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In This Issue…

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What Are Best Practices for Civil Jury Trials?

Part One of a Two-Part Series

By Stephen L. Brischetto

In 2005, the American Bar Association published Principles for Juries and Jury Trials as a part of its American Jury Project . The ABA report recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation is enhanced. Toward this end Principles for Juries and Jury Trials sets forth a set of 19 principles each designed to express the best of current day jury practices in light of existing legal and practical constraints.

Stephen Brischetto

In Multnomah County, a Committee comprised of Multnomah County trial judges and experienced plaintiff and defense lawyers from the civil practice bar was formed to study the American Bar Association's Principles. Using these Principles as a template to evaluate jury practice in Multnomah County, work groups were formed to consider improvements to different aspects of jury service in Multnomah County, from information for jurors on the court's website to more understandable jury instructions. As the evaluation process continued a task force evolved to focus exclusively on civil trials.

The task force considered its collective trial experiences, studied research and proposals from jury reform efforts in other states and met from 2006 until early 2008 to craft its recommendations. The task force sought to identify practices that would be likely to increase juror comprehension and understanding; increase juror satisfac-

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FROM THE MANAGING EDITOR

DIRECT EXAMINATION OF EXPERT WITNESSES

BY
DENNIS RAWLINSON
MILLER NASH LLP

One of the most important but often least effective components of a trial presentation is the direct examination of expert witnesses. It is unusual these days when a trial or arbitration presentation does not include direct examination of at least one expert. Completing such a direct examination is not difficult, but it is rarely done effectively and persuasively.

Set forth below for your consideration are some suggestions for the framework of the direct examination of an expert.

Dennis Rawlinson

The Tickler

For two to three minutes, when an expert first takes the stand, he enjoys a few golden moments when he has the fact-finder's full attention, and so do you as his direct examiner. Instead of spending the first 15 minutes of testimony on a litany of the background and qualifications of the expert and encouraging the court or jury to daydream or grow bored, ask two or three initial questions that tell the fact-finder who the expert is and why he is there. For instance:

Q. Doctor, can you tell us what kind of doctor you are?

A. Yes, a neurologist.

Q. Is a neurologist a doctor skilled in the diagnosis and treatment of diseases of the nervous system?

A. Yes.

Q. And have you come here today to explain to the fact-finder (court or jury) your diagnosis and treatment of the damage to plaintiff's nervous system caused by the accident?

In short, within the first two to three minutes, make it clear to the fact-finder who the expert is and what he or she will be talking about.

Qualifications

In federal court, curriculum vitaes and résumés are generally admitted into evidence. In state court, they are admitted by certain judges and upon stipulation by the parties. If you have the opportunity to do so, save precious examination time by introducing the vitae.

It is preferable to cover only the highlights of the expert's qualifications (which will relate directly to his or her specific opinion) during direct examination and leave the rest of the general background for the fact-finder to obtain from the curriculum vitae. This, of course, means that the curriculum vitae should be reviewed and edited so that it becomes self-explanatory and persuasive and so that extraneous matters are deleted.

Nothing encourages the fact-finder's mind to wander more than 20 minutes of detailed background questioning of an expert that has little to do with his or her opinion in a specific case. An effective discipline is to limit the expert's qualifications to no more than five minutes or no more than 10 to 15 questions (depending on the expert and the case). Consider covering

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From the Managing Editor

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only the vitae's highlights and select those highlights for their relevance to the opinion in the particular case.

Lead With the Opinion

Unlike lay witnesses, who seem to be most believable when they explain the factual basis for their opinions before they give an opinion (e.g., the symptoms of drunkenness as perceived by the witness before the opinion of drunkenness), expert opinion is more powerful if the opinion is given before its basis.

To begin with, if the opinion is held back until a lengthy explanation of the basis is given, the opinion itself may be lost as the fact-finder's mind wanders. Accordingly, if your expert is going to give three opinions, you should consider having the expert give all three opinions early in his or her testimony in a succinct, systematic manner and explain after each opinion that you will come back to it and explain the basis and procedure in arriving at it.

Such an approach ensures that even if a fact-finder pays attention to only the opening ten minutes of the examination, the fact-finder will understand who the expert is, why he is there, and what his opinions are.

Explain the Basis for the Opinion

In my experience, the most persuasive expert testimony is the expert testimony in which the basis for the opinion is well organized, understandable, and succinct.

It is often helpful to use an overhead projector or a chalkboard to list the points or the procedures as the expert testifies about them to reinforce them and demonstrate their interrelationship.

The expert must use common, everyday language—not jargon. The best experts use picture words and analogies, just as the best lawyers use them in a closing argument.

Prepare for Cross-Examination

An often overlooked but important component of any direct examination of an expert is to have the expert undercut the adversary's anticipated cross-examination by explaining away in his or her own words the points that you believe he or she will be asked on cross-examination. Such a preemptive strike, particularly at the end of the direct examination and just before cross-examination is to begin, may convince your adversary to either abandon the proposed line of cross-examination or risk the patience of the fact-finder by covering "purported weaknesses," which you have already shored up on direct examination.

Conclusion

One thing I have learned about direct examination is that it may not be as exciting as cross-examinations, opening statements, and closing arguments, but it is usually the battlefield on which cases are won or lost.

It is a constant challenge to turn the direct examination of an expert into an entertaining and attention-demanding presentation. You may want to consider the above-listed suggestions the next time you conduct the direct examination of an expert. Experience has taught me that no matter how accomplished your direct examination of an expert may be, it can always be made better. ❐

Trial Strategies and Evidence

By William Barton
Stoel Rives LLP

"The modern jury trial is one of the most important, demanding, exhausting, probing, and sometimes humbling and humiliating events that can be experienced by a person, be that person a party, witness, a lawyer or a judge." State v. Mains, 295 Or 640, 658 (1983).

This paper is a practical guide for beginning civil jury trial lawyers, synthesizing rules of evidence, procedure, proof, deposition use, ethics and principles of social psychology that form the basis of strategic trial decisions. This paper's content is divided broadly into three areas: general trial strategy, evidence, and trial tips. I've subdivided the points into headings which roughly correspond to the order of pretrial and trial events as they unfold. Few areas of the law are more tactic driven than the application of evidence. Decisions are often made on one's feet, and are a function of context, strategy, and philosophy. While there is plenty of information for both sides of the table, the paper is written for the civil practitioner with an obvious lean for the plaintiff.[2] I submit this paper is just as valuable for defense practitioners. Think of it as a chance to read the other side's playbook. Besides, the lines between plaintiff and defense often blur with third party practice, allegations of comparative fault, cross- and counterclaims.


William Barton

The late Multnomah County Judge Robert P. Jones wrote a column titled "Tips From the Bench" for the *Multnomah Lawyer*. Some of the following material either quotes or summarizes some aspect of his monthly column, and is generously fertilized with my own contributions. With this concession to plagiarism and excellence, I now proceed with few citations, but much credit to "The Judge."

Your trial habits will be shaped by your temperament, creativity, the type of cases you try (whether jury or bench, criminal or civil), your opponents, and certainly the judge. A threshold question involves how much you are going to object. It depends of course upon the like-

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lihood your objection will be sustained, and "so what" if it is? Maybe the evidence is objectionable, but doesn't really hurt you. Even if harmful and objectionable, you may decide not to object because by this proof the opponents have "opened the door" (rendered relevant) to evidence favorable to you that can later be offered in response.

1. BE FRUGAL WITH YOUR OBJECTIONS

I'm dedicating several pages to objections. Let's start by getting our thinking straight. I direct the readers' attention to an April 1998 *Oregon State Bar Bulletin* article, "Object at Your Own Risk."[3] The author's thesis is "though rules of evidence are important weapons, they must not be brandished in front of the jury except in rare circumstances." I generally agree, and subject to some exceptions, quote liberally as follows:

> "If there is one 'truth' of the dispute, as the jurors believe, and if, therefore, one of the lawyers is lying or, at the very least, trying to keep that 'truth' from the jury, why would lawyers ever object in front of the jury? Lawyers object for the same reason people fall down when they are shot: They believe that they should. Law schools and many continuing legal education providers teach students and lawyers how to object to evidence; they are, in reality, teaching hara-kiri.
>
> Truth-givers do not object in front of the jury to the admission of evidence. Facts cannot hurt a truth-giver. Skilled trial lawyers thus save their display of evidentiary knowledge for motions in limine, where the real battles shaping the trial should be fought. A lawyer should risk objecting in front of the jury to the admission of evidence only if the evidence is both inadmissible and a case killer. First, if the evidence is admissible, but not through this witness, an objection garners nothing but the jury's distrust. The evidence will come in eventually. Second, the successful trial lawyer shapes the trial's theme so that it accounts for all facts, including those unfavorable facts that cannot be excluded by an order in limine. The skilled trial lawyer is a truth-giver who is not afraid to let it all hang out.
>
> Many lawyers tell me that they object in front of the jury to the admission of evidence in order to make their record. An objection that is overruled when it should be sustained, they argue, will give them fodder for an appeal. This is too slim a reed to justify giving jurors the impression that you are trying to hide something from them . . .
>
> The United States Court of Appeals for the Seventh Circuit is even more explicit: 'Appellants who challenge evidentiary rulings of the district court are like rich men who wish to enter the Kingdom; their prospects compare with those of camels who wish to pass through the eye of a needle.' *United States v Glecier*, 923 F.2d 496, 503 (7th Cir. 1991).
>
> . . . lawyers think it part of the routine of the trial to object. Law schools and most continuing legal education programs (some of which put the lawyer-registrants through elaborate 'objection' exercises) perpetuate the myth. Lawyers should realize, however, that as much as they might like to sound like lawyers and strut their stuff, a trial is not an evidence test. It is a battleground where the lawyer whom the jury perceives as the trial's truth-giver will generally prevail. The lawyer who wants to win should do nothing that tarnishes his or her image as 'Honest Abe,' and that means not objecting in front of the jury to the admission of evidence."

