss in value of the property as the *sole* measure of damages. In fact, the Court quotes with approval *J. T. & K. W. Ry. Co. v. P. L. T. & M. Co.*, 27 Fla 1, 9 So 661 (1891) for the proposition that where market value cannot be ascertained, all ". . . pertinent facts and circumstances are admissible in evidence that tend to establish its real and ordinary value at the time of its destruction . . . ." *Moss,* 134 Or at 236. Under this approach, the *replacement value* (when the trees are replaceable) is a permissible measure of damages.

Conclusion

The state of the law regarding the proper measure of damages in Oregon trespass cases is confusing, at best. This is largely due to the fact that the vast majority of timber trespass cases deal with merchantable timber. And in such cases, the Oregon Court, beginning with *Firchau*, conveniently equates stumpage value, which is easily ascertainable, with the loss in value to the freehold. Notably absent in any of these cases is the testimony of a land appraiser, who opines on the reduced market value. Loss in value to the freehold is simply equated with stumpage value.

If the Legislative purpose of warning those who would cut trees that they should proceed at their own peril is to be given any meaning beyond the cutting of merchantable timber, it is clear that a mechanical damage formula must be avoided. The proper measure in cases where the trees are not merchantable upon severance from the land, but are replaceable should be the reasonable replacement cost. This is especially true today, when there are companies that grow, sell, and plant large ornamental trees, thereby rendering such timber trespasses a *temporary, rather than permanent,* injury to the freehold. To conclude otherwise would limit the vitality of the timber trespass statutes, and essentially allow defendants to avoid liability whenever they cut their neighbors' trees. As noted in *Sinsel v. Henderson*, 62 Or App 150, 153, 660 P2d 1072 (1983) ". . . it must be remembered that the 'overriding purpose' of [the timber trespass statute] is to award the victim of the trespass *adequate compensatory damages.*" (Emphasis added.) ❐

(Endnotes)

1 This article only examines Landowner B's liability. For the liability of contract loggers please refer to ORS 105.810(4) to (8).

2 Stumpage value is "the market value of timber before it is cut; the amount that a purchaser would pay for standing timber to be cut and removed." *Gerdes v. Bohemia, Inc.*, 88 Or App 62, 67, 744 P2d 275, 278 (1987).

A Different Point of View

By Stephen F. English
of Bullivant Houser Bailey

"This idea of a fair trial has been the greatest contribution made to civilization by our Anglo-American polity." Arthur Goodhart, 4 *New York Law Journal* 1 (1964).

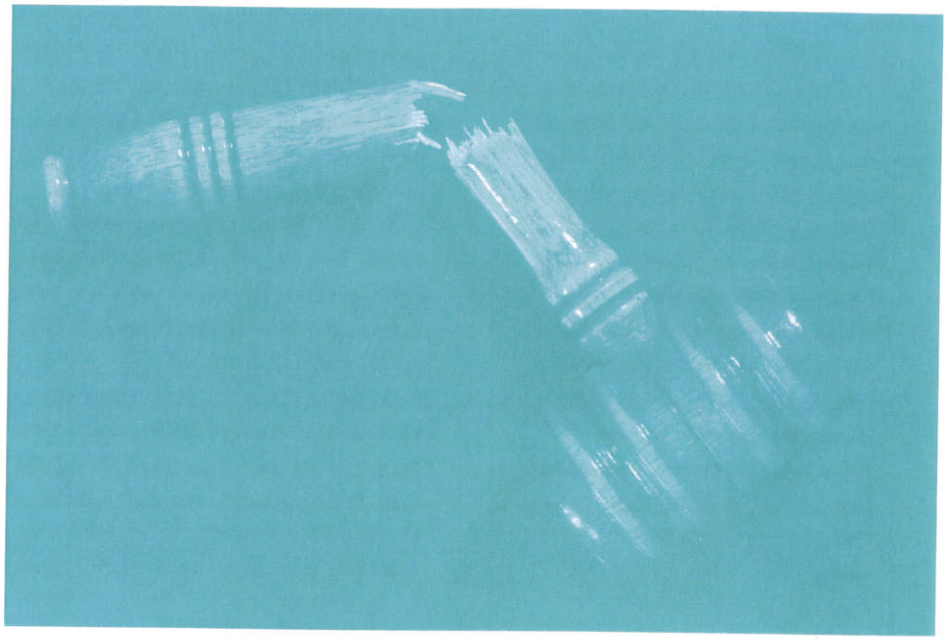
A recent article in the State Bar Bulletin posed the question "Are trials passé?" This article offers a response to that question.

Stephen F. English

Although many of us call ourselves litigators, in fact the percentage of cases that we actually try is, under the best of circumstances, quite small in relation to the percentage of cases that we settle. Of those many cases that we settle, how do we know whether the settlement is good, bad, or indifferent? We know it by measuring it against what likely would have happened in trial. Setting aside the multiple constitutional issues which recognize the right to and value of a jury trial, and addressing the issues purely on a pragmatic basis, the following immediately comes to mind:

1 Jury verdicts are the ultimate measure by which we judge the value of a case. If enough cases are tried involving similar situations, other cases can be resolved more efficiently and at a value that more closely approximates what a jury might do.

2 One of the reasons mediators have become valuable is because generally mediators have, because of their background as trial lawyer or judge, the requisite experience to tell attorneys and litigants what the realistic value of a claim is. The primary reason they are able to do that is because they can rely on their own *trial* experience. If there were no jury trials, there would be no basis for mediators or counsel to expound on what the realistic value of a case is.



3 The harsh reality is some cases either can't or shouldn't be settled and trials are the best alternative. By way of example, one can look at the area of products liability, both from the plaintiff and defense side. It is nonsensical to think that the tobacco companies pursued by some of the preeminent plaintiffs' lawyers here in Oregon would have been willing to sit down and settle a case involving their liability for injuries caused by smoking. Likewise, from the defense side, some product manufacturers are adamant that their product, as designed, is a safe one and believe that any attacks on the integrity of their product design must be vigorously defended.

4 Despite the fact that discovery at times may be expensive and cumbersome, a lawyer has a fiduciary obligation to represent his or her client zealously. There is nothing archaic or inherently wasteful about reviewing the necessary documents and taking the necessary testimony under oath in order to establish the existence of, or lack of, factual underpinnings to a claim or its defense.

5 If discovery has become too burdensome, one could argue that it is precisely because *not enough cases are being tried*

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A Different Point of View
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that this has occurred. In other words, the more trial experience a litigator gets, the more that litigator understands not only the crucial nature of certain documents and evidence, but the extraneous nature of others. If anything, a judiciary that encourages trials would probably find the 90%+ of cases which do resolve short of trial may well settle more readily and perhaps discovery will be more focused as well.

6 Lawyers who are working on their client's behalf in good faith should never be made to feel guilty when in their best judgment and acting in the interests of their client, they believe that trial is the best choice for their client. The Constitution guarantees a right to trial, not an obligation to do everything but end up in trial. As Judge Edward Leavy of the Ninth Circuit Court of Appeals, one of the esteemed members of our judiciary over the past several decades, has remarked both publicly and privately, if two parties have the money and interest to decide their differences in a trial, then they should be allowed to exercise their constitutional right to do so. Judge Panner of the District of Oregon, another esteemed judge of the federal court and a former experienced trial lawyer, will sometimes end a mediation by announcing to the lawyers that "I think you need to try this one to figure out who is right."

These examples and the experience that all of us have with mediation are based on a common theme and a common thread; namely, somewhere, someone has been out there trying cases and those *trials in front of real juries have resulted in verdicts that re ect what happened to real parties in a real trial.* Armed with that information, a prepared lawyer can make an intelligent recommendation to his or her client regarding an appropriate settlement. Removing that guideline would quickly eliminate from mediators one of their primary weapons in facilitating a settlement.

