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Don't pray at the gate (and other travel tips)

By Brian Campf^f

Your fight is delayed. Your flight is cancelled. You are in Newark, but your luggage is in Honolulu. Airline passengers almost expect such unwelcome refrains. But what about, hands against the wall? You are being detained? You are under arrest?

Airports form a unique and volatile hub where commerce, society, and safety intersect. The rights of travelers and the need for increased vigilance must be weighed against the principle that the unjust loss of one person's liberties is an injustice to all. In the post-9/11 world, for some the mix of suspicion and security is an uneasy one.

The allegations of six travelers who flew from Phoenix to Minneapolis in November 2006 to attend a conference bring these concerns into sharp focus. The following description is a summary of some of their key claims made in *Shqeirat v. U.S. Airways Group, Inc.*, 515 F.Supp.2d 984 (D.Minn. 2007).



Five of the six travelers were Arizona residents, and one lived in California. A few weeks before their departure date, one of the group purchased round-trip tickets for all of them to travel on U.S. Airways from Phoenix International Airport to Minneapolis-St. Paul International Airport. One of them would depart for Minneapolis on November 16, and the rest would travel on November 18. The



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1. Traditional Method

A few years into practice, based on experience and study, most of us develop a checklist that we use as a basis to prepare witnesses for trial and deposition testimony. It is not unusual for the checklist to number 10 to 20 items or more.

We then invite our witness to a testimony preparation session. We spend half an hour to 45 minutes lecturing the witness on how to be a good witness and cover the 10 to 20 points (the witness no doubt feels like a worker

caught behind a dump truck when the truck bed is lifted vertically, the gate opened, and the contents dumped). At the end of the session we ask the witness

if he or she has understood or has any questions. We get either a nod of the head (to avoid the embarrassment of admitting that the witness is not on the same intellectual plane as the lawyer) or perhaps a question or two.

The witness then proceeds off to the examination not only with the trepidation of facing an unusual or unknown experience but with the additional baggage of trying to remember 10 to 20 foreign and unnatural rules.

We are then surprised when the testimony doesn't go the way we had hoped.

2. Novel Approaches

A number of psychologists have criticized the traditional form of witness preparation. The criticism is



FROM THE EDITOR

NOVEL APPROACHES TO WITNESS PREPARATION

By
DENNIS RAWLINSON
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usually based on a number of factors, including:

- a. Witnesses generally have limited attention and retention capabilities;
- b. Dialogue and participation heightens the possibility of retention; and
- c. Witness preparation should be confidence-building, not fear-provoking.

Set forth below are a number of suggestions collected from a number of sources, including participation as a faculty member at National Institute of Trial Advocacy Deposition Preparation seminars:

3. Question, don't lecture.

Don't start witness preparation sessions by advising and coaching. Instead, find out what is on the witness's mind. What concerns does the witness have? Answer and address those concerns so that they do not block the witness's ability to pay attention to the rest of the session. You may even find that such a dialogue will cover some of the points you had hoped to cover.

4. Practice before lecture.

Practice a direct examination with the witness or even a difficult, but not brutal, cross-examination. You will discover the strengths and weaknesses of the witness. You may well discover that a number of the points you had hoped to cover don't need to be covered because the witness already understands and practices those points.

The same practice examination will raise weaknesses that can be discussed. These weaknesses will no doubt involve other points you had planned to cover and will allow you to:

- a. Prioritize those points.
- b. Take them one at a time.
- c. Create pertinence and context for the points.
- d. Promote dialogue with the witness.

As the practice and session continues, interrupted by dialogue,

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discussion, and suggestions, consider the following:

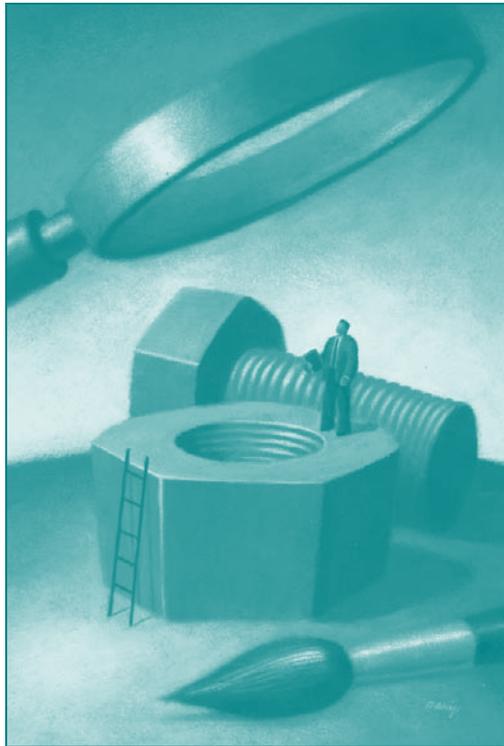
- a. Initial comments should be mostly positive to build confidence. Initially instilling confidence in the witness will make the coaching session a positive experience. The witness will gain confidence and more readily accept suggestions for improvement later in the session.
- b. Give good with bad. With every negative suggestion, mention something good. If a witness believes he or she is doing well, he or she is more likely to improve, concentrate, and enjoy the preparation experience. For instance:

"Good, calm, deliberate answer."

Then you may say,

"But remember to answer briefly."

- c. Comment positively about the witness's appearance. Everyone cares about his or her appearance. Make the witness feel good about how he or she looks. For instance:
- "Don't be afraid to stop and think before your answer. As you just did, you look thoughtful and credible."
- d. Relative to roles, be sure your witness knows how his or her particular testimony is intended to fit into your overall case. This may prevent voluntary digressions and assist the witness in



With every negative suggestion, mention something good. If a witness believes he or she is doing well, he or she is more likely to improve, concentrate, and enjoy the preparation experience.

using his or her own wits in response to surprise questions.

- e. Alert the witness to vulnerabilities. Discuss with the witness what you see as probable grounds for attack by the adverse party, and practice and discuss the handling of those attacks.
- f. Conduct a practice cross-examination. Conduct or have someone in your office conduct a more ruthless cross-examination than you believe even the examiner will conduct. Discuss and cure problems and weaknesses.

- g. Help the witness sound good. Assist the witness, if necessary, with testimony volume, speed, breathing, articulation, and fading of sentences. Help the witness be positive, clear, and engaging with his or her choice of words.
- h. Encourage the witness to have proper eye contact with the proper party (in the case of a jury, looking comfortably from juror to juror and then the counsel and then the jurors again). Ensure that the witness avoids talking to the floor, the ceiling, and shirt fronts. The witness should also avoid looking to you for help and approval (and thereby losing credibility).
- i. Consider video sessions. For witnesses who need work, consider preparing a videotape of their mock direct and cross-examinations and then viewing it with the witness. Often, when a witness sees his or her nagging idiosyncrasies and bad habits, it will enable the witness to address and correct them.

Consider conducting a debriefing after the testimony. Ask the witness which portions of the preparation were helpful and which were not. Witness preparation is one of the processes on which we have the opportunity to obtain regular feedback. With this feedback there is no excuse for not improving.

You may not find that by trying some of these testimony preparation approaches, you start winning cases that you otherwise would have lost. On the other hand, I believe you will find that you will improve the chances of communicating effectively with your witnesses and improve their abilities as witnesses. In a close case, that just might make the difference. □

FCRA: Class Actions Net Insurance Policyholders \$72 Million

By Steve Larson & Mark Friel

In the summer of 2001, a lawyer in Beaverton named Charlie Ringo was approached by consumers who discovered they were being charged more for insurance because of their credit scores and did not think that



Steve Larson



Mark Friel

was fair. Ringo did some research, and learned there was no law preventing this practice, but a federal law called the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq. ("FCRA"), required insurers to tell consumers if they were charging them more for insurance because of their credit scores. The consumers that approached Ringo were not receiving such a notice, so he sought our firm's assistance to help evaluate whether

these potential clients had claims under the FCRA that could be asserted in a class action.

Although there was virtually no case law to guide us, based on the plain language of the statute it looked like it was a viable cause of action. In October 2001, we filed putative class actions against 8 different insurance companies. After years of hard fought litigation, we were able to settle three class actions alleging violations of the FCRA with Valley Insurance Company, Nationwide Insurance Company and Hartford Insurance Company. Checks were mailed to almost 500,000 class members, and those checks netted the policyholders jointly in excess of \$72 million. After settling those cases, the United States Su-

preme Court ruled against us on two of our other cases. We are still pursuing the remaining cases.

I. Classes Form

Our firm, with Ringo as co-counsel, filed eight separate putative class actions on behalf of policyholders against Progressive, Hartford, Valley Insurance, Farmers, State Farm, Nationwide, GEICO, and Safeco in federal district court in Oregon. The complaints alleged that each company, itself or through its various subsidiaries, had violated the FCRA by charging the policyholders more for insurance because

of their consumer credit information, but failing to sufficiently notify them of that fact. The statute at issue, 15 U.S.C. § 1681m(a), provides that any person taking an adverse action against a consumer, based in whole or in part on information in a consumer report, must notify the consumer of the adverse action. The complaints alleged the defendants had willfully violated FCRA, and prayed for statutory damages under 15 U.S.C. § 1681n of \$100 to \$1,000 per violation.



We conducted extensive discovery to determine how the insurance companies used credit scores, and whether they had any procedures for providing notice. While discovery was underway, the defendant insurance companies began filing dispositive motions.

II. Adequacy of the Notices

Some insurance companies sent no "adverse action" notice to consumers. Others sent notices that did not inform

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the consumer what was really going on. Farmers chose to file a motion for summary judgment on the adequacy of its FCRA "notice." The Farmers "notice" (which was included with all new and renewal policy packets) stated simply that consumer reports were used in setting the premiums, and the rates charged were based at least in part on the information in those reports. In one of the first major victories for consumers in these cases, the district court held that the notice had to inform the consumer that the action taken was, in fact, adverse:

On the face of the statute and attempting to give it its plain meaning, I conclude that the statute requires notice in a form that advises the recipient that the action taken by the party giving notice, based in whole or in part on review of information in a consumer report, was in fact adverse action.

Those words "adverse action" need not expressly be used. But the statute requires, in the circumstances of this case, that Farmers provide sufficient information from which it can be concluded that the action it took in response to using the Ashbys' consumer reports was in fact adverse action, as that term is understood in the statute.¹

III. Setbacks in the District Court

The next round of motions came the following year. This time, the focus was on whether a particular insurance company defendant was a "taker" of adverse action under the statute if that defendant did not actually issue the policy in question, but simply dictated and/or carried out the underwriting of the policies issued. The district court's first decision on this issue came in the case against Nationwide. On January 21,

2003, the district court held that only the issuing company could "take" adverse action, regardless of whether others (including the named defendant) had participated in the underwriting decision, or even controlled the outcome.² The district court proceeded to repeat this holding in several of the other pending cases. As a consequence, in some instances we were forced to narrow the scope of the actions, including as defendants only the companies who actually issued the named plaintiffs' insurance policies.

The defendants gained additional traction with the resolution of the next major issue in the cases: whether FCRA requires an adverse action notice to first-time customers (so-called "new business"). Despite a clear definition of the term "adverse action" provided by FCRA, 15 U.S.C. § 1681a, and extensive Congressional and Federal Trade Commission guidance indicating that an adverse action occurred any time an insurance applicant did not receive the best rate because of his or her credit information, the district court held that only those who had previously purchased insurance from the defendants could ever suffer an "adverse action" and thus have a statutory right to notice.³ This ruling, initially made in the *Valley Insurance* case and then subsequently made in several other actions, effectively ended the cases against Hartford, Safeco, GEICO, and State Farm, and partially gutted the remaining cases. The only claims left against Valley Insurance, Farmers and Nationwide were the claims of renewal customers.

Each dispositive ruling in favor of the defendants was appealed. In response to the appeals, the defendants included, as an alternative ground for supporting the judgments, the argument that they did not "willfully" violate FCRA by failing to give proper notice, even though that issue was never decided by the trial court.

IV. Classes Certified in Two Cases

While the appeals were pending in the Ninth Circuit, the remnants of the *Farmers*, *Nationwide*, and *Valley Insurance* cases marched on.

In 2004, two positive developments occurred. In the *Valley Insurance* case, the district court certified a class of 396 renewal consumers over the strenuous objections of Valley Insurance.⁴ In the *Farmers* case, the district court certified a class of renewal consumers. This time, the class certified was much larger with 130,000 class members.⁵ The court was not persuaded by Farmers' cries that certification of a statutory damages class of this size could result in a "horrendous" and "annihilating" judgment in violation of Farmers' due process rights.⁶ Farmers filed a discretionary appeal of that ruling, but the Ninth Circuit chose not to review it.

V. First Settlements Reached

Approximately three months after the court certified a class in the *Valley* case, a settlement was reached, resulting in recovery of approximately \$500 for each of the class members.

More good news came in early 2005, when the part of the *Valley Insurance* case that had been dismissed settled. This part of the case (which involved "new business" consumers) settled before a judgment was entered. The new business class was also larger—roughly 2,900 class members in all. In settlement of their claims against Valley Insurance, each class member received approximately \$100. Less (per class member) than the first settlement, but still within the range of statutory damages provided by FCRA. These settlements served as significant negotiating precedents in the next two cases to settle.

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VI. Plaintiffs' Appeals to Ninth Circuit

Arguments in the Ninth Circuit appeals in *Safeco*, *Hartford*, *Geico*, *State Farm* and *Farmers* were heard in early March 2005. The Court appeared to be receptive to our arguments, and at times less-than-sympathetic towards the defendants. The assistance of the FTC was also invaluable. The agency charged with enforcing FCRA, the FTC, had entered the fray on our side as amicus on the issue of whether it was possible under the statute for new business customers to suffer adverse action. The other issues before the court included whether anyone other than the policy-issuing insurance company could "take" an adverse action; what information a proper notice of adverse action had to convey; and the legal standard for willfulness under 15 U.S.C. § 1681n.

Beginning in August 2005, the Ninth Circuit issued its opinion and then modified it twice, with the final opinion coming down on January 25, 2006.⁷ Essentially, the only difference in the three opinions was the harshness with which the Court treated the defendants' arguments. The opinion was issued in the *Reynolds v. Hartford* and *Edo v. Geico* appeals. The Ninth Circuit panel, in a split decision, found in the first two opinions that GEICO and Hartford had willfully violated FCRA as a matter of law because their legal positions were patently unreasonable.⁸ The Ninth Circuit panel, in a unanimous decision in its third and final opinion, set the standard for proving willfulness but left open the ultimate question of liability.

