Oregon State Bar

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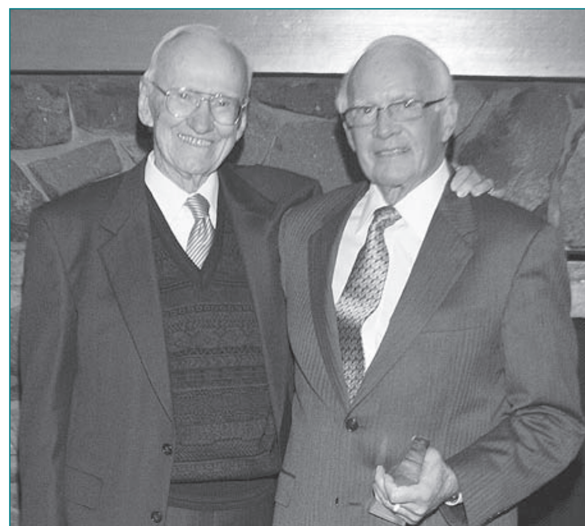
Bill Crow Receives Owen M. Panner Professionalism Award

By Nancy M. Erfle
Schwabe, Williamson & Wyatt PC

Bill Crow is the latest recipient of the Owen M. Panner Professionalism Award. Judge Panner presented Bill with the Award at the Annual Banquet of the Litigation Institute and Retreat at the Skamania Lodge on March 4, 2011.



Bill was joined for the evening by his wife Judy, his son and daughter-in-law Chris and Jennifer Crow, law partners from both Miller Nash and Schwabe, Williamson & Wyatt and many friends and colleagues from both sides of the bar. Judge Panner made the presentation with fond memories of his longtime friend. He commented how Bill had been the epitome of what the award was intended to exemplify and how he was surprised Bill had not been its recipient years earlier.

Nancy Erfle, Bill's current law partner, described how Bill is a constant reminder to all who work with him on how to practice law and conduct themselves in the most professional way. His guidance, assistance and mentoring to others in the firm is without equal. Nancy spoke on how Bill reminds all who work with him to do their best to meet the client's goals, but do so in a way that never compromises the high standards of professionalism he so exemplifies.

Bill's friend and colleague Steve English reminded Bill that he had interviewed to work with Bill when he was a young lawyer. He remarked that in all settings Bill is always respectful, cordial and a great model of the best of our profession. Dennis Rawlinson, who worked with Bill for many years, told stories of Bill's long tenure at Miller Nash and the supreme example of professionalism he had always displayed. Denny also provided a great personal history of Bill growing up in Oregon and his years of service to the profession in Oregon.

As only Bill can do, he accepted the award with a reminder to all in the room that our profession is noble and we should all be proud with the work that we do. ❒

From the Managing Editor

"How to Get Your Point Across in 30 Seconds or Less"

By
Dennis Rawlinson
Miller Nash LLP

We find ourselves in an age of fast food, fast transportation, and fast communication. Scientific advances are conditioning us to expect instant communication, instant responses, and instant gratification.

The business world recognizes that a businessperson who cannot get his or her point across in 30 seconds or less will not be persuasive. When we rise to our feet in court, put pen to paper, or key information into a computer, we should be guided by the same principle.

Dennis Rawlinson

I recently read *How to Get Your Point Across in 30 Seconds or Less* by Milo O. Frank, one of America's foremost business communication consultants, and found that it echoed what most of us learn over the course of a litigation career about the value of brevity and clarity.

1. Attention Span.

Frank notes that the human mind has an attention span of approximately 30 seconds. Try to concentrate for a moment on a single object, such as a pencil. You will find that in about 30 seconds your mind begins to wander unless additional action recaptures your attention. This simple test corroborates what television, radio, and newsprint advertisers have known for years: You need to capture someone's attention, get your message across with high impact, and then stop within 30 seconds. Time a few commercials on television. I believe you will find that the most effective ones are those that last 30 seconds or less and follow the methodology set forth below.

2. Courtroom Application.

I have been told and have come to believe that no legal argument that cannot be explained to a colleague in a three-minute elevator ride will be successful. And if you don't catch that colleague's attention in the first 30 seconds, the other two and a half minutes will be wasted. One of the most challenging tasks of our practice is to reduce complex, complicated cases to brief, clear, concise contentions that persuade. The first 30 seconds are the most crucial.