"If there is one 'truth' of the dispute, as the jurors believe, and if, therefore, one of the lawyers is lying or, at the very least, trying to keep that 'truth' from the jury, why would lawyers ever object in front of the jury? Lawyers object for the same reason people fall down when they are shot: They believe that they should."

Judge Jones is less harsh about the wisdom of objections, but cautions "The only test regarding objections is not whether you have legal grounds, but rather, will a favorable ruling be beneficial to your case? The more you object, the greater the likelihood that you will alienate the jury, educate your opponent or focus on a topic that you would

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Trial Strategies & Evidence
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prefer be minimized. The only criterion: will prevailing on this objection help my client's case?"

If you aren't hurting, don't object. Seasoned trial lawyers infrequently object, rookies jump up and down continually. Jurors are suspicious of and cynical about lawyers who object frequently. A possible exception is in criminal defense, where sometimes a jury will permit defense counsel more latitude if they sense the police officer has an attitude. Common, non-productive objections include:

■ "Leading Question." ORE 611(3). Most trial judges evaluate a leading question as to its motive, rather than its form. Is the questioner inappropriately suggesting the answer to the witness?

I add that the real problem isn't the question's legal impropriety, it's that the inquiring lawyer is "testifying" rather than the witness, with the suggestion that you, the lawyer, don't trust the witness knows the answer; otherwise you wouldn't be so eager to tell them what you want to hear. I almost always let the other lawyer lead. It tells me they haven't properly prepared the witness.

■ "Outside or beyond the scope of direct." Rule 611(2). "Cross-examination should not be limited to the exact facts stated on direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom . . ." *Ritchie v. Pittman*, 144 Or. 228, 231, 24 P.2d 328 (Or. 1933).

■ "Beyond the scope of redirect." The easy answer is to simply ask leave to reopen your direct for a few points you overlooked. Judges almost always grant your request.

The dominant benchmark used by the jury in evaluating the lawyer's effectiveness was whether the attorney was liked by the jury. Forty percent of the jurors will have a firm opinion whether they like the trial lawyer in their first four minutes of contact. Eighty percent will form their opinion by the time voir dire is completed.

■ "Question asked and answered." The form of this objection is lawyer conceived. It probably invokes the issue of whether the response will be cumulative or repetitive. Those are matters within the trial judge's discretion.

■ "Question in aid of an objection." Think twice before using this procedure in attacking foundation for routine exhibits – 99% of the time you arouse the jurors' interest and alert opposing counsel to any defect in the foundation. A more sensible procedure is to wait for the offer and simply object. Distinguish this from pretrial ORE 104 motions before a judge when you are challenging the foundations of expert testimony.

In July/August 1992 Judge Jones queries, "Do Trial Lawyers Influence the Jury Verdict?" Research by Kelvin and Zeisel in their work *The American Jury* reveals that in 10% of close cases, verdicts are influenced by the more effective attorney. The dominant benchmark used by the jury in evaluating the lawyer's effectiveness was whether the attorney was liked by the jury. Forty percent of the jurors will have a firm opinion whether they like the trial lawyer in their first four minutes of contact. Eighty percent will form their opinion by the time *voir dire* is completed.

According to Boggs in *The Jury's Verdict on Effectiveness of Trial Counsel*, whether we are liked is not determined by what we say, but whether we are willing to smile, maintain eye contact, and are courteous and respectful to everyone in the courtroom. Once again lawyers are warned that jurors do not like objections. They view the objecting attorney as a person attempting to conceal something. The jurors' dislike of objections is the one constant finding in every jury study. Lawyers, heed this message!

For a counterpoint, here are some of Eugene attorney Bill Wheatley's comments offered after reviewing an early draft of this paper:

> "I agree with your Section 1, 'Be Frugal With Your Objections,' but I think your introduction may be a bit overstated, especially for beginning trial lawyers. It almost sounds like you are advocating the abolition of the evidence course at law schools. As you know, a keen knowledge of the rules of evidence is extremely important in understanding the strengths and weaknesses in your case and your opponent's case and in preparing for an effective jury presentation. Your 'beginning trial lawyers' should be encouraged to have a thorough understanding and knowledge of the rules of evidence, and

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before every trial should review the ORE sources with respect to anticipated evidentiary issues.

You are quite right that knowing when a question is objectionable is a separate issue from knowing 'when not to object to an objectionable question.' Probably 95% of the objectionable questions should go by without an objection. However, a lawyer must be prepared to take a stand on objectionable questions which may irreparably damage their case or which simply 'go too far.' Among the objections in that category, not necessarily in order of importance, are as follows:

1. Objection to questions which go beyond the scope of the pleadings, and which might ultimately result in the Complaint or Answer being amended to conform with the proof: In state court, we try a case based upon the pleadings, and it is dangerous to allow new issues to be subtly brought into a case and later sanctioned by a motion to amend.

2. Argumentative or 'badgering the witness' objections: The beginning trial lawyer is likely to encounter many lawyers who lack experience, knowledge, and common sense and, thus, a more aggressive examination or cross-examination might be expected. I believe the client expects, and the jury respects, an attorney who tastefully 'draws the line' and objects to abuses by the opposing attorney.

You certainly capture the essence of frugal objections with Judge Jones' quote that 'The only criterion: will prevailing on this objection help my client's case.' With every case it is different, factually and legally. Each judge has a different attitude with respect to objections, some witnesses are more fragile than others.

3. Your point about 'Ask and Answered' is correct, in general, but sometimes both the jury and the judge are pleading for you to make an objection. I am sure you have many times had the experience of a judge looking over at you at some point during the cross-examination, visually pleading for an objection. This is a matter of timing and common sense, but we don't want to discourage the beginning trial lawyer from taking a stand when it is appropriate to do so.

4. Concerning 'Protecting the Record on Appeal,' the phrase is meaningless unless we identify its meaning. Protecting the record with respect to issues which will never be reversed on appeal is counterproductive. On the other hand, there are certain issues which occasionally come into a trial – issues which could not be anticipated and resolved by motions in limine – issues which, however, may involve a persuasive appealable issue. An attorney must protect the record and make appropriate objections to establish and preserve an appealable issue.

You certainly capture the essence of frugal objections with Judge Jones' quote that 'The only criterion: will prevailing on this objection help my client's case.' With every case it is different, factually and legally. Each judge has a different attitude with respect to objections, some witnesses are more fragile than others. While we don't want the beginning trial lawyer coming into court armed with an evidentiary assault rifle, a small target rifle with a well-adjusted scope should be available for their use at trial."

2. BARTON'S THREE BIGGEST THOUGHTS

a. Learn to disagree without being disagreeable. This means exactly what it says. Agree to disagree, then move on. Make your point and then let the judge decide.

b. Volume and repetition have nothing to do with quality. For emphasis, try lowering your voice. A whisper can be deafening.

c. Take what you do seriously, but not yourself. (Okay, I have some work to do on this one . . .)

3. THE MAIN DIFFERENCES BETWEEN STATE AND FEDERAL COURT

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Preparing the pre-trial order in federal court and complying with the pre-trial procedures takes a ton of time. You'll think you have to try your case twice, once to comply with the pre-trial procedures, and then the trial itself. There are also no interrogatories in Oregon state courts. Federal civil cases require a unanimous verdict by a six to eight-person jury. There's also remittitur in federal court, which means the judge can reduce the jury's award if they deem it against the "weight of the evidence." Federal judges have much greater latitude in every respect than state judges. Whenever the jury issues its verdict in federal court, and remember all civil verdicts must be unanimous, you may next have a motion for remittitur (particularly when punitives are involved) and alternatively for a new trial filed. Expect the judge to take the matters under advisement. Here's when you really feel the pressure to settle.

Order and read two publications: *The Federal Court Practice Handbook* published by the Federal Bar Association of Oregon (this is my favorite because the judges set forth their expectations for practicing before them, along with some of their peeves and preferences), and *The Advanced Federal Practice and Procedure* handout from a February 2006 seminar by The Oregon Law Institute. There is also an Oregon State Bar Publication titled *Federal Civil Litigation in Oregon*.

4. WRITE INFORMED CONSENT LETTERS TO YOUR CLIENTS WHEN REJECTING (PRETRIAL) OFFERS OF SETTLEMENT

If your client authorizes you to reject and/or counter a settlement offer, and circumstances permit, confirm it in writing. Attach a proposed distribution of the funds showing what will end up in the client's pocket if the client were to accept the offer. This way, the client knows not just the amount of the offer, but what s/he is really saying "no" to. When practical, have the client sign the bottom of a letter in which you have communicated the offer and indicate that by the client's signature s/he is authorizing the rejection of the specific offer. Keep the original and provide a courtesy copy for the client's records.

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If this seems like defensive lawyering, you're right. If you later lose the case, the client may well have a different recollection of whether you actually communicated a prior offer, which the client now claims s/he would have accepted, if only s/he had known . . . It's time then to notify the PLF of a pending claim that you and the fund will probably later be paying on. I served on the PLF and was Chairman my last year. Many payouts occur for plaintiffs' lawyers because of missed statutes of limitation and simply failing to keep the clients informed.

5. ORPC 2.1 AND SETTLEMENT ADVICE TO CLIENTS

ORPC 2.1 provides:

> "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."

This language was not in the old DR's. Now, when I write informed consent letters, I include this rule whenever I suggest non-fiscal matters should be considered by the client in making decisions. Remember the weight, if any, given these nonfiscal factors belongs exclusively to the client who is the principal.

6. LAWYERS THINK, AND JUDGES INSTRUCT DEDUCTIVELY, YET JURORS THINK INDUCTIVELY

We lawyers suffer the disadvantage of being legally trained, a contaminant which ordinary folks aren't burdened with. Legal training is grounded on deductive thinking and logic. Lawyers think in syllogisms[4], meaning we begin with the facts, and then carefully build, from the "bottom up," to conclusions supported by the facts. In reality, people process information inductively, meaning they think from the "top down." They form early impressions/opinions, then collect facts to support what they already believe. Inductive processing is obviously different from the legal template commanded by the court's instructions. This general proposition isn't news to most jury trial lawyers; however, the extent of the inconsistency is. Within this gaping chasm between deductive and inductive thinking lie both challenges and opportunities.