The decision was on all fours with plaintiff's arguments. The Ninth Circuit first held that the definition of "adverse action" under FCRA included actions taken against new business consumers. Specifically, the Court held that a notice of adverse action was required every time a consumer received anything less than the most favorable rate offered by an insur-

ance company because of information in the consumer's credit report.

Second, the Court held that a transmission from a credit reporting agency stating that no credit information or insufficient credit information is available for a given consumer (so-called "no-hits" and "thin files") constitutes a "consumer report," and thus if an insurance company offers less than its best rate because of a no-hit or thin file, an adverse action notice must be given to the consumer.

Third, the Court held that a notice of adverse action must, at the very least, (a) communicate that an adverse action was taken based in whole or in part on a consumer report, (b) describe the adverse action taken, (c) specify the effect on the consumer, and (d) identify the party or parties taking the action.

Fourth, the Court held that a statutory "taker" of an adverse action can include entities in addition to the particular entity that issues a policy of insurance to a consumer.

Finally, the Court held that a person can "willfully" violate FCRA either by knowing that a policy it follows is in contravention of a consumer's rights, or by recklessly disregarding whether or not the policy contravenes those rights. Such a standard, the Court held, "does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" ⁹ Thus, where "at least some of the [defendants'] interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive."¹⁰

This particular aspect of the Court's holding regarding the meaning of "willfulness" created significant discomfort for the defendants in the remaining

cases. They were now faced with the unpleasant choice between raising an advice of counsel defense and waiving attorney-client privilege, or forgoing the defense and allowing the court to instruct the jury that the defendants sought no such advice in connection with developing and implementing their FCRA notice policies and procedures.

After the Ninth Circuit's final decision came down in January 2006, the defendants in the *GEICO*, *Hartford*, *Safeco*, and *State Farm* cases all filed petitions for writs of certiorari with the U.S. Supreme Court. *Farmers* chose not to petition for certiorari, and instead chose to raise an advice of counsel affirmative defense.

VII. Nationwide Comes to the Table

The Ninth Circuit still had not heard argument in the *Nationwide* appeal at the time the *Reynolds v. Hartford* and *Edo v. Geico* opinions were handed down. For some procedural reasons, the *Nationwide* appeal had become disconnected from the other FCRA cases on appeal.

However, after the decision by the Ninth Circuit in *Reynolds v. Hartford*, *Nationwide* decided it wanted to bring an end to the litigation. In May 2006, during a mediation with the Honorable Edward Leavy, the lead plaintiffs (Ruslan Razilov and Sarah and Derek Lapham) reached a \$19.25 million settlement with *Nationwide* which ultimately netted each of the 65,000 plus class members approximately \$200. The court awarded the named class representatives \$10,000 as incentive awards.

VIII. Hartford Agrees to Mediate

Shortly after the *Nationwide* case settled, Hartford agreed to mediate with Randy Wulff, a well known and very effective mediator in the Bay Area. After a mediation extending into the wee hours of the morning, Hartford and the lead plaintiff (Jason Reynolds) reached an agreement in principle on a settlement

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that would provide money to over 400,000 policyholders if they filed a claim. Unlike the settlements with *Valley Insurance* and *Nationwide*, the *Hartford* settlement (which involved many times the number of class members) was a national "claims-made" settlement, in which each eligible class member had to file a claim in order to obtain any recovery.

The participation in the claims process by class members was excellent. Over 75% of the eligible class members submitted claims, which was one of the highest participation rates the claims administrators had ever seen. As a result, over 340,000 class members received a check for approximately \$175, netting the policyholders jointly in excess of \$59 million. The court also awarded the class representative, Jason Reynolds, a \$10,000 incentive award.

It is hard to tell what caused the extraordinary claim rate, but there were a number of factors that may have come into play. First, 95% of the addresses were accurate, which was exceptional. Second, the large majority of class members were AARP members as Hartford sells automobile and homeowners to AARP members through an affinity program. Retired people may move less often, may be more likely to read their mail, and evidently were receptive to filing claim forms to recover \$175. Third, as part of the settlement, we negotiated what the claim form would look like, which enabled us to use a very simple claim form with the seal of the federal district court on it. All the policyholder had to do was sign it and send it back. Fourth, we also negotiated that we would do a preliminary "robo-call" to all class members telling them a claim form was coming, and a follow-up mailing reminding them to turn in their claim forms. Finally, the fact that the defendant was an insurance company may have made class members feel more comfortable filing a claim.

IX. Case Stayed Pending Supreme Court Review

Any discussions of settlement in the other cases came to a screeching halt in the fall of 2006, when the Supreme Court granted the petitions for certiorari in the *GEICO* and *Safeco* cases. The issues on appeal were: (a) can an insurance company take "adverse action" against a new business consumer?, (b) when is an adverse action "based in whole or in part" on information in a consumer report for purpose of triggering FCRA's notice requirement?, and (c) what is the proper standard for willfulness under 15 U.S.C. § 1681n? In light of the Supreme Court accepting these cases for review, the District Court exercised its discretion and stayed the remaining cases pending a decision by the Supreme Court.

X. Supreme Court Reversed Ninth Circuit

The decision by the Supreme Court, issued on June 4, 2007, was disappointing but not totally unexpected given the present court's makeup, and the fact that the court had accepted certiorari of a case from the Ninth Circuit - the most reversed circuit in the country. While the Court affirmed the Ninth Circuit's holding that new business consumers could suffer adverse action, and affirmed the holding that the standard for willfulness included reckless conduct, the Supreme Court reversed the Ninth Circuit decisions, and found that there had been no willful violation of the FCRA by Safeco and Geico as a matter of law. The U.S. Supreme Court then granted certiorari in the *State Farm* case, vacated the judgment, and remanded the case to the Ninth Circuit for reconsideration in light of the holdings in *Safeco* and *Geico*. This decision is now often cited as an example of the United States Supreme Court's pro-business shift.

XI. Conclusion

Despite the ruling by the United States Supreme Court, the FCRA class actions we filed in 2001 proved to be fairly successful. Checks were mailed to almost 500,000 insurance policyholders who jointly received over \$72 million. Most importantly, the class actions changed behavior in the insurance industry. Now, adverse action notices required by the FCRA are being provided by insurers. □

Endnotes

- 1 *Ashby v. Farmers Group, Inc.*, Case No. CV 01-1446-BR, Feb. 28, 2002, Transcript of Proceedings Before Judge Anna J. Brown (Docket # 98) (D. Or.).
- 2 *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977 (D.Or. 2003).
- 3 *Mark v. Valley Ins. Co.*, 275 F.Supp.2d 1307 (D.Or. 2003).
- 4 *Mark*, slip. op. (Feb. 6, 2004).
- 5 *Ashby v. Farmers Ins. Co. of Oregon*, 2004 WL 2359968 (D.Or. Oct. 18, 2004).
- 6 *Id.* at *8 (D.Or. Oct. 18, 2004) ("This Court ... is not persuaded it should follow a policy to protect defendants from potentially serious financial consequences based on their substantive violation of consumer protection statutes enacted by Congress.").
- 7 *Reynolds v. Hartford Fin. Servs. Group Inc.*, 435 F.3d 1081 (9th Cir. 2006).
- 8 See *Reynolds*, 416 F.3d 1097 (9th Cir. 2005), and *Reynolds*, 426 F.3d 1020 (9th Cir. 2005).
- 9 *Reynolds*, 435 F.3d at 1099.
- 10 *Id.*

Know It Before You Waive It: A Primer on the Constitutional Rights of Corporations

By Janet Lee Hoffman & Sarah Adams
of Hoffman Angeli LLPB

Your client Clean Co. is defending a civil suit brought by the Environmental Protection Agency (EPA) for fees and penalties for noncompliance with certain hazardous waste disposal regulations applicable to dry cleaners. A consultant hired by



Janet Lee
Hoffman



Sarah Adams

the company to assist with compliance prepared a report advising Clean Co. that certain of its practices did not comply with the regulations. In a written opinion, you advise Clean Co. that the noncompliance may expose it to criminal penalties under various state and federal statutes. Clean Co.'s CEO takes a copy of the consultant's report home to review it and then resigns. A few days later, Oregon

Department of Environmental Quality (DEQ) agents show up at Clean Co.'s door, purportedly to do a routine investigation of the premises. They want an employee familiar with Clean Co.'s processes to give them a tour of the facilities. At the same time, they serve a request for "all" documents related to Clean Co.'s processing methods.

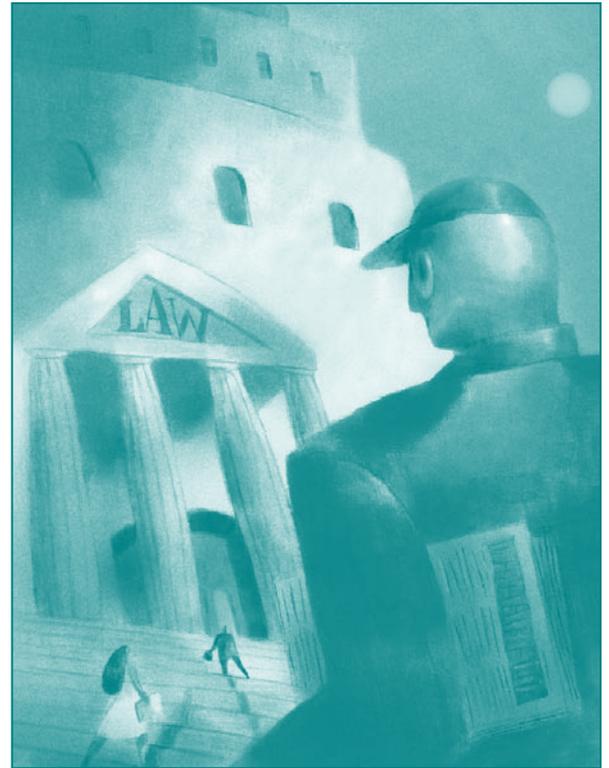
Introduction

We often think of the constitutional

rights of individuals—but we rarely consider that corporations also possess constitutional rights. The steps your corporate client takes in response to an agency's (or any other state entity's) request to inspect its premises, talk to its employees or hand over its documents implicate important rights that should not unwittingly be waived. Such a waiver could affect your client's rights in not only the agency proceeding, but also in an ongoing or subsequent criminal investigation.

The first step in avoiding an unwitting waiver is to know your corporate clients' constitutional rights. Under the Oregon and U.S. Constitutions, corporations are protected against unreasonable searches and seizures, yet have no protection against compelled statements. They also have other constitutional rights, including federal due process rights and the right to effective assistance of counsel.

But what do these rights mean for your corporate clients when they are facing a government search, seizure of documents and interrogation of employees? Does it matter that the search and seizure is pursuant to administrative authority or under a search warrant? Does it make a difference if the person making



the potentially incriminating statement is an employee or former employee or if the statement is contained in a corporate document? Does it make a difference if the document is attorney-client privileged or if the person who possesses the document could be personally incriminated by his or her admission that the document exists? And, if your corporate clients have constitutional rights to be free from unreasonable search and seizure, to due process and to effective assistance of counsel, what are the implications of asserting them?

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Rights of Corporations

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The Right to Be Free from Unreasonable Searches and Seizures

Unlike the Fifth Amendment privilege against compulsory self-incrimination (discussed below), the right to be free from unreasonable searches and seizures unquestionably extends to corporations like Clean Co. This right is protected by article I, section 9 of the Oregon Constitution¹ and the Fourth Amendment of the U.S. Constitution.² Article I, section 9 and the Fourth Amendment protect against government violations of privacy interests, including a business's or person's privacy interest in business property.³ These rights mean that the government cannot make unreasonable searches or seizures of a person's property, including a business's property, unless the person has abandoned his or her privacy interest in the area or object of the search or seizure (article I, section 9) or does not have a reasonable expectation of privacy in the area or object of the search or seizure (Fourth Amendment). Unless an exception to the warrant requirement applies (as will be discussed below), a search or seizure of an area or object in which a person has a privacy interest is presumed unreasonable.⁴ Thus, absent an exception to the warrant requirement, a government agent cannot enter (search) or "secure" (seize) a business premises from which the public is generally excluded without consent.⁵ Such an intrusion would violate the article I, section 9 and Fourth Amendment rights of any person with a privacy interest in the premises.⁶

Even for a Routine Administrative Inspection, if the Government Does Not Obtain Consent and the Search Does Not Fall Under the "Pervasively Regulated Industry" Exception, the Government Must Obtain a Valid Warrant.

Article I, section 9 and the Fourth

Amendment prohibitions against unreasonable searches apply to administrative searches of regulated businesses.⁷ Administrative searches are searches conducted pursuant to a regulatory or statutory scheme. The government can conduct an administrative search without a warrant if it obtains valid consent or the "pervasively regulated industry" exception applies. Otherwise, article I, section 9 and the Fourth Amendment require a valid warrant. However, the government's administrative search power (with or without a warrant) does not authorize it, absent consent, to question employees in the course of the search.⁸

Under both article I, section 9 and Fourth Amendment jurisprudence, legislative schemes that authorize warrantless administrative searches of businesses that are pervasively regulated may be reasonable.⁹ A warrantless search is reasonable when: (1) a substantial government interest informs the regulatory scheme pursuant to which the search is made; (2) the warrantless search is necessary to further the regulatory scheme; and (3) the certainty and regularity of the statute's or regulation's inspection program provides a constitutionally adequate substitute for a warrant.¹⁰ Accordingly, if the regulatory scheme under which DEQ is authorized to conduct a search of Clean Co.'s premises meets these standards, DEQ may proceed with an administrative search without a warrant or consent—assuming the search constitutes an administrative search.¹¹ But, regardless of how detailed, complex and important the regulatory scheme is, if it does not provide for nondiscretionary routine inspections that are limited in scope you should argue that it is not a constitutionally adequate substitute for a warrant.¹² And, even if the inspection goes forward, its scope may not exceed the bounds of the regulatory scheme under which it is conducted.