3. Methodology.

Set forth below is a brief summary of the points made by Frank in his book. For the most part, they are the same points that trial-technique advocates preach and that experience confirms are valid.

a. Identify your objective.
b. Reduce your objective to a single persuasive sentence.
c. Identify an approach to your objective that will take into consideration the needs and interest of your listener (fact-finder).
d. Ensure that each point directly advances your objective and relates to the listener.
e. Use imagery to create a picture.
f. Tell a story.
g. Personalize the story characters (your client).
h. Add emotional appeal and idealism.
i. Be prepared, but don't memorize.
j. Care about what you are saying and use your voice and gestures to express that care.
k. IF YOU WISH TO EMPHASIZE SOMETHING . . . speak softly.
l. When you want the attention of the fact-finder . . . pause.
m. Start and end on a high note.

4. Conclusion.

It is not particularly surprising that effective communication, whether in the courtroom or in the boardroom, follows the same principles. This realization may suggest to some of us that we ought to attend fewer litigation seminars and more effective-communication seminars. ❐

A Tale (Or Two) Of Two (Or More) Forums

"It was the best of times; it was the worst of times."

By Robert E. Maloney, Jr. and Milo Petranovich
of Lane Powell PC

The chance to prove the client's case in two courts; the chance to lose in each. The opportunity to employ the rules in one court to the client's advantage in another; the risk that a loss in the first is preclusive in the second. The prospect of a quick decision in one court; the purgatory of endless litigation in another.

A. Two Cases, Many Forums

The Electricity Cases.

Our client, Wah Chang, is in the service territory of PacifiCorp, an electric utility. Wah Chang uses a tremendous amount of electricity in its manufacturing processes, all of which it must buy from PacifiCorp at the standard industrial rate, or tariff. Seeking to lower costs, Wah Chang entered into a five year contract with PacifiCorp to purchase its power at wholesale market rates, rather than the standard industrial tariff. Such wholesale market rates had been consistently below the standard industrial tariff, and Wah Chang and PacifiCorp chose a market price index—the Dow Jones California Oregon Border Index (Dow COB)—that would establish the monthly price Wah Chang would pay for the electricity it would buy from PacifiCorp. But just as the price indexed contract went into effect, the California energy crisis erupted. Prices in Western wholesale energy markets skyrocketed—and so did market price indexes like the Dow COB. Wah Chang's monthly power bill skyrocketed too—from about $300,000 a month to as much as $6 million a month.

Milo Petranovich

Robert E. Maloney, Jr.

Wah Chang sought relief from its contract in two forums: it petitioned the Oregon Public Utility Commission ("PUC") for an order that the indexed rate it must pay under the contract was "unjust and unreasonable," a concept unique to regulated utility practice. Wah Chang also filed a civil lawsuit in state court, asserting the contract should be declared void, by virtue of the doctrine of frustration of purpose.

PacifiCorp moved to dismiss the state court case, arguing first that the PUC had exclusive jurisdiction over the matter, because it involved issues of rate regulation. Alternatively, PacifiCorp argued that there was concurrent jurisdiction at the PUC and in state court, but the doctrine of primary jurisdiction demanded the case be heard by the PUC, which has expertise in such matters. The state court ruled there was

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Two (Or More) Forums
continued from page 3

concurrent jurisdiction, and that it was fully capable of handling matters of contract—"qua contract." The dispute proceeded in two forums.

Thereafter, the PUC ruled the rate was not unjust or unreasonable, that Wah Chang had "assumed the risk" of market price increases. And the state court granted PacifiCorp's motion for summary judgment, ruling in essence that Wah Chang could expect some degree of market speculation to affect market prices, and that was the most that the evidence suggested.

Then, the previously hidden evidence of Enron's manipulation of the energy markets became public. The state court vacated its judgment on the basis of newly discovered evidence—the new evidence suggested active and illegal market manipulation, not mere market speculation—and the PUC was ordered by the Marion County Circuit Court to reopen its case and take new evidence.

Armed with the evidence of Enron's perfidy, Wah Chang filed civil lawsuits against Enron and others, alleging violation of the antitrust laws and the federal racketeering statute. Now, there were proceedings in three forums: Oregon state court, Oregon's PUC, and federal court.