We in Oregon are blessed with a strong, capable judiciary, both at the state and federal level. They should embrace the opportunity to allow civil litigants to resolve their differences through a jury trial. The more experience lawyers get doing this and the greater number of lawyers with experience in trials, the more efficiently the other 90%+ of cases which do settle can be resolved. ❐

When the Accused Knocks, the Constitution Answers

By Janet Hoffman and Carrie Menikoff of the Law Offices of Janet Lee Hoffman

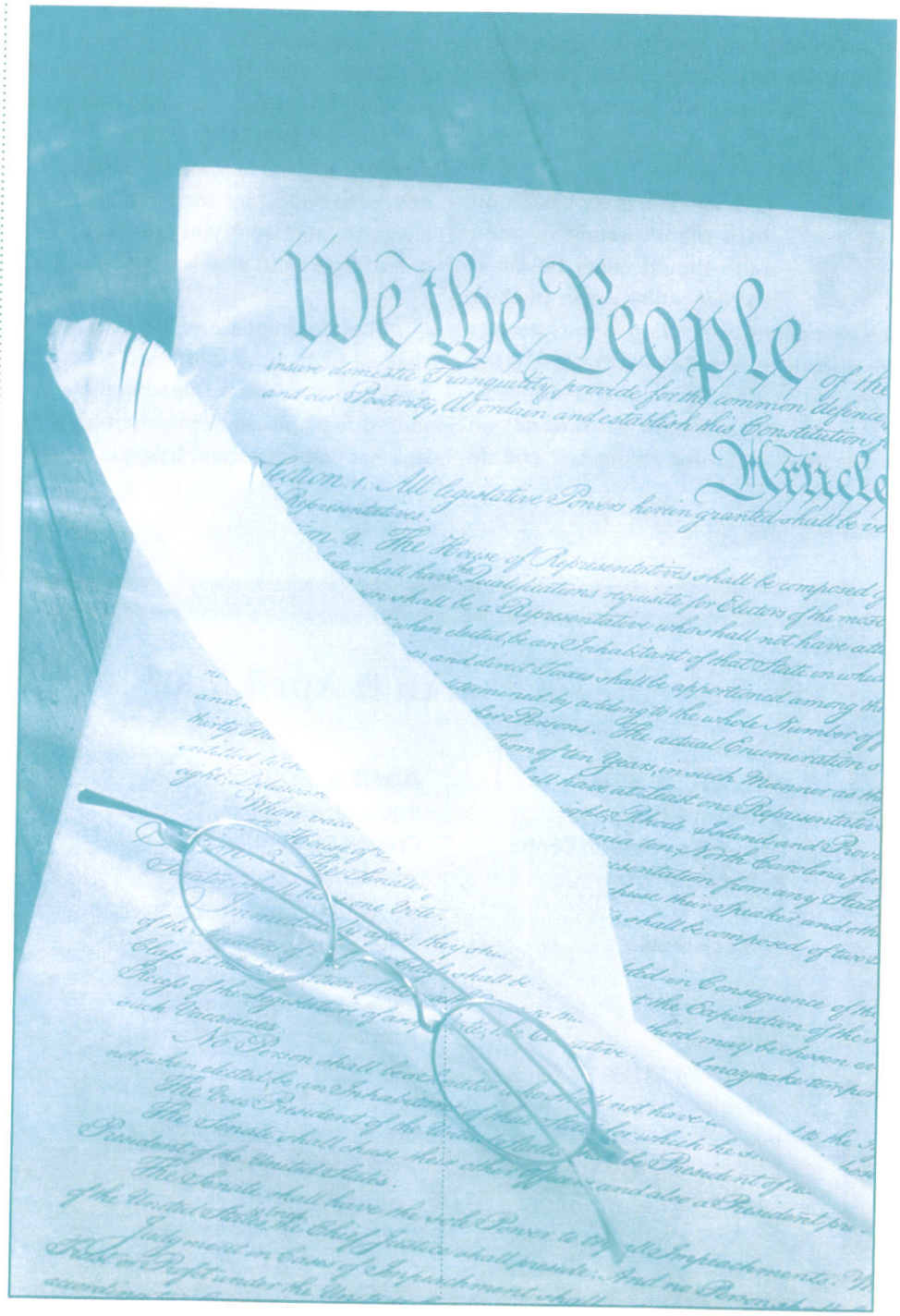
It may come as a surprise to many practitioners that their zealously guarded client confidences could one day be subject to disclosure. When the defendant in a criminal case knocks on your client's door with a subpoena calling for production of privileged attorney-client communications one's reflexive response might be that these communications are not discoverable. But before the experienced litigator dismissively rejects the defendant's claims out of hand, he should consider what might happen when the accused's constitutional right to present a defense meets the seemingly inviolable attorney-client privilege.

Janet Hoffman

Carrie Menikoff

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law."[1] For any number of reasons, including its age, this privilege is often viewed as impenetrable. But what happens when the venerated policy favoring confidentiality of attorney-client communications conflicts with the right of a defendant to obtain and present evidence in his favor? Simply put, the defendant's constitutional rights will likely trump the privilege.

A defendant's right to present evidence is protected by the Sixth Amendment of the United States Constitution.[2] Likewise, the due process clause of the Fourteenth Amendment "guarantees a



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criminal defendant a meaningful opportunity to present a complete defense."[3] Supreme Court cases have established "at a minimum, that criminal defendants have the right . . . to put before a jury evidence that might influence the determination of guilt."[4] Federal Rule of Criminal Procedure 17(c) implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor.[5]

1. Defendant's Right to Access Privileged Evidence under the Confrontation Clause of the Sixth Amendment.

Generally, the Sixth Amendment's confrontation clause requires that a defendant be given an opportunity for effective cross-examination and to present a defense through evidence of bias and motive. That is to say a defendant has a constitutional right to show bias and motive on the part of the witness, and thereby "'expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'"[6] Courts have recognized that where the government's case is largely dependent on informant or accomplice testimony, serious questions of credibility are raised and thus defense counsel "must be given a maximum opportunity to test the credibility of the witness."[7] Since unreliable testimony exists in all types of criminal cases from run-of-the-mill drug cases to high-profile corporate corruption cases, the accused will use every constitutional protection available to impeach unreliable witnesses.

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . . ." The Supreme Court has broadly defined the Sixth Amendment rights, including the right to present evidence, to mean that an accused has "the right to present a defense:"

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has a right to present his own witnesses to establish a defense.[8]

Although the Supreme Court has not yet decided a case involving the intersection between the Sixth Amendment and the attorney-client privilege, we know from well-established precedent involving other privileges that the Court will use a fact-specific, balancing test when determining whether an evidentiary rule requiring exclusion is outweighed by the defendant's asserted need for the evidence.[9] Indeed, its precedents provide that evidentiary privileges or other state laws must yield if necessary to ensure that an accused receives his Sixth Amendment protections.[10]

Notably, in the relatively recent Ninth Circuit case of *Murdoch v. Castro*, the court considered a habeas petition that presented a conflict between the attorney-client privilege and a criminal defendant's Sixth Amendment rights under the confrontation clause.[11] Murdoch, the petitioner, was accused of committing a murder during the robbery of a bar. One of the persons involved in the crime (the "accomplice"), who had already been convicted, had agreed to testify against Murdoch hoping to receive a lighter sentence.[12] Before opening statements, the prosecutor informed the court and defense counsel that during an interview with the accomplice, she had learned of a letter the accomplice wrote to his attorney exonerating Murdoch. The trial court took possession of the letter without allowing Murdoch's counsel or the prosecutor to see it. Murdoch sought to impeach the accomplice with the letter.[13] The trial court concluded that the accomplice was entitled to the privilege and refused to permit Murdoch to use the letter to cross-examine the accomplice. The court then returned the letter to the accomplice's attorney.

On appeal, the Ninth Circuit vacated the district court's denial of the habeas petition, and remanded the case to allow the lower court to consider the contents of the privileged letter, which was not part of the record on appeal. The *Murdoch* court concluded that because of the importance of the right conferred under the confrontation clause "[t]he attorney-client privilege should not be an unequivocal bar to access the only evidence of inconsistent statements and ulterior motives made by accomplices turned government witnesses."[14] In remanding the case, the *Murdoch* court essentially directed the lower court to use a balancing test to resolve the conflict and determine whether denying the petitioner access to the letter resulted in an unconstitutional denial of his Sixth Amendment right to confront witnesses.[15]

The Ninth Circuit is not alone in this emerging area of law. As the *Murdoch* court observed, at least two circuits have acknowledged and applied this precept in the context of the attorney-client privilege. Chief Judge Posner of the Seventh Circuit acknowledged the value of evidentiary privileges but noted that they are not absolute. "Even privileges recog-

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nized when the Constitution was written can be trumped by constitutional rights, such as the right of confrontation conferred by the Sixth Amendment."[16] Similarly, the Eleventh Circuit has implicitly acknowledged that the attorney-client privilege might have to give way in certain circumstances to accommodate the Sixth Amendment.[17]

At the outer limits, a "defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witnesses and enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable."[18] By using a balancing test, courts may find that there is sufficient information available to satisfy the accused's confrontation rights without having to pierce the attorney-client privilege. If an accused can effectively cross-examine a witness without use of privileged material because it is cumulative of other inconsistent statements, then the court will find that the accused has not been prejudiced.[19]

2. Defendant's Right to Privileged Communications under the Due Process Clause of the Fourteenth Amendment.

Notwithstanding the limitations on the defendant's right to obtain privileged information under the confrontation clause, the defendant might also seek to obtain privileged material under the broader due process clause of the Fourteenth Amendment. Because an accused's Sixth Amendment right to confront witnesses against him attaches at trial, it does not allow for pretrial discovery of material, exculpatory evidence. In other words the confrontation clause is a trial right that provides access to privileged material solely for purposes of cross-examination.