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In measuring the width of the divide, let us begin with the mandates of positive law, *i.e.*, the boilerplate instructions with which judges routinely charge juries. A brief examination of pattern jury instructions quickly illustrates the schism between the terms of the court's charges and the inductive decision making processes natural to the jurors.

After each of the following instructions, I contrast the mandates of the charge with the realities of the jurors' inductive thinking processes and their strong inclination to assign justice in a "fair" or distributive manner.

Examples of jury instructions include:

1. "You will hear the evidence, decide what the facts are, and then apply those facts to the law that I will give you. That is how you will reach your verdict." Stated differently, "Do not attempt to decide the case until you begin your deliberations." (Jurors form early impressions, which they thereafter defend.)

2. "You must follow the law whether you agree with it or not." (The jurors will do justice, meaning what they think is fair. Three aspects of the instructions, the charge for them to apply their considered judgment, commanding jurors to both draw from and rely upon any reasonable inferences, and explaining that a verdict can be based solely upon circumstantial evidence, invite and legitimize jurors applying their own notions of fair play and common sense.[5])

3." You must not be influenced by sympathy for, or prejudice against, any party." UCJI 5.01. (This is the heart of jury selection. These values resist being sanitized from jurors and their deliberations.)

The application of positive law (the substantive and procedural rules that govern the case) to the facts of the case, when filtered through jurors' common sense, assures our civil justice system remains grounded in community values. The result is our common law, which is a gestalt that is both a process and a result.

4. "The jury is not to consider whether any of the parties have insurance, or the ability to pay for any loss." Under ORE 408 insurance is not admissible. UCJI 16.01. (In determining which of the parties should bear the loss, jurors may not only discuss insurance, but also whether the plaintiff really needs the money, a point which is entirely separate from whether the plaintiff is entitled to it under the court's instructions.[6])

5. "Do not determine whether a party was negligent by consideration of subsequent events." UCJI 20.04. (This collides with hindsight bias. An excellent example is in an insurance "bad faith" case, where the evidence in the later bad faith trial consists not only of all the earlier insurance offers in the underlying case, but most important, the verdict.)

6. "The amount of money requested by the plaintiff in the complaint should not be considered in arriving at your verdict except that it does fix a maximum amount you can award the plaintiff." UCJI 70.02. (The amount of the prayer is psychologically important because it is where jurors begin their analysis. This is known as an anchoring number.)

The next three judicial directives deal with matters of evidence.

7. "When the court orders that evidence is stricken from the record, the jury must disregard that evidence." (Yeah, right! This is called "unringing the bell.")

8. "When evidence is admitted for a limited purpose, you may consider it only for the purpose it was received." ORE 105. (The temptation to stray is almost irresistible.)

9. "Whenever I sustain an objection to a question, ignore the question and do not guess what the answer would have been." (Same problems as numbers seven and eight.)

Application: Motions in limine, including ORE 104 pretrial motions, are all antidotes to insulate the jury from hearing what they should not. The prohibition against speaking objections is a subdivision of this general concern.

The application of positive law (the substantive and procedural rules that govern the case) to the facts of the case, when filtered through jurors' common sense, assures our civil justice system remains grounded in community values. The result is our common law, which is a gestalt that is both a process and a result.

Successful jury trial lawyers are deft at tiptoeing between the mandates

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of the applicable positive law and the subtleties of jury persuasion. It strikes me that personal injury lawyers tend to fall into two skill sets that are a reflection of their differing job requirements. Defense attorneys are strong on the law, motion practice, and the technical aspects of causation. Plaintiffs' attorneys survive all the factual and legal hurdles the defense throws at them, and live to deliver passionate closings. While all good trial lawyers appreciate the importance of preparation, plaintiffs' lawyers are probably better at improvisation. Each has their strengths, and they are certainly not mutually exclusive, as anyone who has ever tried cases against top flight opponents can attest.

It's also my impression that lawyers who try commercial cases are more comfortable with the technical aspects of their cases than they are at telling stories about the people they represent. Without disrespect, many commercial cases are arbitrated or bench trials. As lawyers move farther away from juries, the more "book smart" they seem to become. The closer lawyers get to juries, the more "people smart" and comfortable with storytelling they become. Being "book smart" has little to do with being "people smart"; in fact they are probably reverse correlates.

When challenged or stressed, it's only natural that we all instinctively resort to our self-perceived strengths, whether it be power of analysis and "book smarts" or our people skills or "street smarts." These differing orientations color our very perception of "what the problem is." This is called correspondence bias, and explains why, within a common set of facts, a "book" lawyer will try one case, and a "people" lawyer will try quite another.[7]

7. THE IMPORTANCE OF SEQUENCE

Under trial strategy, it's important to appreciate the difference between the order a subject is presented and its content. This concept has many applications, beginning with the order the plaintiff chooses to list the defendant parties in the caption, the content of your opening statement, the order of your witnesses (with an emphasis on adversely calling the defendant as your first witness), and the sequence of your evidence, in addition and apart from the numeric order you assign to your exhibits. The first 5-10 exhibits should tell your trial story as should the exhibits you select for your jury notebook.

When challenged or stressed, it's only natural that we all instinctively resort to our self-perceived strengths, whether it be power of analysis and "book smarts" or our people skills or "street smarts." These differing orientations color our very perception of "what the problem is."

Solomon Asch, an eminent social psychologist, demonstrated the importance of sequential order in an experiment.[8] In the study, subjects received the following statements and then were asked to rate the person.

1. Steve is intelligent, industrious, impulsive, critical, stubborn, and envious.

2. Steve is envious, stubborn, critical, impulsive, industrious, and intelligent.

The two statements contain the same words, simply in reverse order. What Asch found was that Steve rated more favorably when he was described with positive traits first.

A related corollary is the belief preservation or heuristic bias, which means jurors tend to cling to a story once adopted, even in the face of conflicting evidence. Thus an (early) trial story once accepted becomes the conceptual template for interpreting and understanding subsequent evidence. It's a cousin to the confirmation bias error and is at the heart of jurors processing information intuitively. Jurors will search for evidence that confirms their preexisting beliefs, critically scrutinize evidence that is contrary, and interpret ambiguous evidence consistent with their preexisting beliefs. This is not the same as the rules of primacy and recency, which deal more with recollection and recall, meaning you remember best what you hear first and last.

Author Jim McElhaney emphasizes making the opponent's conduct and choices the focus of the jury's judgment.[9] Because the plaintiff goes first, they have the power through the strategic sequencing of the proof to shape what the jury will view the case to be about. This is called the availability bias. It means whatever occupies jurors' attention during the trial will influence what the jurors focus on during their deliberations. When you prepare a jury notebook, there's no requirement it must contain every exhibit; you only have to put in the ones you choose to. Each side can have their own jury notebook, and no, you don't have to share. Make your case what you want it to be about. Have your exhibits tell your trial story.

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8. REBUTTAL EVIDENCE

There's a good reason I'm discussing rebuttal near the front of this paper rather than at the end as it normally occurs in trial. The reason is rebuttal evidence is a shrinking and vanishing feature in trials. It's my experience that with each passing year more and more judges are exercising their broad discretion to limit the scope of rebuttal. This is toxic for the plaintiff in medical negligence cases. The plaintiff struggles to find even one well-qualified expert on a key issue. The defense then brings at least two or three experts on the same point, with at least one from OHSU. I know the jurors aren't supposed to count the number of witnesses, but when the defense wins the witness count and it's the last expert testimony they hear, it is very difficult for a plaintiff to win. At the beginning of trial it's hard to anticipate the exact issues that will be important to rebut at the end of the defendant's proof. Add to this the logistical challenges of scheduling out of state witnesses and it's a nightmare.

I've learned that the more jury trial experience your trial judge had before acceding to the bench, the broader he or she tends to be in allowing rebuttal evidence. The defense argues "Judge, they could have called this witness during their case in chief, they chose not to, and now they want to call them in rebuttal and get two bites at the apple." The reality is you can call about any witness in your case in chief, but with the burden of proof you have a right to rebut anything "new" the defense raises. So there you have it. It's a real conundrum, with no obvious answer. Do you call the witness up front and thereby be assured the jury will hear the testimony, or do you save it for the end of the case and take the risk the judge won't let your witness testify? You need to make this decision prior to the start of trial. There is no right answer.

"Jurors are like an audience reacting to a play. They make their decisions based on the information made available to them. So you must control the proportion of time your trial spends on damages. A third to a half should be on harm, losses, and money. Smart defense attorneys try to force you to spend a lot less."

9. NAMING PARTIES

When preparing the complaint, put some thought into how you're going to sequence the parties in the caption. When there are multiple defendants, the order in which they are named in the caption usually determines which defendants go first in jury selection, cross-examination, closing, and all other phases of the trial. This is important, and is within the plaintiff's control. Some lawyers spend their whole careers "tail gunning" as the last named party but aren't so hot when they have to go first.

10. PREPARE A TRIAL BUDGET

Be realistic. What number and type of experts are needed, can you find them, and at what cost? Who's going to pay for them, you or the client, and how soon? And finally, can you really afford to lose this case with the time and the money you've advanced? How's your pocketbook and stress tolerance? Be honest with yourself, and err on the long side; that way there are no surprises. I haven't even discussed the risks, delays and costs of an appeal, not to mention the possibility of a second trial if the appellate courts reverse and remand.

11. THINK ABOUT MONEY (DAMAGES PROOF AND ARGUMENTS) EARLY WHEN REPRESENTING INJURED PLAINTIFFS

My biggest criticism of trial advocacy teachers and programs is they don't teach aspiring plaintiffs' lawyers how to effectively argue money. After all, that's why we're in court! Remember the movie *Jerry Maguire* with Tom Cruise, Cuba Gooding Jr. and Renée Zellweger? Of course you do, and the one line you probably remember from the movie is what? That's right, Jerry Maguire (Tom Cruise) saying "Show me the money!" Trial consultant David Ball agrees and suggests that about 50% of your opening should be dedicated to the discussion of damages.[10] I think this is too formulaic and generally too much. I suggest approximately 30%, but every case is different. I add the best damages evidence is often your best liability proof; meaning "liability provokes damages."