2. The Securities Fraud Cases.

At about the same time Enron was unraveling, Electro Scientific Industries, Inc. ("ESI"), an Oregon publicly traded company, had its own problems. Our client, Jim Dooley, was ESI's CFO, and then its CEO. When he was named CEO, a newly appointed CFO discovered what he believed to be anomalies in ESI's financial statements. At the suggestion of the new CFO, ESI began an independent internal investigation of its accounting, and discovered what it believed to be errors in its filed financial statements. It self-reported to the Securities and Exchange Commission and began the process of restating its previously filed financial statements. A civil class action securities fraud claim followed, naming ESI, Dooley, and others as defendants. ESI terminated Dooley "for cause" under its employment contract with him. The SEC filed a civil action against Dooley. The U.S. Attorney for the District of Oregon filed criminal securities fraud claims against Dooley. Dooley was now a defendant in three lawsuits, one of them criminal.

B. Different Forums, Different Discovery

The good news is that one can leverage the different discovery rules in the different forums to the client's advantage.

In the electricity pricing cases, Wah Chang used the PUC discovery procedures to obtain documents and interrogatory answers (the PUC procedure is called "data request"), and to obtain expert discovery. Wah Chang conducted depositions under the procedures available in state court. Using the PUC procedures, Wah Chang obtained the tape recordings made of the conversations of PacifiCorp electricity traders during a two-year period—it is industry practice that all conversations of traders be recorded. There were more than half a million recorded conversations that had to be reviewed.

Similar advantages were eventually available in the Dooley securities fraud cases. Discovery was stayed in the securities fraud class action, and it soon settled. Depositions and sworn statements of numerous witnesses were taken by the SEC in the SEC proceeding, but they were not immediately available to Dooley, and then the SEC action was stayed pending completion of the criminal matter, as is often the case. Then, unexpectedly for a civil lawyer, the criminal case proved a treasure trove of discovery. The government is required to turn over evidence in its possession, including possible exculpatory evidence, to the defendant. The SEC had shared much of its information with the prosecutor—not uncommon in such parallel proceedings. And ESI had turned over to the prosecutors both the written result of its internal investigation and much of the backup documents, interviews, and other evidence from the investigation. Almost all of that was produced by the prosecutor to Dooley—the good news is that Dooley now had about one million documents related to the cases against him. The bad news was that the documents came in bulk, largely unclassified and undifferentiated.

There were other challenges. First, the electricity pricing cases. The PUC's administrative law judges are knowledgeable and experienced in the complicated world of utility rate setting. But compared to civil judges, they are relatively inexperienced in handling discovery disputes. And the state court was not inclined to get involved in enforcing the PUC's unique written discovery procedures, even though the parties agreed that discovery in one case could be used in the other.

Back to the securities fraud cases.

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Two (Or More) Forums
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The rules governing the prosecutor's obligations to produce exculpatory evidence are broad, and the court supervises the discovery process. But the considerations are different than in civil cases, and the dynamics of defending a criminal prosecution, while at the same time exploring with the prosecutor the possible reality of a guilty plea, require careful weighing of the considerations.

C. Preclusion—What Is the Effect in One Forum of a Ruling in Another

Once you move to the merits, things get really complicated. First, the electricity pricing case.

A doctrine related to the PUC's sole jurisdiction to set utility rates complicated Wah Chang's ability to pursue its case in state court. To the extent Wah Chang's case in the state court would set or affect the rate it would pay to its utility, the PUC arguably had exclusive jurisdiction over the dispute. On the other hand, the state court had jurisdiction to determine the equitable contract issues: was there a frustration of a primary purpose of the contract? To avoid implicating "rate" issues in state court, Wah Chang simply asked the state court to declare the contract void, and that Wah Chang would then ask the PUC to determine what rate would have been charged in the absence of the special contract—in Wah Chang's view, the standard industrial tariff rate. The difference between that standard rate and what it paid under the inflated market indexed rate, together with interest, was about $50 million. Wah Chang also had legal claims: breach of the contractual covenant of

good faith and fair dealing, tortious breach of that covenant, and money had and received. But seeking monetary damages for those claims again risked invading the rate setting province of the PUC, so Wah Chang instead sought a restitutionary measure of damages that would require the jury only to determine whether there was a material breach, but not to calculate and award damages.