Due process is an equally important constitutional protection because it guarantees the fundamental fairness of trials and also ensures a defendant's right to obtain material favorable to his defense.[20] And in contrast to one's trial-based confrontation rights, the due process clause provides the accused with access to pretrial discovery in criminal cases.

Although the conflict between privileges and the defendant's right to secure favorable evidence is less developed under the due process clause, there is also Supreme Court precedent supporting an accused's claim that he is entitled to access privileged communications pretrial under the broader protections of the due process clause.[21] As noted earlier, Federal Rule of Criminal Procedure 17(c) implements the constitutional guarantee that an accused have compulsory process to secure evidence in his favor before trial.

While Rule 17(c) is not intended to be a discovery device, it facilitates the accused's right to procure documents that are evidentiary and relevant before trial recognizing that he could not otherwise properly prepare for trial without such production.[22] Importantly, the accused need not describe fully the contents of the materials sought (indeed, such a requirement would put an undue burden on the moving party since he could never know precisely the contents of the privileged materials.) Rather, he need only show that "there [is] a sufficient likelihood" that the records contain information "relevant to the offenses charged in the indictment."[23]

In the recent case of *United States v. W.R. Grace*, the district court dealt directly with the question of whether the attorney-client privilege must yield to a defendant's right to obtain evidence supporting his defense; in effect, evidence that would demonstrate a lack of criminal knowledge or intent.[24] In a lengthy, well-reasoned opinion, the court rejected the argument that the attorney-client privilege will *only* yield in cases where the defendant seeks to confront the witness.

Specifically, the *W.R. Grace* defendants wanted to use privileged corporate communications in their defense (i) to show that a particular defendant was not involved in certain aspects of company decision-making that related to the charges; (ii) to prove an individual defendant's lack of intent to defraud; and (iii) to establish a defense based on the advice of counsel.[25] The district court found that a defendant had a constitutional right "to present[ ] exculpatory proof that could provide a defense to one or more counts of the indictment."[26] The court then reviewed the "nature and contents of the privileged evidence" *ex parte* and "weighed it against the purposes served by the attorney-client privilege" to determine whether any of the documents are of such value that the right to the privilege must yield to the defendant's right to present evidence.[27] Ultimately, the district court concluded that the evidence defendants sought might "be of such probative and exculpatory value as to compel admission of the evidence over Defendant Grace's objection as the attorney-client privilege holder."[28]

Just as the district court in *W.R. Grace* analyzed the right to obtain and present exculpatory evidence under the Sixth Amendment, the fundamental principle applies with equal force under the due process clause.[29] Therefore, a defendant may invoke his due process rights to obtain pretrial privileged communications that could be material to his defense.

Finally, practitioners faced with a court order compelling production of

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attorney-client communications in a criminal case can take steps to protect the confidentiality of their clients' privileged communications. Under established Ninth Circuit law compelled disclosure does not constitute a waiver of the attorney-client privilege.[30] The producing party should, nevertheless, insist on disclosure subject to a carefully-worded protective order limiting use to the specific criminal case and trial at issue. The protective order should contain explicit language preserving the confidentiality of any documents the court compels the producing party to disclose pretrial.[31]

Moreover, the protective order should limit access to the privileged documents to those persons assisting in the accused's defense or who have a direct and identifiable interest in reviewing the material pretrial. The producing party thereby ensures that the attorney-client privilege is not lost. Although some may be chagrined to learn that this hallowed privilege is not sacrosanct after all, steps can be taken to protect the privilege when disclosure is compelled. ❐

(Endnotes)

1 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

2 *Rock v. Arkansas*, 483 U.S. 44, 51 (1987).

3 *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

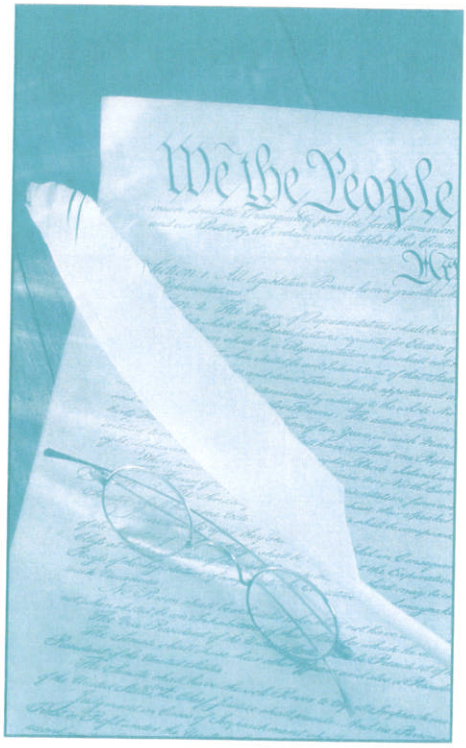
4 *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (defining the specific right secured by the compulsory process clause of the Sixth Amendment).

5 *California v. Trombetta*, 467 U.S. 479, 485 (1984).

6 *Id.* at 705.

7 *Id.* at 704 (quoting *Burr v. Sullivan*, 618 F.3d 583, 587 (1980)).

8 *Washington v. Texas*, 388 U.S. 14, 19 (1967).



9 *See United States v. W.R. Grace*, 439 F. Supp.2d 1125, 1140 (D. Mont. 2006) (analyzing Supreme Court precedent and noting that the Court has used "a balancing test in which the evidence or testimony sought is weighed against the policy behind the rule requiring that the evidence be excluded").

10 *See, e.g., Olden v. Kentucky*, 488 U.S. 227, 232 (1988); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (holding Sixth Amendment right must prevail over state's legitimate policy interest in keeping juvenile adjudications confidential).

11 365 F.3d 699 (9th Cir. 2004).

12 *Id.* at 701.

13 *Id.* at 701-02.

14 *Id.* at 704.

15 *Id.* at 706.

16 32 F.3d 1203, 1206 (7th Cir. 1994).

17 *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998).

18 *Id.* (quoting *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1370 (1994)).

19 *Id. Accord Rainone*, 32 F.3d at 1206-07.

20 *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963).

21 *Pennsylvania v. Ritchie*, 480 U.S. 39, 55-57 (1987). *Cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) (concluding in the context of the presidential privilege "that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial").

22 *Nixon*, 418 U.S. at 699.

23 *Id.* at 700.

24 *See* note 9, *supra*.

25 *Id.*

26 *W.R. Grace*, 439 F. Supp.2d at 1142.

27 *Id.*

28 *Id.*

29 *See Pennsylvania v. Ritchie*, 480 U.S. at 55-57 (1987).

30 *Transamerica Computer Co., Inc. v. Int'l Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978). *See also United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992) (citing to *Transamerica* and holding that privilege was not lost for documents obtained pursuant to court-ordered search warrant).

31 *Bittaker v. Woodford*, 331 F.3d 715, 720-21 (9th Cir. 2003).