> "Jurors are like an audience reacting to a play. They make their decisions based on the information made available to them. So you must control the proportion of time your trial spends on damages. A third to a half should be on harm, losses, and money.
>
> Smart defense attorneys try to force you to spend a lot less. They know that the smaller the proportion of time jurors hear and think about harm, losses,

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and money, the less the jurors will be moved to do much about them . . . *liability is defense turf. Damages is your turf.* Fight on your own turf as much as you can. Whether you have a few minutes or a few weeks for jury selection, spend half on harms, losses and money. Spend a third of opening and direct testimony, a significant chunk of your cross examinations, and half your closing on harms, losses, and money. Do this no matter how much attention your liability case needs. And to do this, don't abbreviate your liability case. Expand damages to meet the necessary proportions."[11]

Start preparing your closing before trial starts. You should be able to give 80% of your closing before the trial even begins.

12. WHAT DOES THE TERM "USUAL STIPULATIONS" IN A DEPOSITION MEAN?

It's typical at the beginning of a deposition for the opposing counsel or the court reporter to say, "Usual stipulations?" For years I wondered what this meant, but I wasn't going to admit ignorance, so I simply said yes. Here's what it means. All objections are reserved until the time of trial, except objections to the form of the question, such as compound questions, and objections to answers that are not responsive to the question.

13. ORCP 45 REQUESTS FOR ADMISSION

This is a much underutilized tool where foundational evidentiary matters are concerned. Admissions can be read later to the jury as substantive evidence. If the other side fails to admit the obvious, and assuming you prevail, later you can petition the court for an award of the attorneys' time and fees required because the opponents failed to admit to your request.

If the deponent is favorable and the deposition is also going to be videotaped, conduct the deposition in a context that reinforces the expert's profession and status, such as having a doctor wear a white medical coat while seated in a medical library. Impressive! Videos help organize your proof because you know exactly how long the perpetuated testimony will be.

14. ORCP 37 PERPETUATING TESTIMONY

If a witness is unavailable for trial, you may want to use their transcribed or videotaped testimony. If opposing counsel won't voluntarily agree to produce a witness, issue a "Notice of Perpetuated Testimony," pursuant to ORCP 37. See ORCP 39 (C) 6 for out-of-state depositions. If you want to videotape them, then this must be stated in your notice. Do you want the witness to bring any documents? Then you must describe them with as much specificity as possible in a subpoena. This then makes the subpoena a subpoena *duces tecum*. After notice to the other side, have the opposing party, or their employee, if a business, appear before a court reporter.

If the deponent is favorable and the deposition is also going to be videotaped, conduct the deposition in a context that reinforces the expert's profession and status, such as having a doctor wear a white medical coat while seated in a medical library. Impressive! Videos help organize your proof because you know exactly how long the perpetuated testimony will be. If the testimony is long, maybe it can be divided and played at two different times. This helps with the orderly flow of proof. A disadvantage of perpetuated testimony is it permits opposing counsel to know before trial exactly what your expert will say, thereby permitting their experts to explain away your expert's analysis and conclusions.

If you know a witness won't make a good physical appearance or might be hard to understand, skip the video and simply have a court reporter transcribe the testimony. During the later trial, have the deposition testimony read back to the jury by an articulate spokesman who presents well.

15. MAKE THE DEFENDANT DESIGNATE A (CORPORATE) REPRESENTATIVE TO ANSWER KEY QUESTIONS - ORCP 36 (c)

Issue a notice of deposition. These answers are later binding and admissible against the defendant as an admission against interest by a party opponent.

16. SUBSCRIBE TO THE LOCAL PAPER

Subscribe to your venue's local paper for three months prior to your trial when trying an "out of town" case. At least read the front page and opinion or editorial section. This ensures you will know what's on the community's mind during jury selection and deliberations. You should also know how to correctly pronounce any local names, places or events. Yes, you may be a carpetbagger, but you don't have to act like one . . . I

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love it when out-of-state lawyers mispronounce "Willamette" and "Oregon."

17. ORCP 55(H) HOSPITAL RECORDS

This rule of procedure addresses the requirement that the records' custodian personally appear to lay a business record foundation for hospital records. This statute allows the custodian to appear by affidavit. Get this request out early so the custodian can file the return with the clerk's office in plenty of time before trial. I recommend mailing the request at least a month before trial. Before doing this however, first telephone opposing counsel. You should have already given them a complete set of the records long before. They will almost always stipulate to the documents' foundation, reserving any objections to content, thus avoiding all this nonsense.

18. KNOW YOUR JUDGE

As a matter of philosophy, is the judge inclusive or exclusive in their evidentiary rulings? Does the judge tend to exercise his or her discretion (ORE 403) in an inclusive manner that allows most material into evidence, thereby letting the jury "shake it out," or is the judge exclusive, meaning s/he is an evidentiary gatekeeper for the jury? Stated even better, how big is the strike zone? How long has the judge been on the bench? What kind of law did s/he practice and how long ago? Is the judge inclined to allow witnesses to explain their answers? Some judges generate written protocols that set forth the way business is conducted in "their" courtroom. Check with the judge's staff on this. These are the individual judge's "local rules."

A growing number of judges allow the jurors to ask questions of the witnesses, and a few want a neutral three-minute opening prior to jury selection to help the jury understand the nature of the case and the key issues. A few federal judges will allow you to introduce your expert witnesses and summarize their testimony. The above are more frequent in federal court but are becoming more common in state court.

A growing number of judges allow the jurors to ask questions of the witnesses, and a few want a neutral three-minute opening prior to jury selection to help the jury understand the nature of the case and the key issues. A few federal judges will allow you to introduce your expert witnesses and summarize their testimony.

19. BATSON CHALLENGES DURING JURY SELECTION

Are there any Batson jury selection challenges? In Oregon, Batson jury challenges exercised on the basis of race, ethnicity, or sex apply to both criminal and civil jury selection, *Batson v. Kentucky,* 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). ORCP 57 D(4) codifies how to use a Batson challenge in civil jury selection; while ORS 136.230 (4) expressly refers to the use of ORCP 57 D(4) in criminal jury selection.

20. PRE-MARK EXHIBITS - UTCR 6.080

Number your exhibits before trial. Consider trading proposed exhibit lists a few days before trial. The odds are both of you will agree to the admissibility of most of the proposed exhibits. Determine whether an agreement can be struck. When it comes to documentary foundations, both parties will usually stipulate "to the foundation of all documents exchanged in discovery including the use of copies in lieu of originals, but reserve all objections concerning content, such as insurance, hearsay, relevance, etc." This gets the preliminary question of document foundation and the use of secondary evidence (copies) out of the way, thereby allowing you to focus on the real questions, *i.e.,* the admissibility of the contents.

Remember earlier we talked about strategically ordering multiple exhibits? Well, you're also free to number your exhibits in any order you choose. Your instinct will to be to arrange everything chronologically. That may be what you ultimately choose, but it's not my style. Have your first ten or so exhibits tell your trial story. Arranging the rest chronologically is fine. You can use 1-A, 1-B, 1-C, etc. when documents are somehow internally related, such as successive drafts of a letter. When discussing an important exhibit with the jury, give the exhibit a name, such as "The January 13 Letter" or maybe name it after an important event, *i.e.*, the "Turndown" letter.

21. TECHNOLOGY

Don't be reluctant to hire a "tech" person to help you in trial if the size and complexity of your case justifies it. Two of the best freelancers in Portland, and they are happy to travel around the Northwest, are Troy Moody at Naegeli Reporting (503-227-1544) and Nicole Ciccarello at Bridge City Legal (503-796-0881). They can store literally thousands of exhibits with unlimited pages. With what appears to be no effort, they can pull any exhibit,

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go to a particular page, and highlight any portion you wish by enlarging, coloring and/or underlining it.

I still like my flip charts for jury selection but am now sold on digital technology for trial. If you have a high-tech spirit, you can do it yourself. You'll have to invest about $5,000 for the software, computer, screens, etc. For about $1,000 per day, Nicole at Bridge City Legal can train you or your staff to use the software and hardware for presentation at trial.

22. BE BRIEF WHEN ARGUING TO THE COURT (AND THE JURY)

The key here is being "ABC," meaning "accurate, brief and clear." State the rule and focus on the reasons for the rule, emphasizing the rule's key phrases. If there is a lead case, cite it and briefly explain its significance. When you're engaged in the heat of battle, it's easy to believe that the outcome of the entire case depends on the court's next ruling. Not true. It just seems that way. Relax and focus on the horizon, not the mud puddle you're standing in.

Part Two of this series will continue in Winter 2010 issue of Litigation Journal.

ENDNOTES:

1 I'd like to thank the Honorable Don A. Dickey of the Marion County Circuit Court; Stephen English of Bullivant, Houser, Bailey in Portland; and Bill Wheatley of Jaqua Wheatley in Eugene for offering their thoughts and suggestions.

2 I had no one to mentor me when I started practicing law in 1972. There are few mistakes I didn't make. I've now tried over 500 jury trials to verdict. With ADR and the reduced number of civil jury trials, today's aspiring trial lawyers don't get the opportunities for on-the-job training that my generation of trial lawyers did. Study this paper. If you have any questions, just give me a call. I am happy to help. After all, we are in the same profession.

3 A similar article, "To Object or Not to Object," appeared in the August/September 2008 *Oregon State Bar Bulletin* on page 42 in the Legal Practice Tips section. I like the earlier article, but maybe the larger point is about every ten years it seems necessary to restate the obvious.

4 See *Nelson v. Lane County*, 79 Or. App. 753, 766-767, 720 P.2d 1291 (Or. App.1986) for an explicit application of a syllogism.

5 *McKee Electric Co. v. Carson Oil Co.*, 301 Or. 339, 723 P.2d 288 (Or. 1986) ("From the driver's account, which was direct evidence, the jury is entitled to draw inferences based on any of the logical inductive or deductive processes by which the brain arrives at reasoned conclusions from given data.").