The state court agreed with Wah Chang's positions. But then the PUC issued its ruling as to whether the indexed rate was unjust and unreasonable—it held that the rate was not, and in doing so, made many factual findings. And it did more; it ruled that it had exclusive jurisdiction over the dispute. PacifiCorp immediately moved for summary judgment in the state court, arguing that the facts found by the PUC were entitled to preclusive effect; not claim preclusion, but issue preclusion. And one of the issues determined was that the PUC had exclusive jurisdiction. Wah Chang countered that the issues in the PUC were not the same as the issues in the state court proceeding so there could be no issue preclusion, and that the state court had already decided the exclusive jurisdiction issue. The state trial court agreed with Wah Chang's positions.

Back to Dooley. He pleaded guilty to one count of criminal securities fraud—an omission in an oral statement to the company's outside auditor during a quarterly review of the company's financial statements. Dooley had obtained an opinion that severance benefits offered by ESI to employees in Japan were not legally required and, on that basis and under the rules for accounting for contingent liabilities, Dooley reversed an existing accrual for such benefits on the company's books, generating income for the company in that fiscal quarter. Dooley had obtained the opinion that there was no legal requirement for severance packages in Japan from the company's international controller. He advised the company's outside auditor of the opinion that the benefits were not legally required, but did not disclose that the advice was from the company's controller—not from legal counsel. One count of the indictment against Dooley alleged that such an omission in the oral statement to the outside auditor constituted securities fraud. Dooley pleaded guilty to that count, and the government dismissed all the other counts. Dooley was sentenced to six months' home confinement. Dooley then settled the SEC claim, agreeing not to serve as an

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officer or director of a publicly traded company, but neither admitting nor denying the SEC allegations.

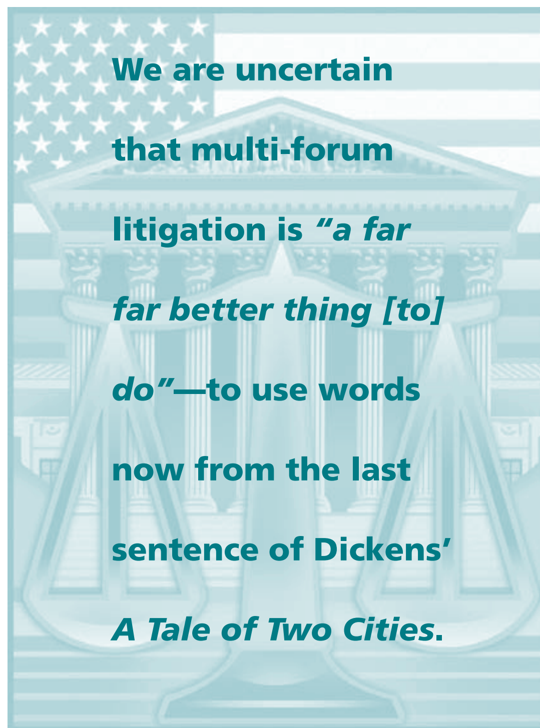
Dooley had a breach of contract claim against ESI. His employment agreement provided for severance benefits worth approximately $1 million if he was terminated. However, if he was terminated "for cause," he was entitled to no severance benefits. Dooley filed a breach of contract claim before the American Arbitration Association—the contract provided for such arbitration—asserting that ESI improperly terminated him under the "for cause" provision, when his actions did not meet the "for cause" standards.

ESI promptly moved for summary adjudication in the arbitration, arguing that Dooley's guilty plea conclusively precluded him from asserting that his termination was not "for cause." Dooley countered that the contract's "for cause" provision required, by its own terms, that Dooley knowingly and intentionally engage in criminal conduct, but Dooley's guilty plea was only to a reckless state of mind—consequently, the issues in the two forums were different, so the guilty plea was not preclusive. The arbitrator denied ESI's motion for summary adjudication.

D. Multi-Forum Issues at Trial

The Wah Chang case was tried—several counts to the jury, several to the judge. The Dooley case was arbitrated before a single arbitrator.

Several stubborn multi-forum problems arose in the Wah Chang trial. Remember the antitrust and racketeering case Wah Chang had filed against Enron and others? It had been dismissed under the federal filed rate doctrine, which gives exclusive jurisdiction over issues related to wholesale energy sales to the Federal Energy Regulatory Commission ("FERC"). PacifiCorp sought to introduce the complaint as an admission by Wah Chang that its damages were caused by Enron and its co-conspirators, not by PacifiCorp's actions. The trial court ruled the complaint inadmissible—its probative value greatly outweighed by its potential prejudice, both to Wah Chang and to PacifiCorp. Wah Chang sought to introduce various FERC rulings and determinations that the Western energy markets had been the subject of massive manipulation. The trial court ruled that the FERC rulings would not be admitted—the jury might defer to the FERC rulings, and that would invade the province of the jury. However, the trial court did allow Wah Chang to place in evidence PacifiCorp's briefs in the FERC proceedings, as an admission by PacifiCorp that the wholesale markets were manipulated.