To obtain an administrative search warrant, the agency need not satisfy the

probable cause standard applicable to non-administrative warrants (*i.e.*, specific knowledge that Clean Co. has committed an offense or that Clean Co.'s property contains evidence of an offense). Instead, the agency can obtain an administrative search warrant when the particular needs of the search outweigh the invasion.¹³ In practice, this has meant that an administrative search warrant may issue when the search is pursuant to "reasonable legislative or administrative standards"¹⁴ (*e.g.*, the DEQ inspection is pursuant to a regulatory and statutory scheme that provides for such inspections). The legislative or administrative standards must be specified in the warrant. And, because the scope of the search is limited to the specific administrative or statutory scheme under which the government is operating, a nexus must exist between the place or places to be searched and the administrative or statutory authority. This means that, if DEQ's statutory and regulatory scheme provide for routine inspections of paperwork related to the use and disposal of dry cleaning chemicals *in Oregon*, it would be a violation of Clean's Co.'s article I, section 9 and Fourth Amendment Rights for DEQ to use an administrative search warrant to inspect Clean Co.'s records related to out-of-state use and disposal of dry cleaning chemicals.

But Beware Parallel Criminal Investigations—the Government May Not Avail Itself of the Lesser Administrative Standard when a Purpose or Consequence of the Search is the Gathering of Evidence of a Crime (Article I, Section 9) or when the Administrative Investigation Is Used Improperly to Gather Evidence for a Criminal Investigation (Fourth Amendment).

Clean Co. may be inclined to consent to DEQ's search—the agents may have told Clean Co. that they can easily

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obtain an administrative warrant, they don't need one because dry cleaners are pervasively regulated, consenting to the search will benefit Clean Co. in any enforcement actions, and failure to consent will result in civil sanctions.¹⁵ However, before granting consent, and thereby waiving its article I, section 9 and Fourth Amendment rights, Clean Co. should carefully consider the ramifications of the waiver. If Clean Co. asserts its rights, the government will be forced to get a warrant. Clean Co. can then subject the agency's actions—including the warrant, its supporting affidavit, and the execution of the warrant—to the rigor of the constitutional standards. Holding the agency to these standards may be especially important when the company is potentially facing criminal as well as civil enforcement.

Moreover, the Oregon constitution requires a showing of individualized suspicion of wrongdoing (*i.e.*, traditional probable cause) to support a search to gather evidence for a criminal prosecution, even when the search is conducted pursuant to a statutory or regulatory scheme.¹⁶ A series of Oregon cases addressing sobriety checkpoints provide that a search is not "administrative" in nature if the purpose of the search is to gather evidence of a crime or the consequences of the search are criminal sanctions.¹⁷ This suggests that when a parallel criminal investigation is ongoing, or the civil or regulatory investigators are sharing or will share information with criminal law enforcement, an otherwise administrative search may be invalid under article I, section 9 absent a warrant based on traditional probable cause.¹⁸ The government may or may not be able to meet this higher burden.

Unlike article I, section 9, the Fourth Amendment allows use of the lower administrative standards even when the evidence may be used for a criminal

prosecution unless the administrative investigation is a pretext for a criminal investigation, the civil investigation is actually being controlled by the criminal investigation, or the government is improperly using the administrative investigation to gather evidence for a criminal investigation.¹⁹

Here—assuming a purpose or consequence of the search is furtherance of a criminal investigation—a warrantless search or search based on the lower administrative standard would violate Clean's Co.'s article I, section 9 rights. Accordingly, as long as Clean Co. does not waive those rights, the search would be unlawful and its fruits subject to suppression, without regard to the Fourth Amendment analysis.

The Right Against Compulsory Self-Incrimination

Article I, section 12 of the Oregon constitution and the Fifth Amendment to the U.S. Constitution²⁰ establish a constitutional right for individuals—and not corporations—to be free from compulsory self-incrimination.²¹ This right applies to any type of judicial or nonjudicial procedure in the course of which the state seeks to compel testimony that may be used, or may lead to evidence that may be used, against the witness in a criminal prosecution.²²

Because the state and federal constitutional right to be free from compulsory self-incrimination is available only to natural persons, Clean Co. cannot invoke it to avoid answering interrogatories even when the answers will incriminate the corporation.²³ Likewise, Clean Co. has no constitutional right to refuse to produce documents even when the contents of the documents or the act of producing them is incriminatory.²⁴ And, because the right is personal in nature, Clean Co. cannot assert it on behalf of its employees or former employees and

Clean Co.'s employees cannot assert it on behalf of Clean Co.²⁵ In other words, neither a corporation nor its employees may use article I, section 9 or the Fifth Amendment to avoid incriminating *the corporation*. Accordingly, Clean Co. has no article I, section 9 or Fifth Amendment privilege against producing the consultant's report in response to a valid request for production or inspection.

As Distinct from the Corporation, Custodians of Corporate Records Have—at a Minimum—Immunity from Evidentiary Use Against Them Personally of their Individual Acts of Producing Corporate Records.

Oregon courts have not addressed the extent to which article I, section 12 protects custodians of corporate records²⁶ from individual incrimination through compelled production of those records. Under the Fifth Amendment "collective entity rule," the government can compel corporate employees in their capacity as agents of a corporation to produce corporate records even when the contents of the records or the act of production will incriminate the employees individually, but the government may not make evidentiary use of the individual act of production against the custodian.²⁷ Likewise, a custodian's sworn statement that he or she does not possess the records may also be compelled, but the statement, like the act of production, cannot be used against the custodian individually.²⁸ Additionally, following the agency rationale underlying the act of production cases, a custodian may be compelled to identify and authenticate by oral testimony the records that she or he has produced, but such testimony cannot be used against the custodian individually.²⁹ Accordingly, the Fifth Amendment protects current employees from evidentiary use against them personally of their acts of production of corporate records.³⁰

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The Oregon courts, when confronted with a corporate custodian's article I, section 12 challenge, may develop an independent analysis.³¹ At least one other state has interpreted its state constitutional privilege against compulsory self-incrimination as protecting the custodian's right to refuse to produce the records at all, while, at the same time, not relieving corporations of their duty to produce records (for example, through appointment of an alternative custodian).³²

Both Article I, Section 12 and the Fifth Amendment Provide Employees with a Privilege Against Compelled Sworn Testimony (and Immunize their Individual Acts of Production) that Would Incriminate the Employee Personally.

With the exception of the federal jurisprudence regarding authentication of produced documents and nonpossession statements, article I, section 12 and the Fifth Amendment provide protection against compelled sworn testimony that would incriminate the witness personally.³³ Therefore, when faced with a subpoena to provide oral testimony or answers to interrogatories, a corporate employee must assert his or her personal Oregon and U.S. constitutional rights against compelled self-incrimination or risk waiving them.

Former Employees Have Both an Article I, Section 12 and a Fifth Amendment Privilege Against Compulsory Production of Documents that Would Be Self-Incriminating.

Under Ninth Circuit precedent, the agency rationale of the Fifth Amendment collective entity rule does not apply to former employees—i.e., because former employees are no longer acting as

agents of the corporation, their actions are attributable to the former employees individually. Consequently, a former employee may have personal article I, section 12 and Fifth Amendment privileges with respect to corporate records that remain in his or her possession or control and may refuse to produce them pursuant to a subpoena to the corporation or the individual.

Although no Fifth Amendment or article I, section 12 privilege applies to the contents of records that were created voluntarily,³⁴ the privilege does apply to the act of production itself because that act may communicate the individual's belief that the requested records exist, the individual possesses them, and they are authentic. Ninth Circuit cases hold that, unless the existence, location and authenticity of the records is a "foregone conclusion," the former employee's act of producing the records is attributable to the former employee only, is testimonial in nature and cannot be compelled.³⁵ Accordingly, Clean Co.'s ex-CEO, in response to a valid subpoena issued to the corporation or the individual, could claim a Fifth Amendment and article I, section 12 privilege against compulsory production of the records in her possession (unless the government can show their existence, location and authenticity is a foregone conclusion).

The Right to Be Free from Unlawful Government Intrusions on the Attorney-Client Relationship

Both the Fifth Amendment Due Process Clause and the Sixth Amendment right to effective assistance of counsel protect the right to be free from unlawful government intrusions on the attorney-client relationship.³⁶ These federal constitutional rights extend to corporations.³⁷ Accordingly, a request for documents that includes "all" docu-

ments, with no exception for attorney-client privileged communications, may violate a corporation's Fifth and Sixth Amendment rights.³⁸ Likewise, an administrative search (even pursuant to a regulatory scheme that includes authority to seize documents) would also violate these rights if the search and seizure unlawfully intrudes on the corporation's attorney-client relationship. Therefore, in response to the request for documents and administrative search, Clean Co. must assert or risk waiver of its constitutional rights (and other privileges) by refusing to produce any attorney-client privileged document and should also take steps to protect its attorney-client privileged documents from seizure during the course of the inspection. If DEQ nevertheless seizes the legal opinion, the violation of Clean Co.'s Fifth and Sixth Amendment rights will provide a basis for suppression of the document and may even require dismissal of the regulatory action.³⁹

Practice Tips

Given the risks that flow from civil and regulatory investigations, you need to understand fully the protections available to preserve your clients' constitutional and other rights. You should also be aware of when your corporate clients' rights and duties may conflict with the rights of employees and former employees. To avoid such conflicts, you may counsel your corporate clients to designate document custodians who have no independent criminal liability. When such designation is not possible, the safest option is probably to obtain separate counsel for the employee while counseling the corporation on its rights and duties with respect to the production of corporate records. You should advise corporate clients to clearly mark all attorney-client confidential materials.

When you represent a client in a civil or regulatory investigation, it is impor-

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tant to investigate whether a parallel criminal investigation is ongoing or likely. You may start by simply asking the civil or regulatory investigators if they are working with criminal enforcement authorities and contacting the prosecutors with jurisdiction. But, to fully understand your client's rights and risks, you must thoroughly evaluate the applicable facts and law of the client's case to determine if they might give rise to criminal charges. If so, you must assume a parallel criminal investigation is likely and take steps to analyze and protect your client's constitutional rights. □

Endnotes

- 1 Article I, section 9 provides:

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

See also ORS 133.545 et seq. (limiting state's ability to search or seize persons or places).
- 2 The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
- 3 *State v. Rivas*, 100 Or. App. 620, 623, 788 P.2d 464 (1990); *Hale v. Henkel*, 201 U.S. 43 (1906). You should be aware that the protections afforded by ORS 133.545 et seq., article I, section 9 and the Fourth Amendment, while similar, are not identical. *State v. Caraher*, 293 Or. 741, 756, 653 P.2d 942 (Or. 1982) (en banc) ("citizens of Oregon are entitled to an analysis of the protections afforded by the Oregon constitution independent of the United States Constitution"). So, when both Oregon and U.S. constitutional rights are implicated—e.g., when a state agency or police officer conducts the search or seizure at issue—you must evaluate possible violations of your client's rights in the following order: (1) state statutory rights, (2) article I, section 9 rights, and finally (3) Fourth Amendment rights.
- 4 *State v. Miller*, 269 Or. 328, 334, 524 P.2d 1399 (Or. 1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). *But see California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (observing that "warrant requirement ha[s] become so riddled with exceptions that it [i]s basically unrecognizable").
- 5 *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311 (1977); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-359 (1977) (warrant requirements applicable to individuals apply when commercial property is searched for contraband or evidence of crime).
- 6 *Rivas*, 100 Or. App. at 623-24 (warrantless search of restaurant kitchen violated Art. I, sect. 9 privacy interest of employee working in kitchen); *State v. Tanner*, 304 Or. 312, 321, 745 P.2d 757 (Or. 1987) (entrustment of stolen video tape to third party established Art. I, sect. 9 privacy interest that was violated when tape was discovered through unlawful search of third party's residence even though defendant did not control access to residence). To establish a Fourth Amendment privacy interest, a person would have to show that he or she personally had an expectation of privacy in the place searched based on concepts of real or personal property or understandings recognized or permitted by society. *Minnesota v. Carter*, 525 U.S. 83 (1998) (short time visitor to apartment had no privacy interest in apartment). Unlike the article I, section 9 privacy interest, the Fourth Amendment privacy interest may not include an interest in a place over which the person has no control. *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (placing drugs in third party's purse did not establish Fourth Amendment privacy interest in part because defendant did not control access to purse); *but see United States v. Johns*, 707 F.2d 1093, 1100 (stating that power to exclude others is not determinative of Fourth Amendment privacy interest) (9th Cir 1983), *rev'd on other grounds*, 469 U.S. 478 (1985).
- 7 *State v. Boyanovsky*, 304 Or. 131, 133-34, 743 P.2d 711 (Or. 1987) (article I, section 9 applies to purportedly "administrative" sobriety checkpoint searches); *Marshall*, 436 U.S. 307 (1978); *See v. City of Seattle*, 387 U.S. 541 (1967).
- 8 *See, e.g., ORS 459.385* (authorizing DEQ to enter premises, access and copy records, and take samples; not authorizing interrogations); *ORS 466.195* (same). As discussed below, employees, even in their corporate capacity, have article I, section 12 and Fifth Amendment rights to be free from compelled oral statements that would be personally incriminating.
- 9 *United States v. Biswell*, 406 U.S. 311 (1972) (upholding constitutionality of warrantless search of pawn shop owner's locked gun storeroom pursuant to Federal Gun Control