6 See *Stewart v. Jefferson Plywood Co.*, 255 Or. 603, 609, 469 P.2d 783 (Or. 1970) for a judicial concession of this point.

7 Excerpted from my article "The Forensic Applications of Social Science." You can download the entire article from my website: www.bartonstrever.com. Articles are located under the "Teaching" tab.

8 Solomon E. Asch, *Forming Impressions of Personality,* 41 J. Abnormal and Social Psychology 258 (1946).

9 Jim McElhaney, *McElhaney's Trial Notebook, 4th Ed.*, American Bar Association, Chicago, IL, 2006, pp. 43-45.

10 David Ball, *David Ball on Damages—The Essential Update for Personal Injury and Wrongful Death Cases, 2nd Ed.*, National Institute for Trial Advocacy, South Bend, IN, 2005, p. 5.

11 Ball, p. 5. ❐

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In the Pocket:

Considerations When Using Judgments by Confession and Judgments by Stipulation as Settlement Tools

By Kelly Harpster
Davis Wright Tremaine LLP

When two parties settle and the agreement requires payments or performance over time, the creditor often requests that the debtor execute a "pocket judgment." A pocket judgment is either a confession of judgment or a stipulated judgment executed by the parties or their representatives and held by the creditor until the settlement terms are fully performed. If the debtor defaults, the creditor may file the confession or stipulation and obtain a judgment without further litigation. A judgment by confession and a judgment by stipulation are not identical, and knowing the difference will help you avoid certain traps for the unwary.


Kelly Harpster

For example, suppose Jane Doe's client owes a consumer debt to ABC Corporation. ABC's attorney is threatening to file an action to collect the entire amount of the debt plus attorney fees and interest. ABC is willing to settle for the principal balance, but Jane's client cannot raise the entire amount at once. ABC's attorney asks the debtor to sign a confession of judgment, which ABC's attorney will file only if the debtor fails to make the agreed upon payments. Now suppose that a year later Jane's client moves out of state and stops paying. If ABC's attorney files the confession in Multnomah County and obtains a judgment, can Jane move to have the judgment set aside? Can her client appeal the judgment? The answer to each question is yes. A confession of judgment was the wrong vehicle for what ABC's attorney was trying to accomplish.

Suppose instead that ABC's attorney files an action against Jane's small business client seeking both money damages and non-monetary relief. ABC's attorney notices a clause in the contract confessing judgment if Jane's client defaults. Is the clause enforceable? If the parties reach a settlement after the trial court grants partial summary judgment in favor of ABC, will a stipulated judgment bar Jane's client from appealing the trial court ruling? What if Jane's client makes an offer of

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judgment instead of stipulating to entry of a judgment?

This article addresses each of these scenarios, highlighting important differences between judgments by confession and judgments by stipulation that the careful practitioner should consider when advising clients.

Differences Between a Judgment by Confession and a Judgment by Stipulation

A judgment by confession is a judgment "entered pursuant to a voluntary act or agreement of one party, viz. a defendant." *Russell v. Sheahan*, 324 Or 445, 927 P2d 591 (1996). Judgments by confession have been recognized in Oregon for more than a century and were governed by statute until 1981, when the statutes were repealed and replaced by ORCP 73. *See, e.g., Miller Bros. v. Bank of British Columbia*, 2 Or 291, 1868 WL 655 (1868); *see former* ORS 26.010-26.130 (1979). Unlike a stipulated judgment, which may be entered only after commencement of an action, a judgment by confession may be entered "without action" so long as the party seeking judgment complies with the rule. ORCP 67 F; ORCP 73. A plaintiff need only file a verified written statement by the defendant or his authorized representative that:

(i) authorizes entry of the judgment for a specified sum,

(ii) concisely states the facts showing that the sum is "justly and presently due," and,

(iii) acknowledges the defendant's understanding that the confession authorizes entry of judgment without further proceedings and execution to enforce payment.

ORCP 73 B(1)-(3). The verified statement must be executed after the date or dates the amounts came due. ORCP 73 B(4). In other words, a provision in the original contract or instrument authorizing entry of a judgment by confession in case of default is not enforceable in Oregon. *See* Staff Comment, Council on Court Procedures. If there are two or more debtors, judgment by confession may be entered against all of the joint debtors who join in the confession and the remaining debtors may be separately pursued. ORCP 73 D.

If you represent plaintiff, you will need to consider which type of judgment will best protect your client's interests. If you represent defendant, you will need to consider whether your client is effectively waiving his right to appeal or you may need to analyze on what grounds a judgment already entered may be set aside or appealed.

Judgments by confession should not be confused with judgments by stipulation. A judgment by stipulation is "a judgment entered with the consent of *both* the party against whom the judgment is entered *and* the party in whose favor the judgment is entered." *Russell*, 324 Or at 450 (emphasis in original). Judgments by stipulation are governed by ORCP 67 F and may be entered only after an action is commenced, *i.e.*, only after plaintiff files a complaint. ORCP 67 F(1); ORCP 3. Unlike a confession, which requires a verified statement under oath, a stipulation to entry of judgment need not be in writing. Instead, the stipulation may be agreed to by all parties in open court. ORCP 67 F(2). If the parties stipulate in writing, then the parties or their attorneys must sign the stipulation and file it with the court pursuant to ORCP 9. ORCP 67 F(2). Judgments by confession may be entered only for a specific sum of money that has actually come due. ORCP 73 A(1), B(1), B(4). Judgments by stipulation may be for any specified amount or other specific relief to which the parties have agreed. ORCP 67 F(1). To obtain a judgment by confession, you must state facts showing that the amount sought is "justly and presently" due. ORCP 73 B(2). Judgments by stipulation have no such requirement. Furthermore, judgments by stipulation are not subject to the same venue limitations as judgments by confession. *See, e.g.*, ORCP 73 A(1).

Traps For the Unwary

Recognizing the differences between stipulated judgments and judgments by confession will help the practitioner make informed choices when negotiating the structure of a settlement.

If you represent plaintiff, you will need to consider which type of judgment will best protect your client's interests. If you represent defendant, you will need to consider whether your client is effectively waiving his right to appeal or you may need to analyze on what grounds a judgment already entered may be set aside or appealed. Issues that you should keep foremost in mind are the type of transaction giving rise to the debt, the accuracy and sufficiency of the statement of facts, the effect of venue limitations imposed on judgments by confession, and the narrow right to appeal.

Consumer Transactions

If the debt at issue arises from a consumer transaction, you will need a stipulation rather than a confession.

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ORCP 73 A(2) prohibits entry of a judgment by confession in most consumer transactions:

> No judgment by confession may be entered without action upon a contract, obligation, or liability which arises out of the sale of goods or furnishing of services for personal, family, or household use, or out of a loan or other extension of credit for personal, family, or household purposes, or upon a promissory note which is based upon such sale or extension of credit.

If your client has a judgment by confession entered against him and the debt arises from a consumer transaction, you should consider moving to set aside the judgment pursuant to ORCP 71 B.

Statement of Facts

To obtain a judgment by confession, ORCP 73 B specifically requires submission of a verified statement by the party that includes a concise statement of "the facts out of which [the obligation] arose" showing that "the sum confessed therefore is justly and presently due." ORCP 73 B(2). This requirement has existed "in the same or similar form" for over one hundred years. *Lorentz Bruun Co., Inc. v. Execulodge Corp.*, 313 Or 600, 605 n.6, 835 P2d 901, 904 (1992). As early as 1866, the Oregon Supreme Court held that merely stating that a sum of money was based on a debt and justly owed to plaintiff was insufficient to support the confession of judgment. *Id., citing Richardson v. Fuller*, 2 Or 179, 181 (1866). Plaintiff's attorney should be careful to describe the facts giving rise to the debt in sufficient detail that the confession will withstand scrutiny by the court either prior to entry of judgment or upon a motion to set aside the judgment after entry.

No judgment by confession may be entered without action upon a contract, obligation, or liability which arises out of the sale of goods or furnishing of services for personal, family, or household use, or out of a loan or other extension of credit for personal, family, or household purposes, or upon a promissory note which is based upon such sale or extension of credit.

Proper Venue

ORCP 73 imposes unique limitations on venue that counsel should consider. A plaintiff may apply for a judgment by confession only in the county in which the defendant resides or in which defendant "may be found" at the time of application and only if the court has subject matter jurisdiction. ORCP 73 A(1). If the defendant's residence is outside, the rule requires the defendant's actual physical presence in the county at the time of application. *Burt & Gordon v. Stein*, 128 Or App 350, 353-54, 876 P.2d 338, 340 (1994)("[W]e conclude that the words 'may be found' mean physical presence and are not a code for some other 'legal' presence."). Although the requirements are in the nature of venue provisions, a failure to file in the proper county renders any judgment entered by the court void and unenforceable. ORCP 73 A(1); *Burt*, 128 Or App at 354.

Suppose, for example, that you represent a creditor trying to collect a business debt. You negotiate a settlement with the debtor and require the debtor to execute a confession of judgment that you may file if the debtor fails to make the required payments. The debtor quits paying after six months and you apply for entry of judgment by confession. Unfortunately, during that time, the debtor has moved out of state. Even worse, the debtor has moved to a jurisdiction that does not recognize judgments by confession or requires specific statutory language to be included in the confession. Your verified confession may be worthless.

The hypothetical facts are similar to what happened in *Burt & Gordon v. Stein*. While sitting in plaintiff's office, defendant executed a confession of judgment for a specific amount. Plaintiff agreed to delay application for the judgment for 10 days to give defendant an opportunity to pay. Less than two weeks later, plaintiff applied for entry of the judgment. Unfortunately for plaintiff, by that time defendant was residing in Los Angeles. The trial court denied defendant's motion to set aside the judgment, but the Court of Appeals reversed holding that the trial court abused its discretion in denying the motion because the judgment was void. The court stated that "[i]n light of the strong and precise language of ORCP 73 A(1), there is no circumstance under which defendant could consent to application of judgment in a county other than the one in which he resided or could be found." *Id*. at 355. Including a specific venue or jurisdiction provision in the confession or settlement agreement will not alter the analysis. *Id.* at 353. Instead, the requirements of ORCP 73 A(1) must be strictly followed.