E. Trial Results, and Lessons

After 3 1/2 weeks of trial, the jury returned a verdict for PacifiCorp. The judge ruled in favor of PacifiCorp several days later. An appeal is being considered. The PUC ruling that the contract rate was just and reasonable is on appeal. From the filing of the first actions, it is now 10 years, and counting.

In the Dooley arbitration, which spread over four weeks, the arbitrator ruled in favor of Dooley. He interpreted the "for cause" clause in the employment contract to require Dooley to intentionally engage in criminal activity, and he ruled the evidence was that Dooley had no such state of mind. He awarded Dooley about $1.2 million, which included pre-award interest. ESI has challenged the award in federal court, raising again the alleged preclusive effect of Dooley's guilty plea. From the filing of the first securities fraud suit, it is now only eight years, and counting.

We are uncertain that multi-forum litigation is *"a far far better thing [to] do"*—to use words now from the last sentence of Dickens' ***A Tale of Two Cities***. But, we are certain that sometimes it is necessary, and we must carefully navigate its opportunities and risks. ❒

Security Interests in Collateral – How Secure is Your Interest?

By David A. Bledsoe
and Nicholle Y. Winters
of Perkins Coie LLP

PART I - The BIOC Exception

A. Introduction

Imagine a business (Seller) that sells inventory that is collateral for a loan from a lender (Secured Party). What happens if Seller defaults on payments to the Secured Party and files for bankruptcy or is otherwise unable to pay Secured Party? Generally, Secured Party has a perfected interest in the collateral. However, there are questions that can have important consequences for a client: Can the Secured Party make a claim against the purchaser of the collateral (Purchaser), suing for conversion, unjust enrichment or similar claims? Does the Purchaser have an affirmative defense that protects it from claims by the Secured Party?

David A. Bledsoe

Nicholle Y. Winters

The answers to these questions seem straightforward, because the UCC provides that a security interest remains attached to collateral after sale or other disposition. Specifically, UCC 9-315(a), codified at ORS 79.0315(a), states that "A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition thereof unless the Secured Party authorized the disposition free of the security interest or agricultural lien." However, depending on the facts of the situation, the Secured Party may not have a claim to the collateral.

There are two major exceptions to a security interest traveling with the sale of the collateral. The first exception is the "buyer in the ordinary course" (BIOC) exception of UCC 9-320 (ORS 79.0320), which is what most people think of when contemplating exceptions to a security interest attaching after the sale of collateral. The second is the less often discussed but fairly robust "Authorization" exception, which has been heavily litigated throughout the country, particularly in the context of agricultural liens and inventory collateral. This exception arises under UCC 9-315 (ORS 79.0315) itself, which while providing that security interests stay with collateral, includes an exception for when the Secured Party "authorizes" the sale free and clear.

This article discusses the application of the BIOC exception; the second installment of the article (being

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published next quarter) will discuss the "Authorization" exception. Litigators should understand both Authorization and BIOC before bringing or defending conversion or other claims between a Secured Party and a Seller or Purchaser of collateral.

B. Buyer in the Ordinary Course Exception

UCC Section 9-320 (formerly 9-307) provides that when a good faith buyer buys goods from a dealer of goods of that kind, without knowledge that the transaction violates anyone else's security agreement, and the sale comports with the usual custom, that buyer is entitled to possession without any attached security interest.

The quintessential BIOC is the innocent end-user Purchaser who buys a car, stereo, appliance or other inventory item without understanding the complicated world of security interests. The UCC is designed to facilitate the flow of commerce; it would restrict that flow and is not reasonable to expect customers to search UCC filings before buying such inventory items. Accordingly, courts are quick to find that end-use consumer purchases qualify as a BIOC. *See, e.g., In re Doughty's*, 236 BR 407 (Bankr. D. Or. 1999); *Thorn v. Adams*, 125 Or App 257 (1993).