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- Act); *State v. Westside Fish Co.*, 31 Or. App. 299, 570 P.2d 401 (Or. App. 1977) (approving of *Biswell* and upholding under article I, section 9 Fish and Game Commission warrantless search of premises of licensed fish canner and wholesale fish dealer pursuant to statutory investigatory powers). See also *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1969) (liquor industry is pervasively regulated); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining industry is pervasively regulated).
- 10 *New York v. Burger*, 482 U.S. 691, 702-03 (1987); *State v. Saunders*, 103 Or. App. 488, 493-94, 799 P.2d 159 (Or. App. 1990) (analyzing lawfulness under article I, section 9 based on factors articulated in *Burger*); see also *Biswell*, 406 U.S. at 316 (articulating different factors that emphasize importance and pervasiveness of regulatory scheme); *Westside Fish Co.*, 31 Or. App. at 302 (following *Biswell*).
- 11 Under article I, section 9 jurisprudence, if the consequences of the search are criminal sanctions the search may not be "administrative" in nature regardless of whether it is purportedly conducted pursuant to a statutory or regulatory scheme. See cases discussed at notes 16 and 17 below.
- 12 See *Saunders*, 103 Or. App. at 493-94 (holding warrantless search unconstitutional under article I, section 9 when statutory scheme did not provide specifically for routine inspections that are limited in scope).
- 13 *Camara v. Municipal Court*, 387 U.S. 523 (1967) (lower probable cause standard reasonable for administrative searches pursuant to municipal housing code); *State Accident Prevention Division of Worker's Compensation Board v. Foster*, 31 Or. App. 251, 258, 570 P.2d 398 (1977) (approving of *Camara* and adopting a "a sliding scale of evidence/probable cause" for analysis of administrative searches under article I, section 9).
- 14 *State Accident Prevention*, 31 Or. App. at 257.
- 15 Civil and regulatory inducements to waive constitutional rights are common. See, e.g., ORS 465.503 (exemption from action to compel removal not available to dry cleaning operator who denies government agency access to premises); Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecutions of Business Organizations, to Heads of Department Components, United States Attorneys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (cooperation is primary factor in determining whether or not to do criminal referral or initiate criminal investigation).
- 16 See, e.g., *State v. Boyanovsky*, 304 Or. 131, 133-34, 743 P.2d 711 (Or. 1987); see also *Saunders*, 103 Or. App. at 493-94 (article I, section 9 requires warrant be based on probable cause when purpose of statute is to search for evidence of criminal violation of commercial fishing laws); *Commonwealth v. Frodman*, 436 N.E.2d 925 (Sup. Jud. Ct. Mass. 1982) (search with "presupposition of criminal activity" using administrative search warrant issued on lesser probable cause standard would be "fatally flawed").
- 17 See, e.g., *Nelson v. Lane County*, 304 Or. 97, 101, 104, 743 P.2d 692 (1987).
- 18 Parallel investigations are common and are not, in and of themselves, unlawful. See *United States v. Kordel*, 397 U.S. 1, 11 (1970); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc).
- 19 Impropriety in the administrative investigation includes affirmative misrepresentations, deceit or trickery about the status of the investigation. See *United States v. Stringer*, 408 F. Supp. 2d 1083, 1092 (D. Or. 2006) (dismissing indictment largely on basis of active deception regarding criminal investigation); *Abel v. United States*, 362 U.S. 217 (1960) (deliberate use of administrative search warrant to gather evidence for criminal case "must meet stern resistance by courts"); *United States v. Bulacan*, 156 F.3d 963, 967-74 (9th Cir. 1998) (suppressing evidence because purported administrative search had impermissible criminal investigative purpose). See also *United States v. Knights*, 219 F.3d 1138, 1141 (9th Cir. 2000) (legality of probation searches dependent on whether search was true probation search or criminal investigation for law enforcement).
- 20 Article I, section 12, of the Oregon constitution provides, in part, that "No person shall ... be compelled in any criminal prosecution to testify against himself." The Fifth Amendment provides, in part, that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."
- 21 *State ex rel. Juvenile Dept. of Lincoln County v. Cook*, 138 Or. App. 401, 407, 909 P.2d 202 (Or. App. 1996) (observing article I, section 12 and Fifth Amendment may be effectively invoked or waived only by individual holding those rights); *Hale*, 201 U.S. 43.
- 22 *State v. Langan*, 718 P.2d 719, 722 (Or.

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- 1986); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).
- 23 See *Kordel*, 397 US at 9. However, because individuals have a right not to incriminate themselves in compelled sworn statements, even those made in their capacity as corporate employees, when no authorized person at a corporation can answer interrogatories addressed to the corporation without personally incriminating themselves, the appropriate remedy is a protective order postponing the civil discovery until termination of the criminal action. *Id.*
- 24 *Braswell v. United States*, 487 US 99, 109-10 (1988). Keep in mind that not only the content of documents, but also the act of producing documents, may have incriminating testimonial significance—for example, compliance with a subpoena may tacitly concede the existence of the documents demanded, their possession or control by the individual or entity producing them, and the producing individual's or entity's belief that the papers are those described in the subpoena. See *United States v. Doe*, 465 U.S. at 613, n. 11.
- 25 *Cook*, 138 Or. App. at 407; *United States v. Darwin Const. Co.*, 873 F.2d 750 (4th Cir. 1989).
- 26 A "custodian of corporate records" is any agent of the corporation who under ordinary principles of corporate law has custody or control over corporate documents. *In re Sealed Case*, 877 F.2d 83, 86 (D.C. Cir. 1989).
- 27 *Braswell*, 487 U.S. at 109-10, 118. Note that the unavailability of the Fifth Amendment privilege against production does not hinge on whether the subpoena is addressed to the corporation or the custodian. *Dreier v. United States*, 221 U.S. 394, 400 (1911); *Braswell*, 487 U.S. at 109-10.
- 28 *United States v. Lawn Builders of New England, Inc.*, 856 F.2d 388, 394 (1st Cir. 1988); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979).
- 29 *In re Grand Jury Proceedings (John Doe Co., Inc.)*, 838 F.2d 624, 626 (1st Cir. 1988). The rationale behind such compelled oral testimony is that, because the act of producing the records is a representation that the documents are those demanded by the subpoena, oral identification merely makes explicit what is implicit in the production.
- 30 Note that article I, section 12 requires transactional immunity as a substitute for the right not to testify against oneself. See *State v. Soriano*, 68 Or. App. 642, 662-63 (holding that use and derivative use immunity does not clearly protect against non-evidentiary and evidentiary use of immunized testimony and therefore cannot substitute for right not to testify against oneself), *aff'd*, 298 Or. 392, 693 P.2d 26 (Or. 1984).
- 31 The Oregon bill of rights is not derivative of the federal bill of rights, and, even if it were, Oregon is not bound to apply federal bill of rights precedence to the Oregon bill of rights. *Caraher*, 293 Or. at 756; *Soriano*, 68 Or. App. at 645-46.
- 32 See *Matter of John Doe Grand Jury Investigation*, 418 Mass. 549, 637 N.E.2d 858 (Mass. 1994).
- 33 While no Oregon cases address the sworn testimony of corporate representatives, it is well-established under Oregon law that the right against compelled self-incrimination is not self-executing—i.e., failure of the witness to assert the privilege is a waiver. *State v. Tenbusch*, 886 P.2d 1077 (Or. App. 1994); see also *Kordel*, 397 U.S. at 7-8 (employee has individual Fifth Amendment privilege against compelled incriminatory answers to interrogatories).
- 34 See *United States v. Doe*, 465 U.S. 605, 611-12 (1984) ("[T]he Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications." (quoting *Fisher v. United States*, 425 U.S. 391, 409-10 (1976))). *Doe* concluded that the contents of the taxpayer's documents were not privileged absent a showing that the owner "prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents." *Id.* (footnotes omitted). *State v. Jancsek*, 302 Or. 270, 284-85, 730 P.2d 14 (letter that was voluntarily created and non-privileged could not be compelled). Note that *Jancsek* expressly did not address whether the contents of a voluntarily created, but privileged, communication may be protected against compulsory production under article I, section 12. *Id.* at 285, n.8.
- 35 *In re Grand Jury Subpoena*, dated April 18, 2003, 383 F.3d 905, 910-13 (9th Cir. 2004); *In re Grand Jury Proceedings (Mora)*, 71 F.3d 723, 724 (9th Cir. 1995); see also *In re Grand Jury Subpoenas Duces Tecum*, dated June 13, 1983 and June 22, 1983, 722 F.2d 981, 986-87 (2d Cir. 1983). Oregon courts have not addressed the "foregone conclusion rule."

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- 36 *Weatherford v. Bursey*, 429 U.S. 545 (1977) (government intrusion on attorney-client relationship seriously undermines defendant's Sixth Amendment right to counsel that is necessary for effective legal representation and fair trial); *United States v. Fortna*, 796 F.2d 724, 731, 732 (5th Cir.), cert. denied, 479 U.S. 950 (1986) (government violates Fifth Amendment due process rights when it tramples on attorney-client relationship by obtaining confidential attorney-client communications and using information therein to defendant's detriment).
- 37 *Noble v. Union River Logging R. Co.*, 147 U.S. 165, 176 (1893) (recognizing Fifth Amendment due process right of corporation); *United States v. Radio-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) (recognizing Sixth Amendment right to effective assistance of counsel applies to corporations). The Oregon constitution does not have a due process clause and no Oregon cases have recognized a corporation's right to effective assistance of counsel under article I, section 11.
- 38 Note that the Sixth Amendment right does not attach until "at or after the initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984).
- 39 See *United States v. Marshank*, 777 F. Supp. 1507, 1521-22 (N.D. Cal. 1991) (observing that suppression is the appropriate remedy for Fifth Amendment violation except when continuing prejudice from violation cannot be remedied by suppression).

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Summary Judgment Motions on Discovery-Rule Claims: An Exercise in Futility?

By Stephen English of Bullivant Houser Bailey PC

Since the Oregon Supreme Court first endorsed the discovery rule in 1966,¹ the rule has judicially evolved through a series of logical forward steps. For example, although the rule initially applied only to medical malpractice cases, it has gradually evolved to include most—and arguably, all—tort claims. This means that it's virtually certain that a tort-claim litigant will invoke the discovery rule if a statute of limitations defense is raised.



What it means to have "discovered" a claim has also evolved. At first, the Supreme

Court held that a litigant discovers a claim when it knows or should know that a tort was committed. Later, the Supreme Court clarified that a litigant is deemed to have discovered a claim when it knows or should know facts necessary to support a "right to judgment." Next, the Supreme Court explained that discovery occurs only when a litigant knows or should know facts that would make a reasonable person aware of a "substantial possibility" that a claim exists. Finally, the Court of Appeals considered the meaning of "substantial possibility," and concluded that it means "high degree of certainty."

When the discovery rule is consid-



ered in the context of summary judgment motions, the Court of Appeals has held that a trial court cannot rule that a claim is time-barred unless *every rational juror* would be compelled to reach that conclusion.

Together, the Supreme Court and Court of Appeals have created a summary judgment standard for discovery-rule cases that is almost impossible to meet. Under that standard, a trial court can enter summary judgment on a discovery-rule claim only if every rational juror would be compelled to conclude that the litigant had a high degree of certainty about facts that would support its right to judgment by the relevant date.

This article discusses the judicial evolution of what "discovery" means, and how that evolution has made summary judgment motions—in the author's opinion—an exercise in futility in most discovery-rule cases.

A. The early development of Oregon's discovery rule.

The Supreme Court first endorsed the discovery rule in *Berry v. Branner*, 245 Or 307 (1966), a medical malpractice case. In *Berry*, the Supreme Court held that although plaintiff had a claim when her doctor left a surgical needle in her body, the statute of limitations didn't begin to run on that claim until she discovered or

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reasonably should have discovered the “tort committed upon her person by defendant.” *Id.* at 316. The Court pointed out that the rationale for this “discovery rule” is simple: “To say to one who has been wronged, ‘You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,’ makes a mockery of the law.” *Id.* at 312.

Twelve years later, the Supreme Court explained—in a products liability case²—that a litigant is deemed to know that a tort was committed when a reasonable person would associate “his symptoms with a serious or permanent condition and at the same time perceive[] the role” defendant played in causing that condition. *Schiele v. Hobart Corp.*, 284 Or 483, 490 (1978). In other words, under *Schiele*, the statute of limitations doesn’t begin to run on a discovery-rule claim until a reasonable person would become aware of the causal relationship between defendant’s conduct and the resulting harm.

B. In the early 1990s, the Supreme Court clarified that a litigant discovers a claim when it knows or should know facts that would make a reasonable person aware of a “substantial possibility” that a “right to judgment” exists.

The next developments in the meaning of the term “discovery” occurred in the early 1990s—when the Supreme Court made two significant changes to the discovery rule. First, the Court held that a litigant doesn’t discover a claim until it knows or should know “every fact which it would be necessary for [the litigant] to prove . . . in order to support [its] right to judgment.” *Stevens v. Bispham*, 316 Or 221, 227 (1993).³ Second, the Court clarified that discovery occurs only when a litigant learns “facts which would make a reasonable person aware of a substantial possibility” that a claim exists. *Gaston v. Parsons*, 318 Or 247, 256 (1994).

Taken together, these changes mean that the statute of limitations begins to run on a discovery rule claim only when a litigant knows or should know about facts that would make a reasonable person aware of a “substantial possibility” that a “right to judgment” exists. So from the perspective of discovery-rule-claim litigants, the *Stevens* and *Gaston* decisions marked a welcome shift in evaluating when discovery-rule claims are “discovered.”

Since *Stevens* and *Gaston* have guided recent discovery-rule jurisprudence, a brief examination of those decisions will help the reader understand the subsequent judicial evolution of the rule.

The first case involved a plaintiff who took his criminal-defense attorney’s advice and pleaded no contest to various criminal charges. *Stevens*, 316 Or at 225-26. That turned out to be a bad idea. Soon after plaintiff began serving his sentence, another person confessed to the crimes and plaintiff’s convictions were vacated. So plaintiff sued his attorney, arguing that he would have been acquitted or the charges would have been dismissed if the attorney had represented him adequately. *Id.* at 226.

The criminal-defense attorney moved for and was granted summary judgment based on a statute of limitations defense. 316 Or at 226. On appeal, the Supreme Court noted that it had previously decided that a litigant discovers a claim only when it knows or reasonably should know “every fact which it would be necessary for [the litigant] to prove . . . in order to support [its] right to judgment.” *Id.* at 227 (quoting). Since plaintiff hadn’t been harmed until his convictions were vacated (*i.e.*, he had no “right to judgment” before then), his lawsuit was timely and “must be defended on the merits.” *Id.* at 238-39.

In the second case, plaintiff received an injection to treat muscle spasms in his lower body. *Gaston*, 318 Or at 251. Soon

after receiving the injection, plaintiff noticed numbness and loss of function in his left arm (his only functioning limb), but the doctor who gave him the injection told him that those problems were temporary and that he would regain the use of his arm in six months to two years. Three and one-half years later, plaintiff filed a malpractice claim against the doctor. *Id.*

The doctor moved for summary judgment, arguing that the claim was barred by the two-year statute of limitations. The trial court agreed, and dismissed the claim. But on appeal, the Court of Appeals reversed, and the Supreme Court affirmed that reversal. 318 Or at 250. The Supreme Court concluded that whether a litigant should have discovered its claim more than two years before filing suit depended on whether it knew or “should have known facts which would make a reasonable person aware of a *substantial possibility*” that the elements of a claim existed. *Id.* at 256 (emphasis added). The Court explained that a litigant need not know each element of its claim with absolute certainty, but it must have more than a “mere suspicion” in order to have discovered the element. *Id.* at 255-56.