Think Twice Before Accepting an Assignment of Insurance Rights:

Anti-Assignment Provisions May Be Enforced in Oregon

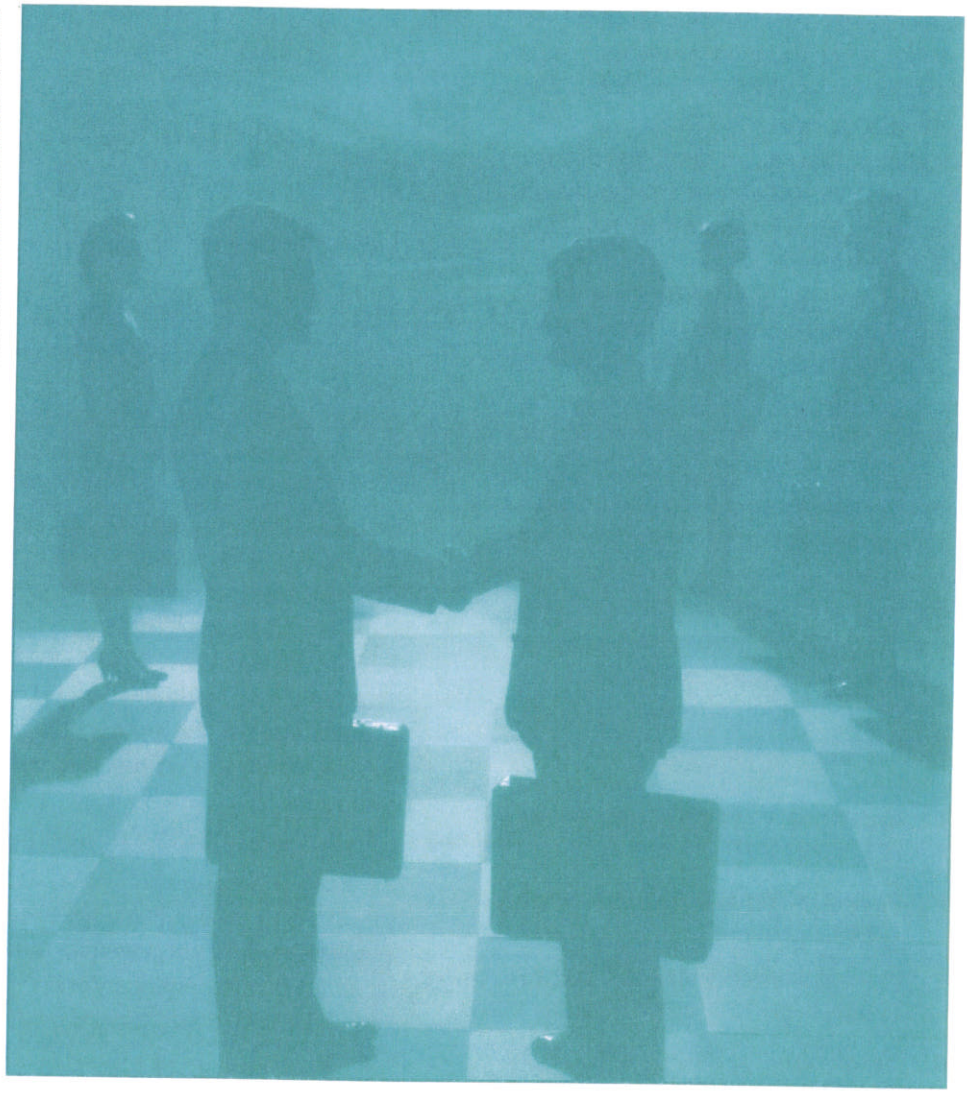
By Frank J. Weiss
of Tonkon Torp LLP

The Oregon Supreme Court recently found in *Holloway v. Republic Indemnity Company of America*[1] that a standard anti-assignment provision in a liability insurance policy barred an insured from assigning policy rights after a loss. This decision is a departure from the law in many other states, and may have a significant impact on the way that insured claims are settled in Oregon.

Frank J. Weiss

Holloway involved a liability policy containing a common "anti-assignment" provision stating that: "[y]our rights or duties under this policy may not be transferred without our written consent." The great majority of courts in other states have concluded that such provisions apply to assignments before a loss, but do not prevent assignments after a loss has occurred.[2]

The reasoning behind the majority approach is simple. Before a loss, an insurer has nothing more than a contractual relationship with its policy holder. An insurer is free to prohibit its insured from assigning that contractual relationship, because an assignment could change the risk being insured. Following a loss, however, the risk disappears. What remains is simply a right to be paid. Courts in other states have found that this right to be paid is nothing more than a chose in action, which may be assigned like any other chose in action.[3]



In *Holloway*, however, the court adopted the minority position. It found that the anti-assignment provision barred any assignment of rights under a policy, including the right to be paid after a loss occurred.

Holloway involved a common form of settlement that arises after an insurer declines to provide coverage. In *Holloway*, the insured was sued for constructive discharge and employment discrimination. The carrier denied coverage for the claim and refused to provide a defense. Thereafter, the insured settled with the plaintiff. Pursuant to the settlement, a judgment was entered against the insured and the plaintiff agreed not

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Insurance Rights

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to execute on the judgment beyond a small amount. The insured also assigned the plaintiff all of its rights against the insurer for breach of contract or for indemnity under the insurance policy.

Following the settlement, the plaintiff in the underlying tort case, as the assignee of the insured's rights, brought a breach of contract action against the insurer. The insurer moved for summary judgment arguing, among other things, that the assignment was invalid. Summary judgment was granted, and the plaintiff appealed. The court of appeals decided that the anti-assignment provision did not apply, but in reaching this conclusion it took a slightly different tack than many of the other cases that have permitted post-loss assignments. The court of appeals concluded that the anti-assignment provision was ambiguous because the policy did not identify which "rights and duties" could not be transferred and, therefore, could be read as prohibiting assignment of pre-loss rights, post-loss rights, or both. Due to this perceived ambiguity, the court of appeals found that the policy should be construed against the insurer and be read to prohibit only pre-loss assignments.

The Oregon Supreme Court reversed. The Supreme Court concluded that there was nothing ambiguous about the provision, and held that: "the only reasonable interpretation of the anti-assignment provision . . . is that it prohibits the assignment of the insured's rights or duties without regard to whether they arose pre-loss or post-loss."[4] As a consequence, the Supreme Court upheld summary judgment in favor of the insurer, finding that the purported assignee had obtained no rights against the insurer.

However, although clear on its face, the *Holloway* decision may not be the final word on this subject. In a footnote, the Supreme Court recognized that "even unambiguous contract provisions may be held invalid when they are inconsistent with statutes or with certain overriding public policies."[5] Since no such statute or policy had been identified, the Court found no obstacle to applying what it found to be the plain language of the anti-assignment provision.[6]

As it happens, there *is* an Oregon statute directly on point. ORS 31.825 is titled "assignment of actions against insurers" and provides that:

> A defendant in a tort action against whom a judgment has been rendered may assign any cause of action that defendant has against the defendant's insurer as a result of the judgment to the plaintiff in whose favor the judgment has been entered. That assignment and any release or covenant given for the assignment shall not extinguish the cause of action against the insurer unless the assignment specifically so provides.

The plain language of the statute seems to directly address the situation in *Holloway*. It provides that a defendant who suffers an adverse judgment may assign any cause of action the defendant has against his or her insurer to the plaintiff who obtained the judgment, just as the insured did in *Holloway*.

Because the holding in *Holloway* appears to conflict with the language of ORS 31.825, the law in Oregon is open for debate. On the one hand, it is possible that the Court never considered ORS 31.825. If this is the case, it would appear that the statute would control if the issue was ever squarely put before the Court. The *Holloway* decision expressly notes that the language of the insurance policy could be trumped by a contrary statute or strong public policy. Given this acknowledgment, if faced with the question, it would seem likely that the Court would conclude that the statute overrides the anti-assignment provision.

On the other hand, it is possible that the Court was aware of ORS 31.825, but for some unstated reason decided that it did not apply. It is possible, for instance, that the *Holloway* Court did not feel that a judgment had been "rendered" against the insured within the meaning of the statute because it was entered by stipulation.

Until the seeming conflict in the law is clarified, it would be wise to be extremely cautious about accepting an assignment of an insurance policy, even following a loss. One obvious approach would be to require the insured to pursue the action in its own name. Another might be to seek an advance declaration that a contemplated assignment complies with ORS 31.825 and, therefore, is not barred by an otherwise applicable anti-assignment provision. Simply taking an assignment in the manner the *Holloway* plaintiff did may provide no benefits at all. ❐

(Endnotes)

1 341 Or. 642 (2006).

2 3 Lee R. Russ, *Couch on Insurance*, § 35:7 (3rd Ed. 2006).

3 *SR Intl. Bus. Ins. Co., Ltd. v. World Trade Center Prop., LLC*, 375 F. Supp.2d 238, 246 (S.D.N.Y. 2005); *Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co.*, 124 Wash.2d 789, 800, 881 P.2d 1020 (Wash. 1994).