There are, however, various factual situations that prevent the application of the BIOC exception. Under the UCC, one purchasing farm products from a farmer is expressly excluded. ORS 79.0320(1). The statute also provides that one does not qualify as a BIOC if the goods are purchased in bulk or in exchange for a debt. ORS 71.2010(2)(i). The requirement of new value is to protect the holder of the security interest because it is entitled to the proceeds of the inventory; if the Purchaser could receive the goods free and clear in exchange for a debt, it would "enable an unsecured creditor — the transferee — to bootstrap himself into priority over the secured creditor who looks to the inventory for security." *United States v. Handy & Harman*, 750 F2d 777, 782 (9th Cir 1984). This would frustrate the UCC's priority provisions.

Additionally, a sale must have occurred. There is some disagreement in the courts as to what is considered a sale. Most cases hold that BIOC protection attaches when goods are identified and contracted for sale and the buyer has the right to possession, even if title has not transferred or the buyer does not have possession. *See In re Doughty's*, 236 BR 407 (Bankr D Or 1999); *In re Havens Steel*, 317 BR 75 (Bankr WD Mo 2004). The policy behind using identification instead of transfer of title is to protect innocent buyers and place the risk of loss on the Secured Party who has the ability to protect itself by requiring various inventory controls and reports. Additionally, in Oregon, title documents are rebuttable evidence of ownership,[1] so cases in Oregon (as well as other jurisdictions) have found that the failure to obtain title documents does not prohibit someone from asserting status as a BIOC. *Doughty's*, 236 BR at 413.

As to whether the sale follows customary practice, courts will look at the facts of the transaction and compare them with the typical sale. If there are significant differences, the transaction may be found to be outside the ordinary course. Insignificant differences, such as the failure to obtain a title document or prepaying on a contract before possession is taken, will usually not be considered outside the ordinary course. *See, e.g., In re Western Iowa Limestone*, 538 F3d 858, 867-68 (8th Cir 2008); *Foy v. First Nat'l Bank of Elkhart*, 868 F2d 251, 254-55 (7th Cir 1989). Oregon takes an expansive view of what passes as the ordinary course of business. *Cooper Indus. Inc. v. Lagrand Tire Chains*, 2002 WL 31477723 at *4 (D Or 2002).

Good faith contains both a subjective and objective component. ORS 71.2010(2)(5). Conduct subsequent to the transaction may not be relevant to the analysis of whether the transaction itself was entered into in good faith. For example, in one case an auto dealer purchased a vehicle from another dealer and was later informed by the Secretary of State that the transaction may have been fraudulent and told to freeze his inventory. When the auto dealer ignored the instruction and sold the automobile, the court

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held that his later bad conduct was irrelevant to whether he bought in good faith. *C Jon Dev. Corp v. Pand-Rorsche Corp.*, 217 NE 2d 416 (Ill App 1966). At the time of the purchase, there was no evidence that the buyer knew of the liens so the events occurring thereafter had no relevance as to whether the buyer was a BIOC. However, courts tend to closely scrutinize transactions between affiliated entities and are more likely to find that deviations place the transaction outside of the ordinary course of business if the Purchaser and Seller are affiliated. *See In re Palmer*, 103 BR 348 (Bankr MD Geo 1989). If the buyer has knowledge that the transaction violates another's security agreement in an affiliated transaction, then the transaction is particularly scrutinized. *See Transamerica Commc'l Fin. Corp v. Union Bank & Trust*, 584 So 2d 1299 (Ala 1991).

C. Conclusion to Part One

BIOC is an important issue to consider in determining whether a security interest remains in collateral that has been sold or otherwise disposed of. However, if a transaction does not qualify for BIOC status, that is not the end of the analysis. Even if a client cannot claim BIOC status, the "Authorization" exception may still apply. That exception will be discussed in the next installment of this article, which will appear in next quarter's edition.

Endnote

[1] *See City of Pendleton v. One 1998 Dodge Stratus*, 180 Or App 72, 78 (2002). ❐

Oregon State Bar

Summer Calendar

CLE Seminars

July 8
Understanding Financial Statements: A Business Roadmap
9 a.m. to 12:30 p.m.
Oregon State Bar Center
Tigard, Oregon
3.5 General CLE credits

July 14
When Worlds Collide–The Government Knocks on the Corporate Door
9 a.m. to Noon
Oregon State Bar Center
Tigard, Oregon
2 General CLE credits and 1 Ethics credit

July 22
Fundamentals of Collecting Money Judgments
9 a.m. to 4:30 p.m.
Oregon State Bar Center
Tigard, Oregon
6.5 General CLE or Practical Skills credits