C. In 2005, the Oregon Court of Appeals interpreted *Gaston*’s “substantial possibility” threshold to require a “high degree of certainty” about facts necessary to support a “right to judgment.”

According to *Gaston*, the requisite level of certainty needed for a litigant to discover a claim is awareness of a “substantial possibility” that the relevant elements exist. 318 Or at 256. In 2005, the Court of Appeals addressed—in an 8-2 *en banc* opinion—what “substantial possibility” means in the context of discovery rule cases; in other words, how much certainty the available facts must provide before it can be said that a reasonable person

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“should have” discovered a claim. *Keller v. Armstrong World Indus., Inc.*, 197 Or App 450 (2005), *aff’d*, 342 Or 23 (2006). The Court of Appeals concluded that “substantial possibility” is a demanding threshold that is crossed only when a litigant learns—with a “high degree of certainty”—about facts needed to support its “right to judgment.” *Id.* at 463.

So, in light of *Keller’s* interpretation of the meaning of “substantial possibility,” *Gaston’s* holding can be restated as follows: A discovery rule statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware to a high degree of certainty that each of the three elements (harm, causation, and tortious conduct) exists.

This “high degree of certainty” threshold avoids forcing potential plaintiffs to choose between two evils: sanctions, attorney fees, and civil liability if they file too early⁴—or forfeiture of their legal rights if they file too late. As such, it’s a logical forward step in the continuing evolution of Oregon’s common-law discovery rule.

D. Under the “high degree of certainty” threshold, whether a litigant “should have” discovered a claim sooner should rarely be decided on summary judgment.

(1) Discovery rule issues are generally left to the jury.

Trial courts traditionally leave discovery rule issues to the jury because questions regarding reasonableness and diligence are highly fact-intensive and the facts are rarely undisputed:

Though the summary judgment procedure is freely available in

all types of litigation, it is obvious that some kinds of cases lend themselves more readily to summary adjudication than do others. It usually is not feasible to resolve on motion for summary judgment cases involving questions such as when knowledge is discoverable by reasonable diligence of plaintiff and concealment by defendants.

Forest Grove Brick Works, Inc. v. Strickland, 277 Or 81, 87-88 (1977); see also *Gaston*, 318 Or at 256 (“Whether a reasonable person of ordinary prudence would be aware of a substantial possibility of tortious conduct is a question of fact”); *Peterson v. Multnomah County School Dist.*, 64 Or App 81, 85 (1983) (fact question as to whether or not plaintiff discovered or should have discovered claim more than two years before filing suit).

In other words, it’s “seldom, if ever, [] possible for a judge to determine summarily when the injured person . . . became fully aware that he or she had been victimized. An appraisal of the full testimony is generally called for.” *Strickland*, 277 Or at 88 n 9. This is the rule because resolution of discovery rule issues usually depends on inferences that a litigant should have known about a claim at a specific time. But those inferences can be drawn only by the jury and are not an appropriate basis for summary judgment, where all reasonable inferences are made in the non-moving party’s favor. See, e.g., *Jones v. General Motors Corp.*, 325 Or 404, 420 (1997).

(2) Summary judgment can properly be granted on a discovery-rule claim only if every rational juror would be compelled to conclude that the litigant had a high degree of certainty about facts that would support

each element of its claim more than two years before filing suit.

The *Keller* case involved a plaintiff who worked in an auto repair shop in the early 1960s—where he was exposed to asbestos while doing muffler and exhaust work. In the 1980s, after he began experiencing shortness of breath, a doctor told plaintiff that asbestos “might” be the cause of his symptoms, but also said that exhaust fumes and smoking could be the culprits. Five years later, in 1991, plaintiff saw another doctor, who concluded that he had “mild pulmonary fibrosis, possibly related to asbestos exposure.” Later that year, plaintiff applied for social security disability benefits, stating that the cause of his lung problems was exhaust fumes, dust, and asbestos. 197 Or App at 454.

In 1994, plaintiff resubmitted his claim for social security benefits, stating that his shortness of breath had worsened and that a doctor had advised him that he should stop working because of his “asbestos lungs.” The next year, plaintiff filed a workers’ comp claim, asserting that he had “asbestos lung” from asbestos exposure. 197 Or App at 455-56.

Then, in 2000, a new doctor concluded that plaintiff had asbestosis. Later that year, plaintiff sued multiple defendants—two of whom moved for summary judgment, arguing that plaintiff’s claims were barred by the two-year statute of limitations. The trial court granted those motions, but the Court of Appeals reversed. 197 Or App at 456, 470.

In reaching its decision, the Court of Appeals concluded that although “a reasonable juror *could* conclude that plaintiff had access to sufficiently certain facts to make him aware of a substantial possibility that his [injury] was caused by asbestos,” the court did not agree “that

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a reasonable juror would be *compelled* to reach that conclusion." 197 Or App at 470 (emphasis in original). Summary judgment was therefore inappropriate.

In *Johnson v. Mult. Co. Dept. Cmty. Justice*, the Court of Appeals went one step further, holding that discovery rule issues may be resolved on summary judgment "only if every *rational juror*, asked whether plaintiff should reasonably have known [by the relevant date] that defendant was probably responsible for her [harm], would answer in the affirmative." 210 Or App 591, 597-98 (2007) (emphasis added).

E. Conclusion.

Under *Stevens* and *Gaston*, as interpreted by *Keller* and *Johnson*, Oregon trial courts can enter summary judgment on discovery-rule claims only if every rational juror would be compelled to conclude that the litigant had a high degree of certainty about facts that would support its right to judgment before the statute of limitations cut-off date. In the author's opinion, that standard precludes summary judgment in virtually every case where the discovery rule applies.

But given the Supreme Court's starting point in 1966—where it dismissed as "patently inconsistent and unrealistic" the notion that a claim could be time-barred before a litigant even knows of it—the gradual evolution of Oregon's judicially created discovery rule is not surprising. Whether it creates as many problems as it solves, however, is a question for another day. □

Endnotes

- 1 Although the Oregon Legislature adopted a discovery rule in connection with fraud claims in 1919, this article only discusses the judicially created discovery rule.
- 2 Although Berry involved a medical malpractice claim, the Supreme Court based its decision on its interpretation of the word "accrued"—found at ORS 12.010. The Court concluded that the Oregon Legislature, by using the term "accrued" in ORS 12.010, meant to incorporate a discovery rule. *Berry*, 245 Or at 315-16; *Gladhart v. Oregon Vineyard Supply Co.*, 332 Or 226, 231 (2001). So, since ORS 12.010 says that claims must be "commenced within the periods prescribed in this chapter, after the [claim] shall have accrued," a persuasive argument can be made that any claim with a statute of limitations set out in ORS Chapter 12 is subject to a discovery rule. See, e.g., *U.S. Nat'l Bank v. Davies*, 274 Or 663, 669 n 1 (1976) (malpractice); *Oregon Life and Health Ins. Guar. Ass'n v. Inter-Regional Financial Group, Inc.*, 156 Or App 485, 492 (1998) (negligence and breach of fiduciary duty); *Allen v. Lawrence*, 137 Or App 181, 189 (1995) (negligent misrepresentation).
- 3 The Supreme Court first quoted the "right to judgment" language in *U.S. Nat'l Bank v. Davies*, 274 Or at 666-67 (quoting Michael Franks, *Limitation of Actions* 11 (1959)). But it first adopted that language as Oregon common law in *Stevens v. Bispham*.
- 4 See ORCP 17 (authorizing sanctions for premature or insufficiently supported filings); ORS 20.105 (requiring trial courts to award attorney fees to a defendant "upon a finding . . . that [plaintiff had] no objectively reasonable basis for asserting the claim"); *Roop v. Parker NW Paving Co.*, 194 Or App 219, 237-38 (2004) (noting possible civil liability for filing claims without an objectively reasonable basis).



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Friday, April 11, 2008

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Investigative Research
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Time and credits pending

The Hidden Interrogatory in the Oregon Rules—ORCP 39C(6)

By John Dunbar

Many lawyers don't take advantage of a significant discovery tool. Under ORCP 39C(6), a corporation and other organizations may be deposed on noticed topics. The federal rules contain a nearly identical provision, FRCP 30(b)(6). While the Oregon rules don't provide for interrogatories, the 39C(6) deposition offers many of the advantages of an interrogatory, without many of the disadvantages.

Rule 39C(6), like the federal rule, provides:

A party may in the notice and in a subpoena name as the deponent [an organization] and describe



with reasonable particularity the matters on which examination is requested. In that event, the organization so

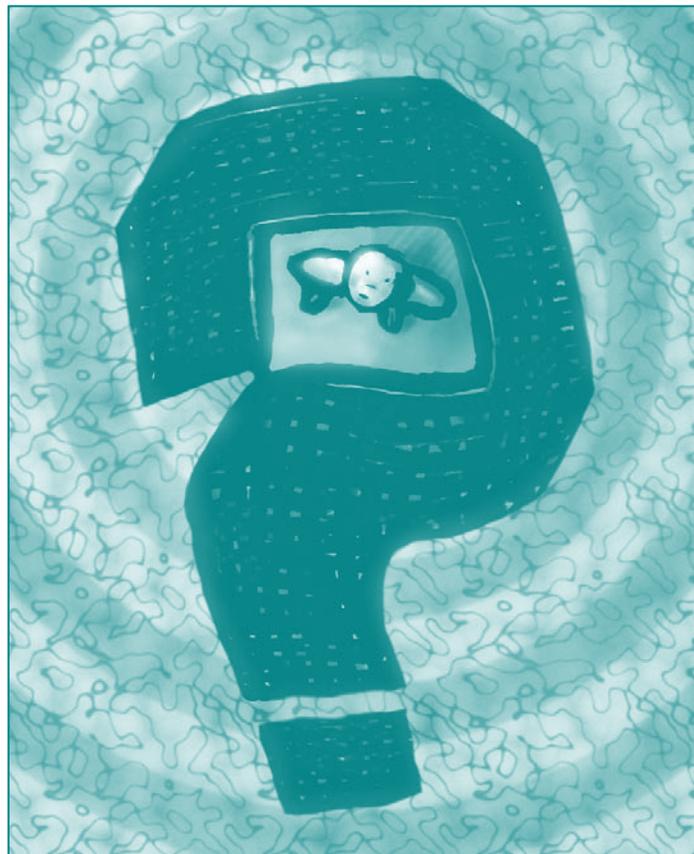
named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition

by any other procedure authorized in these rules.

Preparing the Notice

The deposition notice is key. The notice should be sufficiently detailed, or the preparation—and deposition answers—may be general. The notice also should not be so long and detailed as to provoke a motion for a protective order. While some topics are common to most cases, the topics in the notice will vary depending on the needs of the individual case. In cases where there are concerns regarding the adequacy of discovery efforts,

counsel may need to determine whether sufficient efforts to locate documents have been made. In cases involving very large organizations, counsel may need to determine who made certain decisions, or to identify which witnesses in the organization have the information needed. In some cases, involving organizations large and small, witnesses may appear at individual depositions and claim ignorance. The favorite response, of course, is basically "I don't know now, but by trial we can tell you." That often works in the normal deposition, but not in the 30(b)(6) deposition.



Timing of the Notice

The rule requires reasonable notice for any deposition, and no minimum time is provided for depositions of the organization. Some suggest that at least two weeks notice be given. Appropriate time frames will vary depending on the level of detail in the notice, the amount of research that may be involved, and other relevant circumstances.

Designating Witnesses

After the notice is sent, opposing counsel must designate one or more wit-

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nesses who will appear on the noticed topics. This can be done at the time of the deposition, or counsel can agree on disclosures beforehand. The persons can be fact witnesses, but they need not be. There also is no requirement that the witness be the "most knowledgeable" person on the topic, just that the witness be prepared. The fact that no one currently working at the organization has personal knowledge does not, by itself, excuse a party from providing a witness.

The Duty to Prepare

If the persons designated by the organization do not possess personal knowledge of the matters set out in the deposition notice, the organization is obligated to prepare the designees so that they may give knowledgeable and binding answers for the organization. The duty to prepare is a unique feature of the 39C(6) deposition. While there are no published Oregon cases on the rule, there are many federal decisions on which Oregon courts will likely rely. Federal decisions confirm that there is an affirmative duty to prepare on noticed topics. The corporation must make a "conscientious, good-faith endeavor" to prepare the witness to "answer fully, completely [and] unequivocally." *Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 66-67 (D. P.R. 1981). Courts across the country have adopted this standard. *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F.3d 275, 303-304 (3rd Cir. 2000) (collecting cases).

Ignorance by the witness is no excuse. If designees lack personal knowledge on noticed topics, "the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation." *United States v. Taylor*, 166 F.R.D. 356, 361, *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996). The preparation requirement exists to

prevent sandbagging, when a corporation conducts a "half-hearted inquiry before the deposition, but a thorough one before trial." *Id.* at 362.

The Deposition

The lawyer taking the deposition should mark the deposition notice as an exhibit, as it contains the topics on which witnesses must be designated. The lawyer should establish on the record which topics the witness has been designated to testify on. Asking the witness how much time has been spent preparing, and what was done to prepare, can be helpful in assessing whether the witness has made a good faith effort to prepare. The witness can bring material to the deposition that will aid in the response, such as lists or documents. Those will likely become deposition exhibits, but often make the deposition far simpler. Since the witness is not being quizzed as a fact witness, the witness should be able to refer to materials that provide factual background. The lawyer defending the deposition will also want to consider how much to object to questions that go beyond the scope of the notice. If the witness is deposed both in an individual capacity and as the organization's designee, both lawyers should consider the problems that can arise if no one makes a clear record regarding which capacity the witness is testifying in when various answers are given. One solution is to depose an individual twice, first as the organization's mouth-piece and then as an individual fact witness. This can be done on different days or by clearly marking in the record when the 39C(6) deposition ends.