Although filing a complaint requires additional time and expense, if there is any reason to believe that the defendant may relocate before the

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settlement agreement is fully performed, you should consider obtaining a stipulation allowing entry of judgment rather than a confession of judgment. The parties may ask the court to stay the action while the settlement agreement is performed or may agree to voluntarily dismiss the action without prejudice, assuming that any statute of limitations issues can be addressed by a tolling agreement. In any case, before you apply for entry of judgment by confession, confirm that the defendant still resides in the county in which you are applying or your client may end up on the wrong end of a motion to set aside or an expensive and drawn out appeal.

The Right to Appeal

Suppose that you represent defendant and the judge has just granted partial summary judgment in plaintiff's favor, which you believe is reversible error. Because of the judge's ruling, your case is weakened and you see substantial risk in proceeding to trial. Furthermore, your client does not want to endure the expense or emotional drain of a trial on the remaining issues but does not want to waive his right to appeal if a judgment is entered. Plaintiff's counsel offers to dismiss the pending action without prejudice if your client will execute a confession of judgment to be filed only if your client defaults. Should you be concerned?

The short answer is 'yes.' Parties may not appeal from judgments by confession except as provided in ORS 19.245(2). Unless the judgment is void on other grounds, then your client will not be able to appeal the judge's earlier ruling unless you can show that, in substance, the judgment was one by stipulation, not confession. To avoid any uncertainty, you should use a stipulation to entry of judgment instead of a confession. The parties may provide for dismissal of the pending action without prejudice but with leave to reopen to file the stipulation if your client defaults. Even then, to preserve your client's right to appellate review of the trial court's ruling, you must expressly preserve that right in the stipulated judgment or it will be waived. ORS 19.245(3).

Although judgments by confession and by stipulation are routinely entered into as part of settling disputes, the differences between the two types of judgment should always be taken into account. Understanding the limits of each will help the careful practitioner adequately protect the client's interests while avoiding costly mistakes.

ORS 19.245(3)(a) provides that a party to a stipulated judgment may appeal only if the judgment specifically provides that the party has reserved the right to appellate review of a ruling in the trial court and the appeal presents a justiciable controversy. *See also Bloomfield v. Weakland*, 193 Or App 784, 92 P3d 749 (2004) (defendant's execution of stipulated judgment did not bar appeal on denial of summary judgment motion because defendant expressly reserved her right to appeal the rulings), *rev. allowed*, 227 Or 555, 101 P3d 809, *aff'd on other grounds*, 339 Or 504, 123 P3d 275. Note that, prior to the 2001 amendments, ORS 19.245 barred appeal of stipulated judgments even if the parties reserved their appeal rights so older cases applying the pre-2001 version of the statute should be distinguished. *See, e.g., Rauda v. Oregon Roses, Inc.*, 329 Or 265, 272, 986 P2d 1157 (1999).

Suppose, however, that plaintiff's counsel refuses to agree to an express reservation of rights. In light of the judge's ruling on the partial summary judgment motion, you expect to lose at trial so you decide to make an offer of judgment pursuant to ORCP 54 E to cut off plaintiff's attorney's fees. If the offer is accepted, then pursuant to ORCP 54 E(2) a stipulated judgment will be entered. As with any other stipulated judgment, ORS 19.245(3) will prohibit an appeal unless the judgment specifically reserves the right to appellate review of the trial court's ruling. So before making your offer of judgment, consider whether there are any rulings that you would appeal if a judgment was ultimately entered against your client.

Note that, under ORS 19.245(2), which applies to judgments by confession, there is no jurisdiction for an appeal of a judgment by confession on grounds that the parties reserved such rights. If you want to preserve the right to appeal a trial court ruling, then you should not agree to a confession of judgment even if it contains an express reservation. Rather, you should insist on a judgment by stipulation and expressly preserve the right to appeal the suspect ruling.

Conclusion

Although judgments by confession and by stipulation are routinely entered into as part of settling disputes, the differences between the two types of judgment should always be taken into account. Understanding the limits of each will help the careful practitioner adequately protect the client's interests while avoiding costly mistakes. ❐

A STORY WELL TOLD…

By Stephen F. English
Bullivant Houser Bailey PC

"Once upon a time…." How many of us remember the excitement we felt as children hearing those first few words of a story? Even today, in a world dominated by video, you can still hear those words in the voiceover beginning a movie. Everyone loves a good story.

A well-tried case is nothing more than a story well-told. The value of a good story is that it embodies the themes that we are all familiar with and that we understand to be part of human nature: the good values – such as justice and fairness; and the conduct that flows from deviating from these values – such as selfishness, greed, theft, and lies.


Stephen English

To maximize your effectiveness at trial, creating a story that is interesting and that embodies the themes of your case will increase your chances of a favorable verdict. If your story—and the themes and values it embodies—is powerful enough, it creates a paradigm that allows a jury to "filter out" the other side's evidence and argument.

So how do you find a theme for your presentation? Start by considering the universal values that may apply. You should consider justice and fairness as you develop thematic values that give the jury an opportunity to right a wrong. The themes embodied in your story should have emotional resonance. And finally, the delivery of these themes in your case has to be, putting it simply, INTERESTING. It's very difficult to win a case if you can't get the jury's attention. A good starting point for all of this is to ask yourself this question: What will the jury want to talk about first when they begin deliberations?

Both sides need a theme. For the defense, it is paramount that you do not default to a simple attempt to destroy the plaintiff's arguments. A good example of this unfortunate mistake is in a products liability defense where the lawyer, the client, or both, instinctively push the argument that the plaintiff has failed to prove that the product was unreasonably dangerous. But an alternative—and perhaps more powerful—theme would be, "our client is in the business of making safe products". A positive theme offers the jury an appealing result that does not require it to punish the other party for failing to make its case.

Start thinking about your theme, and the story you will eventually tell the jury, and build a story around it—and be sure to do this as early in the case as possible.

In discovery, you find the facts and evidence that support your desired case theme. You discover the land mines that might invalidate your case theme, and if necessary allow you to change it before trial, and you take depositions aimed at developing and furthering the desired case themes. Keep asking yourself every step of the way, what really happened here? What's my client's story? What wrong does my client need a jury to right?

Don't limit yourself to the evidence that is available but rather pose the question, what theme would I like to be able to use at trial if I can find the evidence for it? I have found it very useful to include non-lawyers in any discussion of my story and themes, because you frequently get a very different perspective from a non-lawyer, which can be very valuable in terms of what you ultimately talk about with the jury.

Whether in mediation or at trial, you can use your theme to deliver a short but powerful story. Always keep this question in mind: why should the jury listen to what this witness has to say, and what role does this witness or this piece of evidence have in my story?

Your closing argument then retells the story and emphasizes the thematic aspects of it and the values that the jury gets to deal with in deliberations which, if all goes well, will end up with your client living "happily ever after…".

(These comments borrow liberally from a presentation I gave at the annual Litigation Institute at Skamania Lodge.) ❐

Civil Jury Trials

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tion; and result in greater efficiency and less waste of jurors' time. The result of the task force's work is a report published in 2008 entitled Recommended Practices for Civil Jury Trials in Multnomah County Circuit Court.

No practice was adopted as a best practice unless it met three criteria. The three criteria were: the practice must be capable implementation without any change in rules or precedents; the practice needed to be unanimously recognized by the judges and practitioners on the task force as a "best practice" that should be recommended for widespread adoption; and the practice must be neutral to plaintiffs and defendants, that is, must provide no advantage to either side in a civil trial.

The Recommended Practices guide is divided into seven areas: Trial Scheduling, Exhibits, Neutral Statement of the Case, Deposition Testimony and Objections, Pre-Trial Conferences, Jury Selection and Trial Procedures. Most of the Recommended Practices should be easily transferable to other Counties although a few (particularly the Trial Scheduling Recommendations) are specific to Multnomah County. A summary of the Recommended Practices is set forth below.

I. Trial Scheduling

■ If the case has not already been designated a complex case or assigned to a specific judge for all matters, and if the trial is expected to last 5 days or longer, the parties should send a letter to Presiding Court requesting pre-assignment to a judge for trial at least 30 days before the scheduled call date.

■ For cases on the regular call docket, counsel who believe their case will require significant judicial time for pre-trial rulings should ask for a Wednesday call date, and at call request that pre-trial matters be handled on Thursday and jury selection begin the following Monday.

Counsel should identify those exhibits to which there are no objections. If there are objections, counsel should inform opposing counsel of the basis for each objection. To the extent the parties are able to reach stipulations regarding exhibits (e.g., stipulations as to authenticity or relevancy), counsel should clearly identify those stipulations for the judge prior to the commencement of trial.

■ If the case is expected to last 2 weeks or longer, the request for pre-assignment should be made at least 45 days prior to the call date for trial so that additional jurors can be summoned.

■ If a case is pre-assigned for trial to a specific judge, counsel should request a pre-trial conference if they believe the case would benefit from pre-trial rulings on motions in limine, admissibility of evidence or outstanding discovery issues.

II. Exhibits

■ Prior to commencement of trial, plaintiff's counsel should initiate a conference to agree upon a date to exchange an exhibit list and exhibits. If there is no agreement on an exchange date, the exchange should occur no later than noon on the court day prior to trial.

■ Counsel should deliver an exhibit list and a copy of each exhibit required to be marked under UTCR 6.080 to opposing counsel and to the trial judge prior to the start of trial. If an exhibit can not be copied it should be made available to opposing counsel to inspect prior to the start of trial.

■ Counsel should identify those exhibits to which there are no objections. If there are objections, counsel should inform opposing counsel of the basis for each objection. To the extent the parties are able to reach stipulations regarding exhibits (e.g., stipulations as to authenticity or relevancy), counsel should clearly identify those stipulations for the judge prior to the commencement of trial.