4 *Holloway*, 341 Or. at 652.

5 *Id.* at p. 653, n.4.

6 *Id.*

Gunslinger

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In the era of "Vanishing Trials," however, high noon rarely comes. It is hardly even possible to talk honestly any longer of a "trial lawyer," meaning one whose specialty is trying cases. Today's litigation lawyer may shine his or her[1] boots in motion practice, and engage in discovery fisticuffs, but rather than take to the streets for a shootout, most often he or she is caucusing in a back room, settling the dispute. This is true even for the most daring risk-takers in the ranks. The gunslinger-warrior archetype retains vitality in the lawyering psyche and certainly in the public's collective imagination, but today the trial lawyer has become, if not quite obsolete, as scarce as a Wild West gunslinger.

In this article we will examine the changing role of the trial and litigation lawyer and the new skills needed to excel in this post-trial world. I am not concerned with "hardware"—the need to be technologically savvy, comfortable with e-filings and e-discovery, and at ease with cutting-edge demonstrative evidence. Rather, I am curious about the "software," that is, the personality, temperament and interpersonal skills needed today to negotiate and resolve conflict. Does our archetypal gunslinger have what it takes? Can such skills be learned? What might the next generation of litigation lawyers, who will specialize in resolving conflict without trial, look like?

The Vanishing Trial

The popularity of television shows featuring courtroom dramas would lead one to think that trials still constitute our primary mechanism for resolving disputes. On the contrary, they are vanishing. And along with them vanishes our need for a large number of lawyers who can skillfully try a case.

Although we have witnessed an explosion of law business generally, a significant increase in lawyers, laws and regulations, and money spent on law,[2] trials have nearly disappeared over the past four decades. Professor Mark Galanter of the University of Wisconsin has studied the phenomenon extensively. He was the first to coin the phrase "the Vanishing Trial."[3] His research shows that despite fivefold increase in the number of cases filed in that time period, "there is abundant evidence of data that shows that trials, federal and state, civil and criminal, jury and bench, are declining precipitously."[4]

Why have lawyers stopped trying cases? Galanter and others cite many causes, including an increase in disposition by summary judgment and in judicial case-management that emphasizes settlement.

From 1962 to 2002, while the number of terminated federal civil cases rose 400 percent, the number of civil jury trials fell 32 percent.[5] Even that masks the more dramatic decline since 1985, in which the number of federal jury trials has dropped 60 percent and now accounts for less than 2 percent of dispositions.[6] In 2004, civil cases made up only 1.7 percent of terminations.[7]

Tort cases once comprised one of the largest group of cases tried. In 1962 the trial rate for tort cases was 16.5 percent of dispositions, but by 2002, only 2.2 percent of tort cases were resolved by trial.[8] Bench trials have declined even more dramatically than jury trials, now accounting for about .5% of dispositions, a decrease of 75%.[9]

Although harder to study, the data for state courts, where the vast majority of trials take place, "bears an unmistakable resemblance to trends in federal courts."[10] One study of 22 states showed that the portion of number of jury trials fell by one-third and the number of bench trials by 6.6%.[11] The trend in Oregon's state and federal courts is similar; trials have declined and now constitute a small portion of dispositions.[12]

Our elders in the trial bar, who nostalgically relate that in the good old days they went to trial nearly continuously, thus have ample support for their anecdotes.

Critique of the Adversary System

Why have lawyers stopped trying cases? Galanter and others cite many causes,[13] including an increase in disposition by summary judgment and in judicial case-management that emphasizes settlement. But certainly one of the major factors is the dissatisfaction with our adversary system of justice, our virtual gunfight. By now the most obvious criticisms of the adversary system are well known. They included crowded court dockets and the belief, right or wrong, that juries are irrational and therefore risky. Also, that lawyers are expensive, spend wasteful time and money in pretrial discovery, and act unprofessionally, making litigation even more contentious, time-consuming, and expensive. In the public view, lawyers lack compassion, honesty and integrity, and are greedy.[14]

Trial lawyers argue that the adversary system is the best mechanism yet devised for finding truth, and because of their role in it, they will never be liked. Critics retort that the adversary system is not equipped to find truth so much as to resolve a dispute, and that can be done

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faster, cheaper and with less emotional damage to the participants when lawyers do not dominate the process.

In her examination of lawyer personality types, Professor Susan Daicoff of Florida Coastal School of Law reviewed the available studies of lawyer personalities and summarized the traits of the typical lawyer. They deviate only marginally from the stereotype. Compared to the general population, both men and women lawyers are driven to achieve; to display dominance, aggression, and competitiveness; to emphasize rights and obligations over emotions, interpersonal harmony, and relationships; to be materialistic and pragmatic rather than altruistic; and to display higher levels of psychological distress.[15] (While apparently the studies Daicoff summarized do not distinguish between trial lawyers and the rest of the bar, it is safe to assume that the profile, to the extent it is valid, is truer for a trial lawyer than, say, a contract lawyer.) Such personality traits, while perhaps not conducive to marital bliss, serve our gunslinger and his client well in the midst of a shootout, which has been relegated to the forum of last resort for dispute resolution.

On the other hand, if these are the traits required to succeed in the adversary system, and if the lawyer's personality traits reflect the personality traits of the system in which he serves, it is hardly surprising that society is seeking alternatives to the shootout. The adversary system provides little room for nuance, emotion, or morality. A sense of striving to achieve the common good is conspicuously absent from the adversary system, and from the lawyer's personality profile. Society has reacted by creating alternatives to trial, and some lawyers and thinkers have called for the revitalization of the profession. The call has gone out for lawyers to become healers, not gunfighters, and to reconnect with human and spiritual values in their representation of clients.[16]

We are now at a point where the so-called alternative dispute arenas have become the primary arenas for disposing of cases. Our language trails reality, for it is trial that has become the alternative means of resolving conflict, the arena of last resort.

The Rise of Alternative Dispute Resolution

Dissatisfaction with the adversary system helped launch the modern ADR movement. Its birth might be traced to 1976 when Harvard Law Professor Frank Sander delivered a speech in which he described his vision of cases proceeding to resolution through a variety of processes other than the courthouse door to litigation.[17] This was attractive to groups who wished to reduce court congestion, such as then Supreme Court Justice Warren Burger, and also to groups who wished to create greater party control, participation in dispute resolution, and more tailored solutions.[18] Over the ensuing years, we have witnessed an explosion in the use of arbitration and mediation to resolve disputes. Many public courts and agencies made ADR mandatory. In the private arena, business and labor have embraced alternatives to litigation. In family law, many courts mandated mediation before a couple could obtain a divorce, and in some quarters practitioners have begun working collaboratively with members of other disciplines, such as mental health and accounting, to craft less damaging outcomes for the family. Even most tort cases now run the gauntlet of mediation or arbitration and nearly get resolved before trial. Even in the courtroom we are seeing the rise of such creative alternatives as hybrid trials, summary jury trials, and hybrid fact-finding/mediation proceedings. We are now at a point where the so-called alternative dispute arenas have become the primary arenas for disposing of cases. Our language trails reality, for it is trial that has become the alternative means of resolving conflict, the arena of last resort.

Paradigm Shift

Some commentators believe that this is no less than an historical paradigm shift. Professor Thomas Barton of California Western School of Law believes we are moving from a legal system that embodies the values of personal freedom and independence to one in favor of connectedness emphasizing relationships and community.[19] Professor Carrie Menkel-Meadows of Georgetown Law School has written that the demise of the adversary system of trial "is a continuing evolutionary development of our Anglo-American legal system" and that we are now in transition between this historical model and whatever model (or more likely, models) will replace it in the future.[20] She writes:

> ". . . I am often tempted to say we are somewhere 'in between', in a modern version of the transition from trial by ordeal or battle to trial by the 'ordeal' of court, though it may not be quite clear that we are moving uniformly (or some would argue, returning) toward 'private' trials or other legal events for the resolution of our disputes with each other."[21]

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Whether the decline in trials is a healthy development for society is the subject of debate, especially worrisome to those who believe the rise of private dispute resolution has deprived society of much-needed development in public law.[22] They argue that some disputes —dangerous products, say—demand a public forum that only a trial provides. The dearth of trials has also led some to lament the lack of opportunity for young lawyers to gain trial experience, although it is unlikely, given the trend, that society will need a large number of skilled trial lawyers in the future.[23] But if the experts proposing a paradigm shift are correct, we are not going to see large numbers of trials again.