How Binding is the Organization's Deposition Testimony?

Federal decisions are split on whether deposition answers create a binding judicial admission. Some courts treat the deposition testimony as binding admis-

sions that can ultimately decide an issue. Other courts permit changes in testimony, reasoning that the organization's testimony is like any other testimony. If it changes, it will be subject to cross-examination and impeachment. *Casper v. Esteb Enterprises, Inc.*, 82 P.3d 1223 (Wash. Ct. App. 2004) (summarizing differing views). The Ninth Circuit has not addressed the issue, and neither have the Oregon appellate courts. Until the issue is resolved, the witness must be prepared under the assumption that the testimony will bind the entity.

Can "I Don't Know" Deposition Answers Be Changed At Trial?

Courts have also reached different results on what to do when an organization states it is unable to answer questions at the deposition, but then does its homework before trial and seeks to offer detailed trial testimony on topics that were the subject of the deposition. Some courts have allowed the testimony, as it was subject to impeachment. Other courts have taken a stricter view. In one frequently cited case, the court took the view that a corporation could not "profess ignorance" during its deposition, but then "present evidence on the same subject at trial." *Ierardi v. Lorillard, Inc.*, No. 90-7049, 1991 WL 158911, at 3 (E.D. Pa. Aug. 13, 1991). In a Washington case, the court upheld a pretrial discovery sanction which required the organization's witness to respond that he "didn't know" when asked questions at trial. The witness had given "don't know" answers to those questions at the organization deposition, and when the court gave him an opportunity to supplement the deposition testimony before trial, he did nothing. When the witness tried to answer questions at trial, the trial court instructed the jury that the witness didn't know the answer. *Casper*, 82 P.3d 1223.

In a middling view, other courts have

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recognized that a corporation that gives "don't know" responses at the organization deposition should not be able to easily change its testimony at trial. These courts have said that a corporation could change its position if it showed that the requested information was not "reasonably available" at the deposition, or if a corporation made an evidentiary showing that there was "extremely good cause" for its change in position, which should be "strictly scrutinized." *E.g.*, *Rainey*, 26 F. Supp. 2d at 94-96; *Taylor*, 166 F.R.D. at 363, n.8, 365.

In other cases, courts have imposed monetary sanctions, holding that the failure to produce a prepared witness is "tantamount to a failure to appear." *Black Horse Lane Assoc.*, 228 F.3d at 304 (affirming monetary sanction under Rule 37(d)). Courts have also refused to allow an unknowledgeable 30(b)(6) witness to belatedly provide an explanation in an affidavit opposing summary judgment. *E.g.*, *Super Futures Equities, Inc. v. Wells Fargo Bank*, 2007 WL 4410370 (N.D.Tex. 2007); *e.g.*, *Rainey*, 26 F. Supp. 2d at 95.

What About Oregon?

Lawyers in Oregon often don't take advantage of the organization deposition. This tool does, however, help fill some of the gaps in state court discovery. When discovery is sought from an organization, a detailed deposition notice can yield answers that normally are obtained from interrogatories, or even expert depositions. Some simple examples:

- What people have knowledge or were witnesses to the events?

- How did you calculate damages?
- What are the corporation's policies on a given topic, and who has authority within the corporation for certain decisions?
- Tell me not just what you did or saw, but what did your corporation as a whole do about this?

The answers to questions like these will come from a live witness. That can be a significant advantage over the interrogatory response, which is often so filtered by counsel as to be meaningless.

Will Oregon courts permit inquiries into areas that are normally off limits in state court discovery? Oregon has no procedural rules that allow interrogatories or expert discovery. Oregon also has no procedural rules that prohibit either tool. And while one purpose of the organization deposition is to thwart trial by ambush, in Oregon trial by ambush is the lore of the land.¹ Courts may hesitate before abandoning this time-honored Oregon tradition, but sooner or later, aggressive counsel will push the limits of Oregon discovery with this tool. □

Endnote

- 1 See *Stevens v. Czerniak*, 336 Or. 392, 404-5 (2004). In *Stevens*, the court did not address ORCP 39C(6), but after examining the history of ORCP 36B the court stated that "without a specific provision authorizing expert discovery, the trial court lacked authority to require the parties to disclose" expert identity and substance of opinion in advance of trial).

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Case Management and Transparency vs. Gamesmanship (and Sanctions): *Recent Decisions in Electronic Discovery*

Eleanor H. Chin of DavisWright Tremaine¹

Two Awkward Outcomes

It is probably safe to say that no lawyer would ever want their name appearing in an opinion that contained the following language:

The Court envisions four scenarios. First, Qualcomm intentionally hid the documents from its retained lawyers and did so so effectively that the lawyers did not know or suspect that the suppressed documents

existed. Second, the retained lawyers failed to discover the intentionally hidden documents or suspect their existence due



to their complete ineptitude and disorganization. Third, Qualcomm shared the damaging documents with its retained lawyers (or at least some of them) and the knowledgeable lawyers worked with Qualcomm to hide the documents and all evidence of Qualcomm's early involvement in the JVT. Or, fourth, while Qualcomm did not tell the retained lawyers about the damaging documents and evidence, the lawyers suspected there was additional evidence or information but chose to ignore the evidence



and warning signs and accept Qualcomm's incredible assertions regarding the adequacy of the document search and witness investigation.

Given the impressive education and extensive experience of Qualcomm's retained lawyers, the Court rejects the first and second possibilities.

Nonetheless that is what happened to 19 attorneys at Day Casebeer Madrid & Batchelder and Heller Ehrman LLP on January 7, 2008. Judge Barbara L. Major, United States Magistrate Judge for the

Southern District of California, issued a ruling that, among other things, personally sanctioned six attorneys for discovery misconduct. *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911 at *41 (U.S.D.C. S.D. Cal. January 7, 2008). The court also ordered Qualcomm to pay over \$8.5 million in attorney fees to the opposing party and both client and counsel to participate in what the court termed a "comprehensive Case Review and Enforcement of Discovery Obligations ("CREDO") program . . . to identify the failures in the case management and discovery protocol utilized by Qualcomm and its in-house and retained attorneys." *Id.* at *66.

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The *In re: Seroquel Products Liability Litigation*, 244 F.R.D. 650 (M.D. Fla. 2007) decision did not order sanctions or recommend discipline for counsel, but it was scarcely better. In that instance the court granted the plaintiffs' motions for sanctions after detailed findings that the defendant, Astrazeneca, had failed to meet and confer on discovery processes and had inexcusably failed to produce thousands of documents in an accessible and usable format. The court cautioned both parties:

[T]he posturing and petulance displayed by both sides on this issue shows a disturbing departure from the expected professionalism necessary to get this case ready for appropriate disposition. Identifying relevant records and working out technical methods for their production is a cooperative undertaking, not part of the adversarial give and take. This is not to say that the parties cannot have reasonable disputes regarding the scope of discovery. But such disputes should not entail endless wrangling about simply identifying what records exist and determining their format . . . The parties' mode of proceeding here has prevented the presentation of any genuine issues as to the proper scope of production of material from data bases. Both parties must bear some of the responsibility for the breakdown, but it is primarily [Astrazeneca], as the creator and owner of the information, which has failed to make a sincere effort to facilitate an understanding of what records are kept and what their availability might be.

Id. at 660.

The *Qualcomm* decision was a long time coming and the motions leading up to it had been closely followed in the legal press. The basic problem, as set forth by the court, was that Qualcomm failed to produce thousands of emails that directly contradicted its position on a critical factual issue until *after* trial in its patent suit. The court's summary of the facts implied that at some point counsel made decisions that were either consciously contrary to their production obligations or so careless as to make no difference. Among the problems was the failure to conduct an exhaustive search for electronically stored information in the custody of FRCP 30(b)(6) and trial witnesses.

The *Seroquel* decision covered a much broader range of issues. Among them were defendant's problems producing a number of specialized data types (or even disclosing their existence), following poorly documented and unsupported search and gathering procedures, producing millions of pages of documents with faulty metadata, no page breaks, or other technical problems, and engaging in what the court termed "purposeful sluggishness."

The firms whose actions appear in such an unflattering light in these decisions are well regarded firms, with reputable attorneys and sophisticated clients. So how did they end up in such awkward predicaments: in *Qualcomm*, being sent to essentially court supervised remedial education, with six attorneys referred to the California bar for potential disciplinary action, and in *Seroquel* with their client subject to (then unspecified) monetary sanctions? It is problematic to speculate on what happened behind the scenes, particularly because the details of discovery strategy between counsel and client are privileged. However, these two cases provide ample opportunity to

discuss some electronic discovery best practices.

Case Management and Proactive Electronic Discovery

The court in *Qualcomm* characterized the CREDO program first as a "case management" program. Case management is one of those vague concepts that none of us learned in law school, but which electronic discovery makes more a fact of life than ever before. Part of electronic discovery culture in recent years is an explosion of vendors and consultants who offer to do project management and electronic discovery "for" lawyers. Part of the learning from the *Seroquel* and *Qualcomm* cases is that some discovery management is non-delegable. *Seroquel*, 244 F.R.D. at 664, fn. 14 (quoting the Sedona Conference principles).² This is true both because courts should and will hold counsel ultimately responsible for form, content, thoroughness and usability of production, but also because failure to manage your own case is a failure to understand it.

The obligation to effectively conduct the logistics of discovery is not new with the exploding volume of electronically stored information ("ESI"). Discovery of ESI does multiply the costs (and consequences) of careless or ill-thought-out case management. The fact of electronic discovery does not change the essential obligation to produce responsive information, balanced by cost and burden, but places the responsibility on lawyers to understand the discovery implications of unfamiliar, high volume technical information.

The court in *Qualcomm* noted that the type of discovery and the responses appeared to be entirely unremarkable, with Broadcom asking for "all documents referring to or evidencing" various topics and Qualcomm responding that it

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would “produce non-privileged relevant and responsive documents” on the same subjects. 2008 U.S. Dist. LEXIS 911 at *7-9. However, the practices counsel actually undertook to identify, gather and produce responsive documents were flawed. Among other things, the court stated that the computers of various key witnesses were not searched. *Id.* at *10-11. Counsel ultimately admitted that had they discovered thousands of emails before trial, they would certainly have produced them and their trial position would have been different. *Id.* at *22-23.

Part of effective discovery management is having a plan early in the case that incorporates both factual and technical strategy. The discovery plan should be detailed enough to avoid having to re-do work. This requires understanding your client’s IT infrastructure to know where to look (and planning to look there). At the same time the plan should be flexible enough to accommodate the inevitable evolution of counsel’s knowledge of the facts, personnel and sources of discoverable information.

When outside counsel begins work on a case, they are not going to know which of their client’s personnel will be helpful and knowledgeable, much less who might be a suitable FRCP 30(b)(6) witness or who they might put on at trial. However it takes no background in electronic discovery to know that once you figure out who your key witnesses are, you will want to have at your own disposal everything the witnesses have that will allow you put them on effectively and make yourself completely comfortable with their knowledge and role. Likewise, we have all had to make the decision to produce all of our witnesses’ materials, even when we wince and see opposing counsel’s Exhibit 1 coming down the pike.

Most litigators have horror stories of

the witness showing up for deposition preparation (or worse yet, the deposition itself) with a briefcase full of documents we have never seen and saying “Gee, I found these at home/in my file cabinet/at my fishing cabin and thought I’d take a look to just help get ready for today.” If that happens to us once, we know to ask the questions that reduce the likelihood of it happening again. Electronic discovery is no different. Therefore the discovery plan should take into account both the process of identifying and understanding key people and getting at their sources of data. This means we should know if they have a laptop, if they have an email account, how many email accounts they have, how they use their laptop, and whether they are in the habit of backing up system files onto their laptop. As part of both preparing the witness and conducting effective discovery, the attorney should understand the witness’s work habits: Do they take work home? Do they use a different computer at home? Do they have a thumb drive? etc. You should also know if your witness is a person who can easily remember and frankly answer all of the above questions.

To meaningfully pursue these questions requires the attorney to understand how a witness’s knowledge and data fit with the rest of the client’s IT infrastructure and practices: Does the client have a centrally managed email system? How long do emails get retained automatically? What methods does the company require or permit employees to use to retain project-specific emails? What customized, proprietary or legacy systems has this witness used? As with knowledge of people, the lawyer’s knowledge of the information architecture evolves during the course of the case. The lawyer is not going to start out knowing how many laptops to search, how many hard drives

to image, which servers to search, or even what the estimated volume of emails will be. However, the discovery plan should be designed to familiarize counsel with the type and scope of information early in the discovery process, and build in contingencies for late discovered information.

A properly implemented discovery plan should mean that a witness who is important enough to take the stand at trial should have no unknown (and therefore unproduced) data, even if counsel learns of the data after the first wave of production. Most litigators joke that there are no real life “Perry Mason moments” when the attorney asks the magic question in trial and the other side collapses. However, the court’s recital of the facts in *Qualcomm* showed something quite close: Qualcomm’s counsel carefully avoided asking their own witness if she had received the emails on her laptop, but Broadcom’s counsel did and the answer turned out to be “yes.” *Id.* at *17-18. Not only was the answer “yes”, but they were emails whose existence directly contradicted Qualcomm’s assertion that it had not been involved in an industry standards body during a critical period. This revelation triggered the post-trial discovery and production of thousands of emails.

Searching a laptop is a specialized technical process and there are numerous steps and decisions that are best handled by vendors. *Qualcomm* does not call upon lawyers to micromanage technical processes, but it does require that the lawyers understand the implications of identifying a laptop, and requires lawyers to make the decision to search it. (Although the issues of admissibility and chain of custody did not arise in *Qualcomm*, the lawyer will ultimately be responsible for those also.) In that sense electronic discovery is not merely an irritating and costly duty to be shoved

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off onto a vendor, but an integral part of lawyers educating themselves about their case. Most cases that involve sanctions for electronic discovery failures can be read as lessons not to be reactive about discovery.

Delegation

Among the issues that the *Qualcomm* and *Seroquel* decisions bring to light is who is responsible for discovery. To whom does “we” and “the attorney” in the preceding section refer? At the sanctions hearing in *Seroquel* the court noted that the defendant Astrazeneca offered:

only the testimony of a junior level attorney, only somewhat versed in technical issues and one who came late to the process . . . [Astrazeneca] provided essentially no information as to how it organized its search for relevant material, what steps it took to assure reasonable completeness and quality control. Its efforts at finding solutions to technical problems are likewise unilluminated.