■ To eliminate unnecessary duplication of exhibits, counsel should attempt to consecutively number exhibits for trial, except as necessary to maintain exhibit numbers used in depositions.

■ To avoid confusing the jury, if possible exhibits should bear only one exhibit number.

■ At the commencement of trial, counsel should deliver to the courtroom clerk those exhibits to which there are no objections and, separately identified, those exhibits that may be offered to which there are objections.

III. Neutral Statement of the Case

■ At least five business days before trial call, counsel should exchange and confer on a proposed "neutral statement of the case" to be read to the jury before voir dire.

■ At the time required for the submission to the court of trial memoranda, counsel should submit to the trial judge a jointly proposed "neutral statement of the case" indicating which portions are

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agreed upon and, if applicable, where there is a dispute.

■ The neutral statement of the case should identify for the jury the parties to the lawsuit and the nature of the claims and defenses. The neutral statement of the case should not be detailed recitation of the evidence and should not be lengthy. Ideally, the neutral statement should be a few paragraphs in length.

IV. Deposition Testimony and Objections

■ Plaintiff's counsel should initiate scheduling a conference to set a date for exchange of deposition excerpts to be used at trial.

■ In the absence of agreement on a date, the exchange should occur no later than noon on the court day prior to trial.

V. Pre-Trial Conferences

■ In pre-assigned cases, counsel should contact the pre-assigned judge and schedule a pre-trial conference. The pre-trial conference should take place before the day set for trial.

■ For cases not pre-assigned, the pre-trial conference should take place before the jury is summoned to the courtroom.

■ The jury should not be called to the courtroom until the judge has: (1) determined the final form of the neutral statement of the case; (2) admitted uncontested exhibits into evidence; (3) considered objections to exhibits; and (4) held a preliminary jury instruction conference to discuss those instructions to be given to the jury at the beginning of the trial after the jury selection.

■ Where a party requests that a particular claim not be discussed in the neutral statement of the case or the preliminary instructions at the beginning of trial, the judge should afford all parties an opportunity to be heard on that question before deciding whether to include a particular instruction.

Where a juror has expressed an opinion or disclosed a prior experience or relationships that raise reasonable concerns about the juror's ability to be fair and impartial, but then also made statements such as "but I think I could be fair," a judge should not merely ask whether, notwithstanding the prospective juror's earlier statement, he or she could be fair and impartial.

■ In longer trials, the judge should consider modifying the trial schedule so that the judge and counsel can address matters that do not require the jury to be present without making jurors wait. These matters might include trial scheduling issues, evidentiary hearings, trial motions and arguments regarding jury instructions, etc.

VI. Jury Selection

■ The judge should avoid extensive efforts to "rehabilitate" a juror or to reject reasons given implicitly or explicitly by the juror for not serving. Judges should ask open-ended follow-up questions sufficient to probe and assess the ability of the individual to fairly judge the case. Judges should also pay attention to clues such as the juror's demeanor in assessing the credibility of the prospective juror's statements.

■ Where a juror has expressed an opinion or disclosed a prior experience or relationships that raise reasonable concerns about the juror's ability to be fair and impartial, but then also made statements such as "but I think I could be fair," a judge should not merely ask whether, notwithstanding the prospective juror's earlier statement, he or she could be fair and impartial. Rather, the judge should diligently probe the reason for concern about the juror's ability to be fair.

■ If the judge believes that excusing a potential juror may provide a "blueprint" for other potential jurors seeking a way to avoid service, the judge should keep the juror seated until the end of jury selection, but should advise counsel outside the presence of the jurors and before the exercise of peremptory challenges that the juror will be excused for cause.

■ If the judge denies a motion to excuse a juror for cause, the judge should make explicit findings on the record, outside the presence of the jury, supporting that decision.

■ The term "alternate" should – if possible – not be used in the presence of the jury, so that "alternate jurors" are not stigmatized or their role minimized.

■ The judge and counsel should not disclose to the jury which jurors are alternates. If a juror asks about the role or identity of alternate jurors, the judge should explain the role and purpose of

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alternate jurors and that the identity of alternates will be disclosed at the end of the trial.

■ At the conclusion of the case, the judge should thank the excused jurors and explain their role, including the fact that their presence throughout the trial made it possible for the case to proceed to verdict – whether or not an alternate juror replaced one of the original 12.

VII. Trial Procedures

■ After voir dire and before evidence begins, the judge should present preliminary instructions to the jury. Preliminary instructions should typically include trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluations, the issues to be addressed, and the basic relevant legal principles including the elements of the claims and defenses, and definitions of unfamiliar legal terms. The preliminary instructions should not be as specific as the pleadings or final instructions. If a claim or defense is presented to the jury in the preliminary instructions that is later withdrawn by a party or by the judge, the judge should give a curative instruction with the final instructions at the end of trial.

■ At the commencement of trial, the judge should state on the record that the uncontested exhibits have been received into evidence.

■ The judge should permit the jury to ask written questions directed to a witness after the witness' testimony is completed and before the witness leaves the stand. The judge should advise the jurors of this opportunity before the first witness is called.

VIII. Use of Deposition Testimony at Trial

■ The use of video depositions as a means for presenting deposition testimony is strongly encouraged.

Counsel should agree to a short summary statement to be read to the jury prior to showing a video deposition or reading a deposition. The summary statement should provide a brief introduction related to the witness' background and relationship to the case so that the only testimony of the witness provided is what is essential to the merits of the case.

■ Video depositions synchronized with a written transcript are the preferred method of presentation when possible so that jurors can read along while watching the video deposition.

■ Depositions, whether presented by video or reading, should be tightly edited down to essential testimony. "Essential" means only those portions important to the merits of the case and not duplicative of other testimony. Objections and attorney colloquy should be removed, unless the attorney's conduct is important for the jury to consider.

■ Every effort should be made to reduce deposition presentations to no more than 30 minutes.

■ Counsel should agree to a short summary statement to be read to the jury prior to showing a video deposition or reading a deposition. The summary statement should provide a brief introduction related to the witness' background and relationship to the case so that the only testimony of the witness provided is what is essential to the merits of the case.

■ Either the judge or counsel offering the deposition testimony should explain to the jury when the deposition was taken, who was asking questions at the deposition, whether the witness was unavailable or the parties agreed to presentation of testimony by deposition.

VIII. Dealing with Objections to Deposition Testimony

■ Counsel offering deposition testimony should mark with blue brackets on the deposition transcript the testimony to be presented to the jury.

■ Counsel responding should note objections on the transcript in red and then bracket in red any additional testimony offered.

■ Offering counsel should note in blue on the transcript objections to the testimony offered by responding counsel.

■ Deposition transcripts, with objections marked, should be submitted to the judge when exhibits are submitted, i.e., prior to the pre-trial conference.

■ After providing a hearing, the judge should rule in a timely fashion so as to permit offering counsel time to complete necessary deposition editing.

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IX. Presentation of Deposition Testimony to the Jury at Trial

■ Prior to the first time deposition testimony is presented to the jury, the judge should instruct the jury that deposition testimony is about to be offered and that jurors should consider this testimony in the same way as if the witness was present to testify in person.

Prior to the first time deposition testimony is presented to the jury, the judge should instruct the jury that deposition testimony is about to be offered and that jurors should consider this testimony in the same way as if the witness was present to testify in person.

■ The judge should instruct the jury as follows: "A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party ask questions. You are about to have certain testimony [read to you/shown by video] from depositions. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present in court to testify."

■ When deposition testimony is read to the jury, the preferred method of presentation is to use a reader who will read aloud all deposition answers. Readers should be instructed to read the deposition answers from the transcript in a neutral way, understanding the goal is to provide a fair presentation of the deposition testimony to the jury irrespective of which party obtained the services of the reader. The identity of the reader of the deposition testimony should not be disclosed to the jury.

X. Final Jury Instructions

■ The judge should instruct the jury before closing arguments are made.

SUMMARY

The Recommended Practices guide not was intended to be the definitive statement of what constitutes "best practices" in civil jury trials. Rather, the document was intended to foster discussion among practitioners state-wide as to what does and doesn't work to make civil trials a better experience for jurors and more effective and efficient. As such, the Committee welcomes comments, feedback and suggestions both on the practices recommended above as well as practices that aren't set forth above but should be. Comments can be directed to the Co-Chairs, Elden M. Rosenthal (Elden@RosenthalGreene.com) or the Honorable Janice R. Wilson (Janice.R.Wilson@OJD.State.Or.US).

A complete copy of the Recommended Practices for Civil Jury Trials in Multnomah County Circuit Court can be found on the web-site of the Multnomah County Circuit Court by clicking the "Services" tab on the Court's home page and then clicking the "Civil" tab on the Services page. The Circuit Court's home page is located at http://courts.Oregon.gov/Multnomah. ❐

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Recent Significant Oregon Cases

Hon. Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

- *Ram Technical Services, Inc. v. Koresko*, 346 Or 215 (2009)

The plaintiffs in *Ram Technical* filed an action in federal court, alleging claims arising under the Employment Retirement Income Security Act (ERISA), 29 USC § 1132 *et seq*. The district court dismissed, and plaintiffs filed parallel state law claims in state court. Defendants contended that the state law claims were barred by claim preclusion or by the applicable statute of limitations, but the Supreme Court disagreed. The court explained that (1) under the *Restatement (Second) of Judgments* § 25 comment e (1982), claim preclusion does not apply "when it is clear that the district court would have declined to exercise supplemental jurisdiction over any state law claims that plaintiffs could have asserted" (346 Or at 226); and (2) there was "no doubt" in this case that the district court would have declined to exercise supplemental jurisdiction over state law claims because dismissal of state law claims strikes "the appropriate balance in the usual case in which all federal-law claims are eliminated before trial." *Id*. at 229 (internal quotes omitted). The court noted that the claims would not be barred by the statute of limitations if ORS 12.220 applies, and whether that statute applies "reduces to two issues: (1) whether plaintiffs' federal action was dismissed on any ground not adjudicating the merits of the action and (2) if it were, whether plaintiffs' state action is based on the same claim or claims." *Id*. at 230 (internal quotes omitted). On the first issue, the court held, based on its conclusion that the federal court would have declined to exercise supplemental jurisdiction over the plaintiffs' state law claims after dismissing plaintiffs' ERISA claims, that the federal court decision did not "adjudicate the merits" within the meaning of ORS 12.220. *Id*. at 235. On the second issue, the court concluded that plaintiffs' state action was based on the "same claim" that they brought in federal court because the federal claim "alleged, at most, a state law claim for fraud in federal court" and defendants "were on notice in the federal action of the nature of plaintiffs' claims[.]" *Id*. at 236.