Old Dog, New Tricks?

The drop in trials produces significant consequences for our gunslinger trial lawyer. The gunslinger's law school education, apprenticeship, and experience were directed toward trying cases. He developed expertise in controlling the courtroom, building rapport in *voir dire*, offering a teasing yet authoritative opening, disappearing behind the voice of the witness on direct, controlling the playing field on cross-examination, and leading the jury home in summation. He was, at all times, expected to go for the kill. These skills and this mindset, however, are of little or no help in the world of non-trial conflict resolution.

Were our gunslinger to study the many fine works on negotiation, even such accessible yet seminal works as *Getting to Yes*[24] and its progeny,[25] he would learn that today's expert negotiator does not dominate a conversation; she is instead a superb listener. The expert negotiator does not finish off an opponent but instead she allows an opponent to save face. She does not control the playing field but devises creative options for maximum flexibility. She focuses on interests, not positions. She is not afraid to tackle the white elephant of emotion in the caucus room. And she considers not only her client's interests but also the interests of her opponent, so that the interests of both parties can be met to achieve a mutually satisfying outcome. In effect, today's litigation lawyer needs to master psychology, communication arts, and negotiation theory, along with traditional law, in order to resolve conflict effectively. She should also be familiar with emerging literature on multiple intelligence, neuroscience, and how and why people change their minds.

While it would be nice to think the gunslinger could simply learn more advanced negotiation tactics, more is involved than merely acquiring some new bullets; what is required is a different mindset.

Advanced settlement and negotiation skills did not even exist when the gunslinger served his apprenticeship, and they cannot be acquired in a daylong CLE session. Consequently, gunslingers work outside their traditional skill area without training and experience in advanced negotiation techniques, and their negotiation tactics show it. Often veteran trial lawyers exhibit a one-bullet negotiation strategy, which is largely an extension of their adversarial mindset. They attempt to club or bluster the opponent into settlement using the biggest weapons they had loaded for trial. The underlying assumption is that the other side will capitulate when they see the strength of the gunslinger's case. The primary strategy is therefore to win over the mediator or settlement judge in the hopes he or she will bludgeon the other side into settlement. The gunslinger may get away with these crude tactics in cases with strangers, such as tort cases with an injured party and insurance company, where negotiation resembles shadow boxing before trial. He will be less successful resolving cases in which there are ongoing relationships to protect, such as employment and family law cases. And to the extent the gunslinger's negotiation tactics simply embody and reflect the deficiencies of the adversary system, the gunslinger can expect that eventually these tactics will meet the same dissatisfaction that has been directed toward the adversary system.

While it would be nice to think the gunslinger could simply learn more advanced negotiation tactics, more is involved than merely acquiring some new bullets; what is required is a different mindset. The gunslinger, however, will be hard pressed to change hats. Do we really see the grizzled trial lawyer mid-career learning to listen empathically, to handle a client's emotional needs, and to create outcomes that satisfy an opponent's interests? As Professor Daicoff puts it: "Asking lawyers to change may be about as successful as asking leopards to change their spots."[26] Maybe the gunslinger should simply continue to do what he does best —lock and load—on those rare occasions when a gunfight is needed.

New Models for Lawyers.

Perhaps in the future we will see a bifurcation of litigation duties and the emergence of negotiation specialists. But who will be tomorrow's experts at dispute resolution, if not our gunsling-

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ing Traditionalists or Boomers? More promising will be the younger lawyers of Generations X and Y, not yet rutted by habituated adversarial behavior and thinking. Even more promising will be tomorrow's law students, emerging from schools whose curricula is giving greater weight to non-trial skills such as client counseling, negotiation, mediation, and even mindfulness training.

But all is not lost for veteran litigation lawyers, especially those who possess personality traits that make for a better fit with modern negotiation strategies. These are reluctant warriors in the adversarial ranks for whom drawing a weapon has produced reticence and discomfort rather than exhilaration and satisfaction. Professor Daicoff writes about the minority of lawyers who do not share the dominant personality characteristics. They possess instead humanistic values, feeling, an ethic of care, a desire for affiliation, and altruism.[27] Daicoff notes these lawyers may feel isolated, alienated, and devalued in their profession.[28] Daicoff questions whether the misfit between personality traits and adversary system might be one explanation for the profound dissatisfaction and distress found among some lawyers.[29] Like the public, some have felt that their profession had become too focused on advocacy of individual rights at the expense of relationship or community, or on profits, and had thus lost meaning. Likely they have kept their feelings hidden, lest they elicit sneers and derisive comments ("wimps") from their gunslinging colleagues, or risk losing their jobs. For these lawyers, the rise of alternatives to trial might enable them to serve clients in ways that are more congruent with their personalities.

Already across the country lawyers are creating nontraditional ways to practice law. No one name has yet captured the proliferating variety of movements, trends, and groups that Professor Daicoff has labeled "vectors."[30] The vectors go by such disparate names as procedural justice, therapeutic jurisprudence, therapeutically-oriented preventive law, problem-solving courts, restorative justice, collaborative law, transformative mediation, holistic lawyering, and creative problem solving. The common denominator is that they seek the resolution of legal disputes in ways that are psychologically healthy for the parties. They do this by taking into consideration not only parties' legal rights but also the entire spectrum of interests a party brings to a dispute. This will include emotion, values, interpersonal relationships between people and their employers, and community ties.

Like the public, some [lawyers] have felt that their profession had become too focused on advocacy of individual rights at the expense of relationship or community, or on profits, and had thus lost meaning.

In Oregon collaborative family law[31] has gained a foothold. In collaborative law, lawyers commit to working cooperatively with the parties on their divorce. In the event the case is not resolved, the lawyers do not take the case to trial; instead, the parties retain litigation counsel. In this emerging model we may be witnessing the seeds of the bifurcation I spoke of earlier, in which negotiation becomes a specialty unto itself.

East Meets West

It is also hard to imagine the gunslinger, a man of action and little patience for reflective insight, reacting positively to the impending incursion of ancient Eastern Wisdom traditions into law. Yet the practice of meditation or mindfulness, which has already made inroads into Western medicine, has quietly entered the gates of the conservative legal profession. Among those taking mindfulness training in recent years are lawyers in prominent law firms, persons in criminal justice, and law students at many schools including Harvard, Yale, Stanford, and Columbia. The Harvard Negotiation Insight Initiative, an offshoot of the Harvard Negotiation Project at the law school, is designed to create a forum for the fertile exchange between negotiation and conflict resolution and meditation and ancient Wisdom traditions.

One of the leading proponents of mindfulness is Professor Leonard Riskin of the University of Missouri-Columbia, whose comprehensive article in the *Harvard Negotiation Review* laid out the benefits of meditation practice for lawyers involved with counseling, negotiating and mediating.[32] These include what he calls "emotional intelligence competencies," and include self-awareness, self-regulation, motivation, empathy, and social skills.[33] In mindfulness training, negotiators and mediators learn methods for calming the mind, concentrating, experiencing compassion and empathy, and achieving awareness of, and distance from, habitual thoughts and emotions that can interfere with good judgments, rapport building, resisting retaliation, and motivating others.

Letting Go

Thus we find ourselves a world removed from the shootout at trial. In an era of few trials, there are few gunslingers left, and few needed. For most

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litigation lawyers, who rarely try a case, it may be time to appreciate how fully the gunslinger archetype has pervaded the profession. It is now not only obsolete, but counterproductive, perpetuating an attitude, personality type, and skill-set much too narrow for the needs of litigation lawyers and their clients. It is time for new archetypes to arise. And with this comes the opportunity for today's litigation lawyers, who no longer require bullets so much as heart and creativity, to re-imagine their role. ❐

It is time for new archetypes to arise. And with this comes the opportunity for today's litigation lawyers, who no longer require bullets so much as heart and creativity, to re-imagine their role.

(Endnotes)

1 I have used the male pronoun when referring to the gunslinger trial lawyer because the archetype is a male figure, and the archetype is a holdover from a time when men dominated the trial bar. When referring to a litigation lawyer, by which I mean one whose specialty involves primarily pre-trial work and usually settlement, I have used male and female pronouns.

2 Galanter, *A World Without Trials?* 2006 J. Disp. Resol. 7, 11-12 [hereinafter Galanter, *World Without Trials?*].

3 Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004) [hereinafter Galanter, *Vanishing Trial*].