244 F.R.D. at 660, fn. 6.

In *Qualcomm*, the court cited a number of declarations or testimony by the different attorneys indicating that while counsel were valiantly trying not to finger-point at one another or their client, the senior attorney team could not meaningfully testify about what had happened in the document gathering and production process.

Like delegation to a vendor, delegation within litigation teams requires both communication and recognition of where the buck stops. Senior partners with strategic oversight of the case

logically delegate reviewing hundreds of individual emails and day-to-day work with vendors on search terms and data processing to others. However, when the partners leave associates or paralegals responsible for the identification, gathering, processing and review of electronically stored information thrashing about in a sea of data, with no connection to core case development, problems inevitably arise.

The discovery problems in *Seroquel* were much more diverse than those in *Qualcomm* and included the failure to identify and disclose search terms, the failure to use effective search terms, 244 F.R.D. at 661, and the failure to produce documents in usable format, specifically including millions of pages that did not have page breaks. *Id.* The court was clearly concerned that the pure logistics of the discovery process took place in a low quality manner. Development of search terms is not a complex task, but it is a strategic one. The court cited examples such as “omitting *Seroquel*’s generic name, acronyms for *diabetes*, spelled the British way; and *endocrine*. The search method apparently failed to include common misspellings or the singular forms of words and failed to make allowance for spaces or dashes.” *Id.* at fn. 7.

Using search technology that captures spaces, dashes, plurals and variations in tense is arguably the responsibility of the vendor, but counsel bears responsibility for selecting a competent vendor in the same way that a partner bears responsibility for delegating to a competent associate. The decisions about searching for substantive concepts likely to produce responsive information is not a vendor responsibility, unless the vendor is providing strategic consulting based on knowledge of the merits and strategy of the case. That may be an appropriate choice if the counsel team does not have

the combination of technical expertise and substantive knowledge to work through issues like “‘*NDA* is too general,’ ‘*Seroquel* is a core term but has a generic name and other proxy terms’ etc.” When to identify search terms (after counsel has sufficient knowledge of the facts, but before beginning data processing), what search technology to use, and when and how to identify and remove duplicate information, are not simple administrative tasks beneath the notice of the senior members of the attorney team. Certainly the identification of custodians (the individual sources of data, usually people, but sometimes data collections) is a strategically important task. *Qualcomm* makes that abundantly clear, and in *Seroquel* the court noted that one of Astrazeneca’s two witnesses on its discovery processes had no idea how the custodians were chosen. *Id.* at 662.

Picking Battles

Another common issue addressed by the court in these two decisions is the scope and integrity of the “meet and confer” process and the necessity of filing a motion to compel. In *Seroquel* the court noted that “[Astrazeneca]’s refusal to allow contact between individuals with appropriate technical backgrounds as part of the effort to resolve technical issues is an inexplicable departure from the requirements of Rule 26, the Sedona Principles and this Court’s expressed expectations.” 244 F.R.D. at 658, fn. 4. The court also faulted the defendant for not disclosing the existence of various databases but instead taking an overly technical view of whether or not plaintiffs had actually requested the databases, and otherwise failing to confer in good faith. *Id.* at 659-61.

In *Qualcomm* the court stated:

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Case Management

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For the current “good faith” discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client’s or attorney’s discovery obligations.

2008 U.S. Dist. LEXIS 911 at *31.

Being scolded (and worst case sanctioned) by courts for failing to confer in good faith is not new to electronic discovery and the court in *Seroquel* made clear that the vague border between vigorous advocacy and inappropriately gaming the discovery system was crossed. All counsel bear the responsibility of deciding how much of their discovery process to open up to the other side. Agreeing to every detail of complex electronic discovery processes with opposing counsel is tedious, reduces flexibility, potentially increases cost, and is just plain uncomfortable and intrusive. Moreover, many decisions about how to balance the burdens of discovery are protected by privilege and work product doctrines. Beyond the basic guidelines of FRCP 16 and 26 and their state equivalents, civil discovery regimes do not mandate the extent and details

of cooperation, but merely that parties must cooperate. Reading between the lines in *Seroquel*, it is possible to see a number of decision points in a complex and protracted discovery process where counsel and the parties chose to agree or not. By way of example, the decision to agree to or even disclose search terms is not black and white (unless the court orders it). However, in the right case agreement can save time and aggravation. Once agreed however, the application of search terms must be consistent, collaborative and well documented.

Both Qualcomm and Astrazeneca argued that sanctions were not proper because the opposing party had not filed a motion to compel. In *Qualcomm* the court summarily disposed of this argument noting “Why should Broadcom file a motion to compel when Qualcomm agreed to produce the documents? What would the court have compelled: Qualcomm to do what it already said it would do? Should all parties file motions to compel to preserve their rights in case the other side hides documents?” 2008 U.S. Dist. LEXIS 911 at *30, fn. 4.

Likewise the court in *Seroquel* found that Astrazeneca’s position had no merit because the plaintiffs had indeed filed a motion to compel, but had withdrawn it based on the defendant’s representations and agreements in the court-ordered conferences prior to the evidentiary hearing on the motion to compel. When the defendant failed to live up to the agreement, the plaintiffs moved for sanctions. 244 F.R.D. at 656-57. The take home lesson from this aspect of these two decisions is that, once it is obvious to you that you have made a substantial discovery misstep, be careful about asserting technical defenses.

Conclusion

Many articles, opinions and CLEs about electronic discovery start with statistics about how the mind boggling volume of electronic data in the world has changed the landscape of discovery because of cost and bulk alone. However, as the *Seroquel* court pointed out, volume alone is not the issue. 244 F.R.D. at 661, fn. 8. High volume (and complex) ESI production is not merely production for production’s sake, but a bigger haystack which still contains needles (both procedural and substantive) that we are obligated to find. In order to do this effectively, in a way that saves our clients needless cost (and certainly the cost of sanctions), counsel must develop an intuitive understanding of both the benefit and burden of electronic discovery. As a profession we have done so for non-electronic discovery. Making discovery “electronic” should not change our basic ability to ethically and efficiently perform our job. □

Endnotes

- 1 Eleanor Chin is an associate in the litigation group of Davis Wright Tremaine LLP. Her practice includes complex commercial disputes and electronic discovery counseling. She is a graduate of the University of Michigan Law School, the University of Michigan School of Social Work and Bryn Mawr College.
- 2 The Sedona Conference (www.theseconaconference.org) is a leader in developing complex litigation guidelines and best practices in a number of areas including electronic discovery. Its guidelines, definitions and principles for electronic discovery are extensively cited in court opinions, including by the court in *Seroquel*.

¹Assessing Appealability: Lessons of *Interstate Roofing, Inc. v. Springville Corporation*

By Robyn Ridler Aoyagi of Tonkon Torp LLP

Drafting a notice of appeal is a fairly straightforward task. See ORS 19.250. Alas, the same cannot always be said about deciding when to file it.

It is a basic tenet of Oregon appellate law that notices of appeal are jurisdictional and that failure to timely file and serve the notice cannot be excused, no matter what the reason for the delay. ORS 19.270(2); *Jeffries v. Mills*, 165 Or App 103, 112, 995 P2d 1180 (2000). Thus, for example, the Oregon courts have rejected appeals for lack of jurisdiction where the trial court clerk failed to notify the would-be appellant that a judgment had been entered, causing the party to miss the filing deadline. See, e.g., *Junction City Water Control v. Elliott*, 65 Or App 548, 672 P2d 59 (1983).



The tough-luck jurisdictional nature of notices of appeal is a good reason to triple-check your calculation of when your notice of appeal is due. However, counting to 30 ten times over won't do any good unless you start from the right date. The Oregon Court of Appeals' recent decision in *Interstate Roofing, Inc. v. Springville Corporation*, Case No. A135686 (January 9, 2008), provides a good reminder that determining whether a particular judgment is appealable (and therefore must be appealed immediately if it is to be appealed at all) is not always as simple as one might expect.

The Jurisdictional Statute

ORS 19.205(1) is the statutory provision governing appealability of judgments. It states, in relevant part: "Unless otherwise provided by law, a limited judgment, general judgment, or supplemental judgment, as those terms are defined by ORS 18.005, may be appealed as provided in this chapter." Refer to ORS 18.005 for complete definitions, but a few points are worth noting here: (1) a "judgment" must be reflected in a judgment document, which is defined as a writing in the form proscribed by ORS 18.038; (2) a "limited judgment" includes a judgment under ORCP 67 B or 67 G, certain judgments related to real property, and judgments that dispose of at least one but fewer than all claims where a limited judgment is specifically authorized by law; (3) a "general judgment" decides all claims in an action except claims previously decided by a limited judgment and claims that may be decided in the future by a supplemental

judgment; and (4) a "supplemental" judgment is a judgment that may be rendered "after" a general judgment. ORS 18.005 (7), (8), (9), (13), (16), and (17).

The *Interstate Roofing* Decision

In *Interstate Roofing*, the plaintiff brought three claims—foreclosure of a construction lien, breach of contract, and quantum meruit. The defendant counterclaimed for breach of contract and negligence. Both parties requested attorney fees. The case was consolidated with another case in which plaintiff sought indemnity and contribution from various parties.



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Assessing Appealability

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On September 29, 2006, the trial court issued a limited judgment, which stated that the court “found, by a preponderance of the evidence,” that the plaintiff’s construction lien claim was overstated and therefore invalid, that the defendant was entitled to judgment and a money award in a stated amount on its breach of contract claim, and that the defendant’s negligence claim was inapplicable as a matter of law. The judgment contained a separate money award section related to the second “finding.”

On April 16, 2007, the trial court issued a supplemental judgment awarding attorney fees to the defendant in connection with its breach of contract counterclaim.

On April 20, 2007, the trial court issued a general judgment of dismissal, upon plaintiff’s motion for voluntary dismissal, which stated that the “plaintiff’s remaining claims for breach of contract and quantum meruit are dismissed.”

The defendant filed a notice of appeal from all three judgments on May 16, 2007. The Court of Appeals reached the following conclusions regarding appealability:

- With regard to the limited judgment of September 2006, the trial court’s legal conclusions regarding plaintiff’s construction lien claim and defendant’s negligence claim were not intended to conclusively dispose of those claims, so the judgment was not appealable as to those claims. However, the trial court did intend to conclusively dispose of defendant’s breach of contract claim, so the judgment was appealable as to that claim, and was not timely appealed.
- The fact that the limited judgment did not contain the word “adjudged” did not affect its appealability.

- The fact that the limited judgment did not contain an express statement that “there is no just reason for delay” did not affect its appealability.
- With regard to the supplemental judgment of April 16, 2007, the judgment was invalid, and therefore unappealable, because it was entered before the general judgment.
- With regard to the general judgment of April 20, 2007, the judgment expressly dismissed plaintiff’s breach of contract and quantum meruit claims, and it implicitly dismissed plaintiff’s construction lien claim and defendant’s negligence claim (i.e., the two claims discussed in the limited judgment but not disposed of by it). Since the judgment was a “general judgment of dismissal,” the dismissal was without prejudice pursuant to ORS 18.082(5). However, the judgment was appealable, and defendant timely noticed that appeal.
- The fact that the case had been consolidated with another case did not make the general judgment unappealable, because it appeared that the trial court only intended to “consolidate” the cases for purposes of holding joint hearings and a joint trial. Where cases have been consolidated for some purposes, but not all purposes, a judgment disposing of all the claims in one case is appealable.

Lessons from *Interstate Roofing*

Interstate Roofing offers several useful lessons:

First, be very careful in assessing the appealability of limited judgments. If in doubt, ask immediately for clarification or

seek a formal ruling on appealability. ORS 19.235 provides a procedure to obtain a summary determination of appealability from the trial court and/or the appellate court. File a notice of appeal if necessary to preserve the right to appeal while appealability is being determined.

Second, if you obtain a limited judgment in your favor, and are seeking attorney fees, try to get the trial court to include its ruling on attorney fees in the limited judgment. Otherwise, you will have to wait until the end of the case to get a valid (and appealable) judgment on fees.

Third, if you move for a general judgment of dismissal, ask the court to specify that the dismissal is “with prejudice,” or else it will likely be without prejudice pursuant to ORS 18.082(5) and ORCP 54 A(1).

Fourth, if your case is consolidated with another case, be clear on whether it is consolidated for *some* purposes or *all* purposes. Try to get this issue clarified at the time of consolidation, but ask later if necessary as it may be determinative of appealability.

Fifth, if you are the prevailing party on any judgment, and the other side appeals, consider whether you may be able to defeat the appeal on jurisdictional grounds. If you succeed on a preliminary motion under ORS 19.235, you may be able to save your client the cost of briefing on the merits. □

Endnotes

- 1 This article only addresses limited, general, and supplemental judgments. It does not address the appealability of corrected judgments (see ORS 19.205(1)), orders affecting substantial rights (see ORS 19.205(2)-(3)), or orders in class actions (see ORS 19.225).

Travel Tips

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were asked to deplane the aircraft. The next day, they bought tickets on Northwest Airlines and returned to Phoenix.

Just who were these six travelers? Imams, Islamic spiritual leaders. They went to Minneapolis for the North American Conference of Imams. Two of the imams are Muslims of Jordanian-Arab origin, two are Muslims of Egyptian-Arab origin, one is a Muslim of Albanian origin, and one is a Muslim of Syrian-Arab origin. At the gate, they conversed with each other in Arabic and English. The three of them who were praying at the gate did so together in observance of the Maghreb early evening Muslim prayer.

The imams sued the airline and the Metropolitan Airports Commission. On defendants' motion to dismiss and for summary judgment, the court held in part that the imams stated claims under Section 1983 of the Civil Rights Act, for false arrest under Minnesota law, and for intentional infliction of emotional distress.

The court further held that the imams stated claims against the Metropolitan Airports Commission under the Fourth Amendment, Equal Protection Clause, for failure to train its employees, and for one of the imams who alleged that the police posted on the internet a police report showing his social security number, claims for violation of the Minnesota Government Data Practices Act and invasion of privacy. The court determined that discovery should be allowed before deciding whether summary judgment could be granted for claims against the airline under the Federal Aviation Act, and whether the Airline Deregulation Act preempts plaintiffs' state law tort claims.