August 3
Advanced Transactional Drafting
with Ross Guberman
1 p.m. - 4 p.m.
Oregon State Bar Center
Tigard, Oregon
3 General CLE or Practical Skills credits

August 4
Point Made: How to Write Like the Nation's Top Advocates
with Ross Guberman
9 a.m. to Noon
Oregon State Bar Center
Tigard, Oregon
3 General CLE or Practical Skills credits

August 12
Fundamentals of Bankruptcy
Cosponsored by the Debtor-Creditor Section
9 a.m. to 4:30 p.m.
Oregon State Bar Center
Tigard, Oregon
6.5 General CLE or Practical Skills credits

To register for or find out more information about these and other upcoming seminars offered by the Oregon State Bar, please visit the OSB's Web site at www.osbarcle.org, under Seminars, where you can view the online CLE seminars calendar, download a PDF of the current calendar, and register online for live seminars and video replays.

Taming the Social Media Beast

By Katherine Heekin
The Heekin Law Firm

According to *Nielsen's Global Faces and Networked Places* report issued in March 2009:

- Two-thirds of the world's Internet population visits a social network or blogging site.
- Social networking and blogging websites have overtaken e-mail to become the fourth most popular online sector after search, portals, and PC software applications. The sector now accounts for 10% of all Internet time.
- Time spent on social network and blogging sites is growing at 3x the rate of overall Internet growth.
- Between December 2007 and December 2008, the amount of time spent on Facebook grew by 566% from 3.1 billion to 20.5 billion minutes.
- The greatest growth for Facebook has come from people aged 35-49 years of age (+24.1 million).
- Almost one-third of Facebook's global audience is aged 35-49 and almost one-fourth is over 50.

Recognizing this trend, this article highlights recent case law and statutes governing this area and offers practical tips. In addition, consult the Social Media and the Courts Resource Guide by the National Center for State Courts at http://devlegacy.ncsc.org/WC/CourTopics/ResourceGuide.asp?topic=SocMed.

Who Should Collect Electronic and Online Evidence?

Attorneys must oversee the litigation hold and the search for and collection of electronic and online evidence. Attorneys who delay getting the litigation hold notices to all people who may have relevant information and who let their clients or the company's employees check their own files are exposing themselves and their clients to sanctions. Consider two recent cases: *Jones v. Bremen High School District* 228, 2010 WL 2106650 (N.D. Ill May 25, 2010) and *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp.2d 456 (2010).

Katherine Heekin

In *Jones*, the plaintiff brought a motion for sanctions for failing to preserve relevant documents against the school district where she had worked. She contended that the destroyed documents contained discriminatory statements and would have supported her race discrimination claims. After learning that plaintiff had filed an EEOC charge alleging race and disability discrimination, the school district failed to place a litigation hold on electronically created documents. Instead, only three employees, the individuals most involved in the alleged discriminatory actions, were tasked by the district to search their own e-mail and

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set aside whatever they thought was relevant. There was no evidence that outside counsel directed their efforts in deciding what was relevant and what was not. After plaintiff filed her complaint in federal court, the district asked additional employees to search for relevant electronic documents. Again, the employees made their own choices about what was relevant. It was not until much later that the district instructed all employees to preserve e-mails that might be relevant. The district's technological director searched some e-mail boxes, but he was not sure that he searched the archive server and he was not sure of all the people whose e-mail boxes he searched. There was no litigation hold placed on the backup system containing deleted e-mail.

The plaintiff identified a lack of e-mails from 2006 and 2007 and several dates of meetings that should have had related e-mails as evidence of missing relevant information. After plaintiff filed the motion for sanctions, defendant produced 2,354 pages of e-mails, which filled most of the gaps, but because defendant failed to put a litigation hold in place and because the employees did their search without any lawyer guiding them, the court concluded that determining that all relevant e-mails had been preserved was impossible. Moreover, the tardy production of e-mails after depositions caused prejudice to plaintiff.

The court ruled that defendant was grossly negligent in breaching its duty to preserve evidence. The court stated, "It is unreasonable to allow a party's interested employees to make the decision about the relevance of such documents, especially when those same employees have the ability to permanently delete unfavorable e-mail from a party's system. * * * Most non-lawyer employees, whether marketing consultants or high school deans, do not have enough knowledge of the applicable law to correctly recognize which documents are relevant to a lawsuit and which are not. Furthermore, employees are often reluctant to reveal their mistakes or misdeeds." *Id.* at *7.