Judge Bushong

- *Williams v. Funk*, 230 Or App 142 (2009)
- *Brant v. Tri-Met*, 230 Or App 97 (2009)

The plaintiff in *Williams* was injured in a car accident. The jury awarded her $4,443.94 in economic damages but did not award any noneconomic damages. On appeal, plaintiff contended that she was entitled to receive some noneconomic damages as a matter of law. The Court of Appeals disagreed, holding that, where the evidence "would permit the jury to find that plaintiff had suffered only minor, insubstantial injuries, the jury was not required to award plaintiff noneconomic damages for her injuries." 230 Or App at 149. The plaintiff in *Brant* alleged that she was injured when a bus driver "braked suddenly and caused her to fall" off her seat. 230 Or App at 99. The

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trial court granted Tri-Met's motion for summary judgment; the Court of Appeals affirmed. The court explained that "the mere fact that plaintiff testified that the driver braked suddenly—so suddenly, in fact, that plaintiff fell from her seat—is not sufficient evidence for a jury to infer that the driver failed to meet the applicable standard of care." *Id.* at 104. Summary judgment was properly granted to defendant because "the record does not contain evidence from which a reasonable trier of fact could conclude that the bus driver failed to exercise the highest degree of skill and care practicable, and the onus of that evidentiary default falls on plaintiff." *Id*. at 105 (internal quotes omitted).

■ *Bernards v. Summit Real Estate Management, Inc.*, 229 Or App 357 (2009)

The plaintiffs in *Bernards*—members of limited liability companies (LLCs) that owned an apartment complex—brought derivative actions against other LLC members, alleging that defendants "breached a duty to the LLCs by refusing to take legal action against the company that managed the apartments and one of its officers who had embezzled LLC funds." 229 Or App at 360. The trial court dismissed for failure to state a claim; the Court of Appeals affirmed. The court explained that plaintiffs' complaints, "as derivative actions, are conditioned by the business judgment rule. That means that they must state ultimate facts sufficient to overcome the presumption that member defendants acted for the benefit of the LLCs—that, in other words, they acted in bad faith, were grossly negligent, or engaged in fraud or willful or wanton misconduct." *Id.* at 367. And because the LLCs' operating agreements required the unanimous consent of each member before filing suit, plaintiffs "had to allege facts demonstrating that *all* of the member defendants acted in bad faith, etc., because if even one of them refused to proceed and had a valid business legal reason for doing so, the LLCs could not bring legal action[.]" *Id*. at 367-68 (emphasis in original).

■ *Mountain High Homeowners Assn. v. J.L.Ward Co.*, 228 Or App 424 (2009)

In *Mountain High*, the homeowners association of a planned residential community sued the developers and owners of a golf course adjacent to the community. The community was built and marketed in the mid-1980s as a "golf course community." The golf course closed and was not maintained after 2003. The trial court "declared a negative equitable servitude by estoppel burdening certain real property and entered a permanent injunction against defendant to prevent and remedy waste on the property." 228 Or App at 426. The servitude included "both the negative requirement that defendant not use the property for anything other than a golf course in perpetuity as well as the affirmative duty that defendant provide a golf course" to be maintained for 15 years. *Id.* at 440. The Court of Appeals affirmed. The court held that (1) the homeowners' association had standing to sue (*Id*. at 437); (2) the evidence satisfied the elements for creating an equitable servitude by estoppel as set forth in the *Restatement (Third) of Property: Servitudes* § 2.10 (1998) (*Id*. at 437-38); and (3) the court properly granted a permanent injunction designed to "provide to the homeowners the benefits to which they were equitably entitled" and to prevent waste. *Id*. at 439-40.

■ *Eichner v. Anderson*, 229 Or App 495 (2009)

■ *Shogun's Gallery, Inc. v. Merrill*, 229 Or App 137 (2009)

■ *Phoenix-Talent School Dist. #4 v. Hamilton*, 229 Or App 67 (2009)

The plaintiffs in *Eichner* brought a quiet title action, claiming title to certain property by adverse possession. The court held that the action was not barred by laches because "limitation laws cannot compel a resort to legal proceedings by one who is already in complete enjoyment of all he claims." 229 Or App at 500 (quoting Cooley's Constitutional Limitations 763-64 (8th ed)). In *Shogun's Gallery*, the Court of Appeals held that the trial court erred in ordering reformation of a rent escalation provision in a commercial lease because "the parties had no antecedent agreement to which the lease could be reformed." 229 Or App at 148. In *Phoenix-Talent*, a real property transaction did not close in the time specified in the parties' agreement because the county did not approve a required lot line adjustment due to matters beyond the parties' control. The Court of Appeals held that the trial court erred in ordering specific performance of the agreement because (1) the lot line adjustment was "a condition precedent that did not encompass a promise of accomplishment by defendants" (229 Or App at 77); (2) "the timeliness of the lot line adjustment and the resulting closing date were not terms that the district could unilaterally waive" (*Id*.); and (3) the fact that the parties mutually agreed to extend the closing date to April 22, 2005 did not mean that defendants waived the time-essence provision of the agreement beyond that date. *Id.*

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■ *Strawn v. Farmers Ins. Co.*, 228 Or App 454 (2009)

The plaintiff in *Strawn* brought a class action lawsuit based on defendants' process for handling their insureds' personal injury protection (PIP) claims. Plaintiff asserted breach of contract, fraud and other claims, alleging that "Farmers' review process set an arbitrarily low percentage (initially, 80 percent) that resulted in the denial of claims for reasonable medical expenses, thereby increasing Farmers' profits at the expense of PIP claimants and medical providers." 228 Or App at 457. A jury found in favor of the plaintiff class and awarded $1.5 million in compensatory damages and prejudgment interest, and $8 million in punitive damages on the fraud claim. The Court of Appeals concluded that the punitive damages award must be reduced to no more than 4 times the net amount of compensatory damages and prejudgment interest (roughly $900,000), but otherwise affirmed. Farmers contended on appeal that the case should not have been maintained as a class action—and that Farmers' motion for a directed verdict should have been granted—because (1) each claim required individualized proof of the reasonableness of the insured's PIP-related medical expenses (*Id*. at 462-65); and (2) each insured did not incur medical expenses—and is therefore not injured—until the insured suffers an "out-of-pocket" loss (*Id*. at 466-67). The court disagreed. The court also rejected Farmers' argument that it cannot be liable for fraud because (1) its duties are statutory and contractual, not tortious; and (2) plaintiff failed to present evidence that each insured relied on Farmers' misrepresentations regarding payment of PIP benefits. *Id*. at 468-69. And the court rejected Farmers' contention that the trial court's attorney fee award of approximately $2.8 million is (1) barred by the 1999 amendments to ORS 742.061; and (2) excessive in light of the damages awarded on the fee-generating claims for breach of the insurance policy. *Id*. at 486-88.

Procedure

■ *State ex rel Dewberry v. Kulongoski*, 346 Or 260 (2009)

■ *Colby v. Gunson*, 229 Or 167 (2009)

In *Dewberry*, the Supreme Court held that (1) "ORCP 29 [regarding joinder of necessary and indispensable parties] does not apply to mandamus proceedings" (346 Or at 267); and (2) a declaratory judgment action "is neither a plain nor adequate alternative to a mandamus proceeding for compelling the Governor to perform his official duty with regard to the [tribal] gaming compact" because a court would lack authority to issue a declaratory judgment if the Tribes invoked their sovereign immunity and chose not to participate. *Id*. at 273-74. In *Colby*, the Court of Appeals held that an attorney who represented himself and prevailed on his claim under the Oregon Public Records Law is not entitled to recover attorney fees under ORS 192.490(3). The court explained that the statute authorizes "only a charge by an attorney that a separate entity is obligated to pay. It does not include the hypothetical compensation that a self-represented attorney might have been paid by another person." 229 Or App at 172.

Evidence

■ *Blake v. Cell Tech International, Inc.*, 228 Or App 388 (2009)

The plaintiff in *Blake* brought a wrongful death action against companies that manufacture and distribute a dietary supplement called Blue Green Algae. Plaintiff alleged that decedent consumed the dietary supplement, which "contained toxins called 'microsystins,' and those microcystins caused decedent's liver and renal (kidney) failure," resulting in her death at the age of 34. 228 Or App at 390. Plaintiff called an expert witness, Dr. Dietrich, to testify "regarding the immunohistochemical (IHC) tests he performed to detect microcystin toxins in decedent's liver and kidneys." The trial court excluded Dietrich's testimony, concluding that it lacked scientific validity. The Court of Appeals affirmed, citing several factors: (1) "plaintiff failed to demonstrate that IHC testing is generally accepted for the purpose of testing for microcystins in human liver tissue" (*Id*. at 401); (2) "there is no known error rate in the tests performed by Dietrich" and each set of tests "produced at least one false result" (*Id*. at 401-02); (3) "there are no peer-reviewed publications regarding IHC testing of human liver tissues for microcystins by which the accuracy of Dietrich's tests can be assessed, nor are there any established standards identifying specific antibodies and dilution ratios for those tests" (*Id*. at 402); and (4) "the probative significance of the evidence in the circumstances of the case—that decedent died from microcystin poisoning—is central to plaintiff's claim, and Dietrich's testimony, if admissible, could be highly persuasive to a jury." *Id*. Under those circumstances, the court concluded, "the trial court, in the exercise of its gatekeeping function, did not err as a matter of law in excluding Dietrich's testimony." *Id*. ❐

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