The *Shqeirat* case was not the first



time a Minnesota court had addressed such issues. In *Alasady v. Northwest Airlines Corp.*, 2003 WL 1565944 (D.Minn. 2003), plaintiffs were three Muslim men of Middle Eastern descent who alleged that on September 20, 2001, Northwest Airlines discriminated against them by refusing to allow them to board a flight even though they possessed valid tickets and boarding passes, and a Northwest supervisor had received direct confirmation from federal and local law enforcement that they posed no security threat. The New York Times reported that ticket agents expressed concern, according to a police report, because the men went to the restroom often, looked at their watches and appeared nervous.³

All three were Utah residents. One was a U.S. citizen working as a taxi driver. Another was a student seeking asylum. The third worked at a Utah sports club. They sued the airline under 42 U.S.C. Section 1981, Title VI of the Civil Rights Act of 1964, and the Minnesota Human Rights Act, and alleged tort claims for negligent and intentional infliction of emotional distress. On defendant's mo-

tion to dismiss, the court determined that federal aviation law did not preempt plaintiffs' state law claims or their claim under the Minnesota statute for discrimination in public accommodation. The court also denied defendants' motions to dismiss the Section 1981 and Title VI claims.

The *Alasady* court found no basis under Minnesota law for negligent and intentional infliction of emotional distress claims and dismissed them. In *Shqeirat*, however, the court did not dismiss the intentional infliction of emotional distress claim. The court in *Shqeirat* distinguished *Alasady* by find-

ing the imams' allegations to be more severe than the refusal to board a flight in *Alasady*. *Shqeirat* involved claims of removing the imams from a flight, arresting them, handcuffing them, and holding them in the jetway for 45 minutes; forcing them to re-board the plane to identify their carry-on luggage in front of other passengers; escorting them through the airport in handcuffs; and detaining them for several hours before being questioned and released. The *Alasady* case settled soon after the denial of the defendant's motion to dismiss.

Plaintiffs' claims in these cases strike at the heart of America's identity as a nation of immigrants. The Council of Economic Advisors found that in 2006, foreign-born workers accounted for 15 percent of America's labor force, and over the last decade they have accounted for about half of the growth in the labor force.⁴ In 2006, the U.S. issued 33.6 million non-immigrant visas to foreign nationals seeking to enter the country temporarily for a specific purpose, such as visiting, studying, or working;⁵ more than 1.2 million immigrants were granted

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I. Claims and Defenses

Clarke v. OHSU, 343 Or 581 (2007)

In *Clarke*, the Supreme Court addressed “whether the Oregon Tort Claims Act (OTCA), specifically ORS 30.265(1) and ORS 30.270(1), as applied to this case, violates the Remedy Clause of Article I, section 10, of the Oregon Constitution.” 343 Or at 585. Plaintiff sought to recover more than \$12 million in economic damages and \$5 million in noneconomic damages after he suffered permanent brain damage following post-natal surgery at Oregon Health Sciences University (OHSU) to repair a congenital heart defect.



Plaintiff sued OHSU and its individual health care workers for negligence. The trial court granted defendants’ motion pursuant to ORS 30.265(1) to substitute OHSU as the sole defendant in the case; the court then granted OHSU’s motion for judgment on the pleadings in the amount of \$200,000, the maximum liability allowed under ORS 30.270(1). The Supreme Court reversed and remanded for further proceedings, holding that “(1) OHSU would have been entitled to sovereign immunity

Recent Significant Oregon Cases

Stephen K. Bushong
Multnomah County
Circuit Court Judge

at common law and, therefore, plaintiff would have had no common-law claim against OHSU that is entitled to protection under Article I, section 10; (2) because OHSU is entitled to sovereign immunity, the legislature can limit damages recoverable against OHSU to any amount it chooses, unfettered by Article I, section 10’s Remedy Clause; however, (3) the elimination of a cause of action against public employees or agents in ORS 30.265(1), as applied to plaintiff’s claim against the individual defendants, violates the Remedy Clause of Article I, section 10, because the substituted remedy against the public body, as specified in ORS 30.270(1) is an emasculated version of the remedy that was available at common law.” 343 Or at 610.

Bailey v. Lewis Farm, Inc., 343 Or 276 (2007)

Walsh v. Spalding & Son, Inc., 216 Or App 55 (2007)

Loosli v. City of Salem, 215 Or App 502 (2007)

In *Bailey*, the plaintiff was injured when the wheels on a tractor-trailer “came off, bounced across the road, and hit plaintiff’s vehicle in the oncoming lane of traffic[.]” 343 Or at 278. Plaintiff alleged that defendant May Trucking Company’s (May) “negligent maintenance of the axle during the time it had owned the tractor-trailer was a substantial cause of the axle’s failure.” *Id.* May responded that it could not be liable because it had sold the tractor-trailer to another entity (Lewis Farm) a year before the accident. The trial court granted May’s motion to dismiss, reasoning that May’s sale of the tractor-trailer “excused it from any responsibility for negligently maintaining the axle.” *Id.* An evenly-divided Court of Appeals affirmed; the Supreme Court reversed. May argued on appeal that it “owed no duty to plaintiff” to maintain the axle because “a federal regulation and an analogous state statute imposed an obligation on Lewis Farm...to maintain it in a safe condition.” *Id.* at 283. The Court disagreed, finding nothing in the regulation or statute that “purports

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to excuse a prior owner from the consequences of its negligence." *Id.* at 283-84. The Court further found that Lewis Farm's statutory or regulatory duty to inspect, repair, and maintain the tractor-trailer did not relieve May of the consequences of its earlier negligence "as a matter of general negligence law[.]" *Id.* at 284. May also argued that the axle's failure was not a reasonably foreseeable consequence of its negligence because Lewis Farm's "ownership of the tractor-trailer for approximately 11 months before the axle failed constitutes an 'intervening harm-producing force' that relieved [May] of the consequences of its earlier negligence." *Id.* at 287. The Court disagreed, finding that argument to be "at odds with this court's holding in *Hills v. McGillvrey*, 240 Or 476 (1965)] and the general rule stated in section 452(1) of the *Restatement (Second) of Torts*." *Id.* at 288.

In *Walsh*, the Court of Appeals concluded that "a commercial lessor is liable in negligence for reasonably foreseeable injuries to invitees of its lessee where those injuries arise from known or reasonably knowable conditions antedating the lease, *unless*, in the totality of the circumstances, including the nature of the potentially hazardous condition and the lessor's opportunity to remedy that condition, the lessor 'reasonably expected that the tenant would take steps to remedy the defect or otherwise to safeguard persons entering the premises at his invitation.'" 216 Or App at 64 (quoting *Bellikka v. Green*, 306 Or 630, 647 (1988)). The court explained that, in most cases, "the determination of the reasonableness of the lessor's conduct—specifically, whether it was reasonable to expect that the lessee would remedy the dangerous condition—is committed to the trier of fact." 216 Or App at 64-65. In *Loosli*, the Court of Appeals concluded

that the City of Salem was not liable for economic damages on plaintiffs' claim that "the city had negligently represented that [plaintiffs] could operate a [vehicle] sales lot" on property they had leased. 215 Or App at 506. The court explained that "a plaintiff cannot maintain an action for purely economic loss based on a negligent misrepresentation unless the defendant has breached a duty outside the common law of negligence." *Id.* In this case, the court found no statutory duty or "special relationship" between the parties to support holding the city liable for economic damages on plaintiff's negligent misrepresentation claim. *Id.* at 507-511.

Lamson v. Crater Lake Motors, Inc., 216 Or App 366 (2007)

Ram Technical Services, Inc. v. Koresko, 215 Or App 449 (2007)

The plaintiff in *Lamson* alleged that he was wrongfully discharged from his job as a used car salesman after he complained to management about sales tactics that he believed to be unlawful, unethical, or both. The jury returned a verdict for plaintiff, but the Court of Appeals reversed, holding that the trial court should have granted defendant's motion for directed verdict. The court explained that the discharge of an at-will employee may be deemed "wrongful" (and, thus, actionable) only "under certain circumstances." 216 Or App at 374. In this case, plaintiff relied on the exception to the at-will employment rule that applied to "termination for fulfilling some important public duty." *Id.* at 375. The court acknowledged "in some circumstances, the existence of an important public duty to 'blow the whistle' on certain behavior even in the absence of a specific statutory obligation to do so" (*Id.* at 380), but concluded that plaintiff's wrongful discharge

claim failed because "the internal report of suspected wrongdoing...involved private interests and not the interest of the public." *Id.* at 380-81.

In *Ram Technical*, the Court of Appeals found that a common-law fraud claim was barred by claim preclusion after a federal court dismissed a prior lawsuit between the parties. Plaintiffs argued that claim preclusion did not apply because "they could not reasonably have asserted their common-law fraud claims in the federal litigation." 215 Or App at 457. The court noted that plaintiffs' argument "implicates an ostensible tension in our decisions applying the 'could have been brought' component of claim preclusion to claims that were subject to a federal court's exercise of supplemental (aka 'pendent') jurisdiction." *Id.* The court further noted that "the law governing federal supplemental jurisdiction has undergone significant changes...and the mutual exclusivity of claims no longer means that a federal court must or is even likely to dismiss pendent state claims." *Id.* at 462. The court concluded that "plaintiffs reasonably could have brought their common-law claims in the federal litigation" because "the expansive exercise of supplemental jurisdiction dictates that all claims, including mutually exclusive claims, be joined and, at least potentially, be subject to adjudication in one forum." *Id.*

II. Procedure

O'Hara v. David Blain Construction, Inc., 216 Or App 384 (2007)

Ferguson v. Nelson, 216 Or App 541 (2007)

In *O'Hara*—which involved a claim for negligence based on the presence of toxic mold in plaintiffs' newly-con-

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structed residence—the Court of Appeals held that the trial court did not abuse its discretion (1) in denying leave to amend the complaint 30 days before trial “[i]n light of the obvious prejudice to defendants’ ability to defend against the amended claims, had they been allowed, and the timing of plaintiffs’ motion as it affected the court’s docket” (216 Or App at 388); (2) in excluding opinion evidence that one plaintiff’s illness was caused by exposure to toxic mold because plaintiffs did not disclose relevant records from a treating physician until 16 days before trial (*Id.* at 390); and (3) in denying plaintiffs’ motion to reopen the evidentiary phase of the trial to allow the treating physician to testify by telephone. *Id.* at 391-92. In *Ferguson*, the Court of Appeals declined to address assignments of error relating to jury instructions because “[t]he designated portions of the trial transcript are simply insufficient to allow us to properly assess whether the evidence supports the requested instructions.” 216 Or App at 551.

III. Evidence

Gragg v. Hutchinson, 217 Or App 342 (2007)

In *Gragg* (a personal injury case), the Court of Appeals held that the trial court abused its discretion in granting defendant’s motion for a new trial based on a legal error in the court’s prior ruling to exclude evidence of insurance payments under the collateral benefits rule codified at ORS 31.580. Defendant contended that “it was error not to allow cross-examination of plaintiff regarding insurance payments that he had received for his out-of-pocket expenses” because evidence of collateral benefits “was relevant to impeach plaintiff’s testimony that he paid his medical bills himself.” 217 Or App at 346. Defendant argued that (1)

“Oregon law permits a party to interject evidence of insurance coverage into a trial to show the bias or interest of a witness” (*Id.* at 348); and (2) cases from other states have relied on the “bias or interest of a witness” principle to permit a defendant “to introduce evidence of insurance to impeach a plaintiff’s testimony that he paid his medical bills himself.” *Id.* The Court of Appeals disagreed, finding that cases “decided under the common law of other jurisdictions without codified collateral source rules...offer no guidance” to Oregon courts. *Id.* at 349. Prior Oregon cases that recognized an exception to the common-law collateral source rule for evidence showing bias or interest of a witness did not apply, the court explained, because “those cases were decided before the enactment of former ORS 18.580 (1987), renumbered as ORS 31.580 (2003).” *Id.* In Oregon, evidence of insurance benefits is not admissible for impeachment purposes because, “[i]n enacting the statute containing the collateral source rule, the legislature could have chosen to include an exception for evidence of collateral benefits offered to show the bias or interest of a witness but it did not do so.” *Id.* at 350.

State v. Knight, 343 Or 469 (2007)

Marcum v. Adventist Health System/West, 215 Or App 166 (2007)

East County Recycling v. Pneumatic Construction, 214 Or App 573 (2007)

In *Knight*, the Supreme Court held that the trial court “abused its discretion, and therefore erred in failing to exclude defendant’s derogatory statements about his attorney under OEC 403.” 343 Or at 485. The Court explained that “defendant’s persistent references to trial counsel as ‘this fucking attorney’ and ‘this motherfucker’ undoubtedly focused the

jury’s attention on defendant’s personal and professional conflict with trial counsel—a conflict that had no relevance to any issue before the jury.” *Id.* at 483. In *Marcum*, the Court of Appeals held that the trial court properly excluded expert testimony relating to the cause of plaintiff’s medical condition, and, therefore, “correctly granted plaintiff’s motion for a directed verdict against plaintiff’s medical negligence claim.” 215 Or App at 189. The court explained that, where “a plaintiff’s circumstances are unique and the expert cannot proffer a mechanism of causation, general temporal and spatial proximity to the onset of symptoms, even when coupled with reports of other adverse effects, is insufficient.” *Id.* at 187.

In *East County Recycling*—an action for breach of an express warranty in the sale of a baling machine—the Court of Appeals held that the trial court did not err in striking portions of an affidavit offered in opposition to defendant IBC’s motion for summary judgment in which “the affiant asserted that an unidentified IBC representative made a warranty regarding the baler.” 214 Or App at 575. The court noted that there were no prior Oregon cases on point, but “the uniform rule appears to be that, where an employee is not identified by name or responsibilities, the employee’s declaration is inadmissible as a declaration on behalf of the employer unless, from the circumstances of the declaration, it is possible to infer that it concerns a matter that is within the scope of the employee’s authority.” *Id.* at 583. In this case, the court concluded that (1) “it was the plaintiff’s responsibility to provide an adequate foundation for the admission of the evidence” (*Id.* at 584); and (2) “there are simply too many gaps in the foundation to permit an inference that the requisite authority—either actual or apparent—existed.” *Id.* □

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