4 Galanter, *World Without Trials?*, *supra* note 2, at 7.

5 *Id.* at 8.

6 *Id.*

7 Galanter, *ADR and the Vanishing Trial*, 10 Dispute Resolution Magazine 3 (Summer 2004).

8 Galanter, *Vanishing Trial*, *supra* note 3, at 466; 533-34 tbl.A-2.

9 Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. Disp. Resol. 35, 37.

10 Galanter, *World Without Trials?* *supra* note 2, at 9, citing Ostrom, Strickland & Hannaford-Agor, *Examining Trial Trends in the State Courts*, 1 J. Empirical Legal Stud. 755,757-769 (2004).

11 *Id.*

12 For Oregon federal district court statistics, see www.uscourts.gov/library/statisticalreports.html, and www.uscourts.gov/cgi-bin/cmsd2006.pl. For Oregon state court statistics, see www.ojd.state.or.us/osca/2006Statistics.htm.

13 Schlanger, *American Trial Trends*, *supra* note 9, at 39-41.

14 Daicoff, *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses*, at 5-6 (American Psychological Assn 2004) [hereinafter *Lawyer, Know Thyself*], *quoting* Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J. 60, 62-3 (Sept. 1993).

15 *Id.* at 41.

16 David Hoffman, *The Spiritual Revitalization of the Legal Profession: A Search for Sacred Rivers* (Edwin Mellen Press 2005)

17 Carrie Menkel-Meadows, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, 84, 100 in Current Legal Problems (Jane Holder et al. eds., 2004) [hereinafter Menkel-Meadows, *Adversary System*].

18 *Id.*

19 Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 Emory Law Journal 163 (Winter 1998).

20 Menkel-Meadows, *Adversary System*, *supra* note 17, at 86.

21 *Id.*

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22 D. Luban, *Settlements and the Erosion of the Public Realm*, 83 Georgetown LJ 2619 (1995).

23 See, e.g., Nathan Koppel, *Trial-less Lawyers: As More Cases Settle, Firms Seek Pro Bono Work to Hone Associates' Courtroom Skills*, Wall St. J., Dec. 1, 2005.

24 Roger Fisher, William Ury, Bruce Patton, *Getting to YES: Negotiating Agreement Without Giving In* (Penguin, 1991).

25 Roger Fisher, William Ury, *Getting Past NO: Negotiating Your Way from Confrontation to Cooperation* (Random House 1991); Roger Fisher, Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Penguin 2005)

26 Daicoff, *Lawyer, Know Thyself, supra* note 14, at 109.

27 *Id.* at 156.

28 *Id.*

29 *Id.*

30 *Id.* at 175-76.

31 Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (ABA 2001).

32 Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers and Their Clients*, 7 Harv. Negot. L. Rev. 1 (2002).

33 *Id.*

Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

Claims for Relief

Bunnell v. Dalton Construction, Inc., 210 Or App 138 (2006)

Wild Rose Ranch Enterprises v. Benton County, 210 Or App 166 (2006)

Harris v. Suniga, 209 Or App 410 (2006)

Lowe v. Philip Morris USA, Inc., 207 Or App 532 (2006)

In four recent cases, the Court of Appeals addressed the economic loss doctrine, which ordinarily bars recovery of economic damages on a negligence claim absent physical injury. In *Harris*, the court held that deterioration to the physical structure of a building because of defective construction is property damage, not economic loss, so a subsequent purchaser could recover the cost of repairing structural damage from the builder on a negligence theory. 209 Or App at 423. The court concluded that its decision was mandated by the Supreme Court's opinion in *Newman v. Tualatin Development Co., Inc.*, 287 Or 47 (1979), and rejected the defendant's contention that more recent appellate decisions had cast doubt on *Newman's* continued vitality. 209 Or App at 420. In *Bunnell*, the Court of Appeals followed its decision in *Harris*, holding that the trial court erred when it dismissed plaintiffs' negligence claim against a construction company for negligently installed siding on their home.

Stephen K. Bushong

In *Wild Rose Ranch*, plaintiff (Wild Rose) brought an action for negligence and negligent misrepresentation after Benton County denied its application for a conditional use permit to operate a rock quarry. Wild Rose spent $125,000 to acquire mineral rights and entered into a contract with a third party to operate the quarry after a county land use planner stated that a conditional use permit would not be necessary. The county subsequently notified Wild Rose that it had to cease operating the quarry without a conditional use permit, and then denied its permit application. Wild Rose sued to recover the $125,000 it spent on the mineral rights, plus $60,000 in lost anticipated revenues. The jury returned a verdict in plaintiff's favor. The Court of Appeals reversed, holding that the trial court erred in failing to direct a verdict in the county's favor because (1) Oregon law does not permit a plaintiff to recover for purely economic harm caused by negligence or negligent misrepresentation unless there is a special relationship between the parties; and (2) a county code provision specifying the duties of county land use planning officials does not create a special relationship that gives rise to a heightened duty to protect plaintiff from economic loss.

In *Lowe*, plaintiff (a long-time cigarette smoker) filed a negligence action against cigarette manufacturers, alleg-

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ing that "her accumulated exposure to cigarette smoke has increased her risk of contracting lung cancer some time in the future", a risk that "creates a current need for medical monitoring and smoking cessation treatment[.]" 207 Or App at 534. The trial court dismissed the complaint, finding that "under Oregon law, a necessary element of any negligence claim is an allegation of present physical injury." *Id.* The Court of Appeals noted that whether a defendant "may be liable in negligence for so-called 'medical monitoring' is a matter of first impression in Oregon[,]" though it "has been the subject of much litigation and scholarly debate elsewhere." *Id.* at 537. After reviewing the decisions in other states, the commentary, and related decisions in Oregon, the court issued a narrow ruling, holding that plaintiff's allegations were "legally insufficient to state a claim for negligence under current Oregon law or any reasonable extension of the principles underlying that law." *Id.* at 557. The court stated that it would "leave for another day whether a negligence claim predicated on different allegations as to the risk of future harm and the certainty of the need for treatment is cognizable under Oregon law." *Id.*

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Joshi v. Providence Health System, 342 Or 152 (2006)

Groth v. Hyundai Precision and Ind. Co., 209 Or App 781 (2006)

Two recent cases involved wrongful death claims under ORS 30.020. In *Joshi*, plaintiff alleged that her husband died as a result of defendants' failure to diagnose and treat him for a stroke after he was taken by ambulance to the hospital. The trial court directed a verdict for defendants because there was insufficient evidence that decedent probably would have survived if defendants had correctly diagnosed and treated him. The Court of Appeals affirmed, and the Supreme Court granted review "to address two related causation questions: (1) whether the 'but for' standard or the 'substantial factor' standard applies to this wrongful death action; and (2) whether expert testimony that defendants' conduct probably increased the chance of decedent's death creates a jury question as to causation." 342 Or at 157. On the first question, the Court held that "caused" as used in the statute "encompasses both the reasonable probability standard of causation as well as the substantial factor standard; the standard to be applied in a given case depends on the circumstances of that case." *Id.* at 164. The circumstance of this case required plaintiff "to demonstrate, to a reasonable degree of probability, that defendants' alleged negligent acts or omissions caused decedent's death." *Id.* Expert testimony that defendants' conduct "deprived decedent of a 30 percent chance of surviving a stroke" was insufficient, so defendants were entitled to a directed verdict. *Id.*

The decedent in *Groth* was "a machinist who was killed while operating a Hyundai V5 vertical industrial lathe." 209 Or App at 784. The jury awarded $1.9 million in economic damages against all defendants, and $8.3 million in punitive damages against Hyundai. The jury also awarded $1.9 million in noneconomic damages, which the trial court reduced to $500,000 pursuant to ORS 31.710. The Court of Appeals affirmed, finding that (1) the issue of punitive damages was properly submitted to the jury because there was evidence sufficient to permit the jury to conclude, by clear and convincing evidence, that Hyundai "has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others" (*Id.* at 787, quoting ORS 31.730(1)); (2) the punitive damages award does not violate the Due Process Clause under *BMW of North America, Inc. v. Gore*, 517 US 559 (1996), and *State Farm v. Campbell*, 538 US 408 (2003) (*Id.* at 793-94); (3) the trial court did not abuse its discretion in declining to reduce the punitive damages award under ORS 31.730(3) based on remedial measures taken by Hyundai (*Id.* at 796-97); (4) the evidence was sufficient to support the economic damages award (*Id.* at 799); and (5) the trial court properly denied Hyundai's motion for a mistrial based on comments by plaintiff's counsel during closing argument regarding the allocation of punitive damages (*Id.* at 800-01).

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Brown v. Gatti, 341 Or 452 (2006)

Reynolds v. Schrock, 341 Or 338 (2006)

These cases involved claims against attorneys. In both cases, the trial courts granted summary judgment in defendants' favor, the Court of Appeals reversed, and the Supreme Court reversed the Court of Appeals and affirmed the trial courts' summary judgment rulings. In *Brown*, plaintiffs sued an attorney and others for defamation based on comments the attorney made to the media after trial of a medical negligence case. The Supreme Court held that summary judgment was properly granted to defendants, holding that "none of the allegedly defamatory statements attributed to [defendants], when read in context, is defamatory." 341 Or at 455. In *Reynolds*, the Court held that

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"a lawyer may not be held jointly liable with a client for the client's breach of fiduciary duty unless the third party shows that the lawyer was acting outside the scope of the lawyer-client relationship." 341 Or at 340.

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Love v. Polk County Fire District, 209 Or App 474 (2006)

In *Love*, the Court of Appeals reversed a summary judgment for defendant on a wrongful discharge claim premised on the exception to the at-will employment rule for exercising a job-related right that reflects an important public duty. The court first addressed the standards for determining when an employee's conduct would warrant protection. The court concluded that the "class of conduct that is deemed to 'enjoy high social value' is very narrowly circumscribed" but "consists *at least* of (1) conduct that, by statute or rule, is explicitly described as being of high social value; and (2) conduct that is similar to that giving rise to legally compelled obligations to act in other analogous contexts." 209 Or App at 486-87 (emphasis in original). The court noted that "general public concern over a particular social problem . . . does not necessarily give rise to a protected 'important public duty' to act, regardless of how ostensibly laudable the actor's efforts may be." *Id.* at 487. The court then determined, based on Oregon's whistleblower statute (which it found to be "instructive, not preclusive"), that: "There is a protected 'important public duty' for public employees to engage in *objectively reasonable* 'whistleblowing.'" *Id.* at 492 (emphasis in original).

Defenses

Hamilton v. Paynter, 342 Or 48 (2006)

Keller v. Armstrong World Industries, Inc., 342 Or 23 (2006)

Two recent Supreme Court cases addressed statute of limitations defenses. In *Hamilton*, the Court considered whether an advance payment to an injured party tolled the statute of limitations under ORS 12.155. Plaintiff alleged that (1) she was injured when one defendant "rear-ended her vehicle with a forklift"; (2) defendants then paid her $1,000 as a partial payment for the injuries she had suffered; and (3) none of the defendants ever gave her written notice of when the statute of limitations would expire. 342 Or at 50. Defendants contended that the tolling statute only applied to advance payments by an insurer under the Court of Appeals' ruling in *Minisce v. Thompson*, 149 Or App 746, 756 (1997). The Supreme Court disagreed, noting that the Court of Appeals had "read too much into" two prior Supreme Court cases that "involved a dispute between an insurance company and an insured[.]" *Id.* at 58. The Court concluded that neither of its prior cases "suggested—much less held—that the term 'person' in the statute extended to *only* insurance companies." *Id.* at 58 (emphasis in original).

In *Keller*, the Supreme Court addressed how ORS 30.907(1)'s two-year statute of limitations for products liability actions applies to asbestos-related diseases. The trial court granted defendant's motion for summary judgment, finding "as a matter of law that plaintiff either had discovered or should have discovered that asbestos had caused his pulmonary problems more than two years before he filed this action." 342 Or at 26. The Court of Appeals reversed. In the Supreme Court, defendant contended that (1) plaintiff "actually discovered the causal link between asbestos and his lung disease as early as the 1980s and the latest by 1995, when plaintiff referred to his 'asbestos lungs' in filing for social security disability benefits and workers' compensation"; or (2) at minimum, plaintiff "should have discovered the causal link between asbestos and his pulmonary problems by 1995." *Id.* at 31. On the first issue, the Court found that a reasonable juror could conclude that plaintiff's "own supposition, uninformed by any medical diagnosis that asbestos had caused his respiratory problems, is not sufficient to establish actual discovery of that fact." *Id.* at 34. On the second issue, the Court stated that a reasonable juror "could find that, if plaintiff's doctors could not identify asbestos as the cause of his pulmonary disease, plaintiff was not unreasonable in failing to discover what his doctors could not." *Id.* at 38. The fact that plaintiff apparently did not seek treatment between 1995 and 2000 did not change that conclusion because there was no

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evidence that anything "occurred during that period to cause plaintiff to seek additional medical advice", nor did the record "disclose what a further inquiry would have revealed." *Id.*

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Liberty v. State Dept. of Transportation, 342 Or 11 (2006)

Christiansen v. Providence Health System, 210 Or App 290 (2006)

In *Liberty*, the Supreme Court held that the "recreational use" immunity conferred by ORS 105.682 does not give immunity to a landowner that permits persons to cross its land to obtain access to other land in order to engage in recreational activity. The Court explained that "[t]he activity of crossing a parcel of land, by itself, is not a recreational purpose" covered by the statute. 342 Or at 21-22. In *Christiansen*, plaintiff alleged that defendants (a hospital and an obstetrician) negligently failed to recognize signs of fetal distress, thereby delaying performance of a caesarian section delivery, causing the child to suffer neurological and developmental disorders. 210 Or App at 292. The trial court dismissed the complaint, finding that it was barred by the ultimate repose provision of ORS 12.110(4). Plaintiff argued that applying the statute to her claims violated Article I, section 10 of the Oregon Constitution under the analysis adopted in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001). The Court of Appeals disagreed, finding that the statute is not unconstitutional as applied to plaintiff's claims because she "would not have had an absolute common-law right to bring an action in negligence for the child's prenatal injuries in 1857[.]" 210 Or App at 302.

Procedure

Woods v. Carl Karcher Enterprises, Inc., 341 Or 549 (2006)

Huntley v. TriMet, 210 Or App 269 (2006)

Johnson v. Swaim, 209 Or App 341 (2006)

Claims to recover attorney fees under ORS 20.080(1) based on a prelitigation demand were addressed in three recent cases. In *Woods*, the Supreme Court held that the provisions of ORCP 7 regarding service of summons do not apply to a prelitigation demand under ORS 20.080(1); a written demand sent by first class mail was therefore sufficient to satisfy the statute, requiring the trial court to award attorney fees to plaintiff. 341 Or at 558. In *Huntley,* the Court of Appeals reversed an attorney fee award, rejecting plaintiff's contention that "the rules and statutes governing third-party practice obviate the need for a plaintiff to follow the procedures of ORS 20.080(1) with respect to third-party defendants[.]" 210 Or App at 279. In *Johnson*, the Court of Appeals declined to adopt a futility exception to the statute, finding that such an exception "would conflict with the evident purpose of the statute, which is to promote settlement in advance of litigation." 209 Or App at 347.

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McDowell Welding & Pipefitting v. US Gypsum Co., 209 Or App 441 (2006)

House v. Hicks, 209 Or App 429 (2006)

Pearson v. Philip Morris, Inc., 208 Or App 501 (2006)

In *McDowell*, the Court of Appeals held that "the trial court did not err in denying plaintiff's motion for a jury trial on the separately tried equitable counterclaim" for specific performance of a settlement agreement. 209 Or App at 447. Judge Armstrong dissented, concluding that "plaintiff was entitled to a jury trial on the factual issue that was common to plaintiff's claim and defendants' counterclaim, which is whether the parties had entered into a settlement agreement." 209 Or App at 448 (Armstrong, J., dissenting). In *House*, the Court of Appeals held that the failure to hold a hearing before awarding an enhanced prevailing party fee was reversible error. 209 Or App at 431. In *Pearson*, the Court of Appeals declined to accept an interlocutory appeal certified by the trial court in a class action lawsuit, concluding that (1) the class action interlocutory appeal provision of ORS 19.225 applied only in "exceptional" cases (208 Or App at 513); and (2) plaintiffs "have not demonstrated that this is an exceptional case in which immediate resolution of the legal issues presented by the trial court's refusal to certify a class will necessarily result in less expense for the parties, speedier resolution of the litigation, or more efficient use of judicial resources." *Id.* at 514. ❐

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