"Most non-lawyer employees, whether marketing consultants or high school deans, do not have enough knowledge of the applicable law..."

The court decided against an adverse inference instruction because the court did not find a deliberate effort to conceal harmful evidence. Instead, the court ruled it would give a jury instruction explaining that the defendant failed to preserve all e-mail from November 2007 until October 2008 and that defendant is precluded from arguing that the absence of discriminatory statements during that period is evidence that no such statements were made. Additionally, the court ordered the defendant to pay plaintiff's fees and costs for the motion.

In *The Pension Committee of the University of Montreal Pension Plan* case, Judge Shira Scheindlin revisited and expanded her decisions in *Zubulake v. UBS Warburg, LLC.* The defendants moved for a dismissal against plaintiffs as a sanction for destroying evidence. Judge Scheindlin declined to dismiss the case because there was no evidence of misconduct. 685 F. Supp.2d at 470. She concluded that "plaintiffs failed to institute timely written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose." *Id.* at 463. Therefore, the appropriate sanction was an adverse inference instruction and monetary sanctions. *Id.* at 470, 471.

She reiterated that the duty to preserve arises when litigation is "reasonably anticipated" and explained that "[a] plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation." *Id.* at 466. She stated, "A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful." *Id.* at 464. She advised, after the final *Zubulake* decision in July 2004, a party is grossly negligent when the duty to preserve has attached and the party fails to:

(1) issue a written litigation hold;
(2) identify all of the key players and ensure that their electronic and paper records are preserved;
(3) cease deleting e-mail or preserve the records of former employees that are in the

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party's possession, custody, or control; and

(4) preserve backup tapes when they are the sole source of relevant information or when they related to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources. *Id.* at 471.

The burden of proof varies depending upon the nature of the sanction. For fines and cost-shifting, the focus is on the conduct of the accused party more than whether documents were lost. For more severe sanctions, such as dismissal, preclusion, or an adverse inference, the court also must consider whether any missing evidence was relevant and whether the innocent party suffered prejudice as a result. In those situations, the innocent party must show that the accused party "(1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and (3) the missing evidence is relevant to the innocent party's claim or defense." *Id.* at 467.

If the accused party acted in bad faith or was grossly negligent, then relevance and prejudice are presumed. *Id.* But when the accused party was merely negligent, the innocent party has to prove both relevance and prejudice. *Id.* at 468. Typically, the innocent party relies upon extrinsic evidence to show that the deleted e-mails would have been favorable. *Id.* Any presumption is rebuttable, and the accused party should have the opportunity to demonstrate that the innocent party has not been prejudiced. *Id.*

According to Judge Scheindlin, "[a]ppropriate sanctions should (1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party." *Id.* at 469 (internal quotations omitted). And "a court should always impose the least harsh sanction that can provide an adequate remedy." *Id.*

Like in *Jones*, there was "total reliance on the employee to search and select what the employee believed to be responsive records without any supervision from Counsel." *Id.* at 473. Unlike *Jones*, counsel communicated with plaintiffs, but failed to specifically instruct plaintiffs not to destroy records so that the lawyers could monitor the collection and production of documents. *Id.* As a result, Judge Scheindlin concluded that instructions from counsel failed to meet the standard for a litigation hold. *Id.* The Court then analyzed the conduct of each plaintiff to determine each plaintiff's culpability and what the appropriate adverse inference instruction or monetary sanctions should be.

Relying upon these cases, attorneys rather than parties should be responsible for collecting electronic and online evidence. Otherwise, they and their clients risk sanctions.

Who Owns Electronic and Online Evidence?

The old adage "possession is nine-tenths of the law" has new meaning in the digital age. Private and confidential communications that used to be in a briefcase or a file at home are now stored on computers and servers at the office and on servers "in the clouds," prompting the questions, who owns it and who can access it? Several recent cases attempt to answer those questions.

In *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), Quon, a police officer, sued the city, the police department, and police chief under § 1983 alleging that the police department's review of his text messages violated the Fourth Amendment. He also asserted a claim against the wireless communications provider under the Stored Communications Act ("SCA"). Quon and others exceeded their allotted monthly character limits on their pagers, resulting in extra charges. The police department made it clear that the pagers were not considered private. *Id.* at 2629. The pagers were considered e-mail messages, subject to the City's policy as public information, and were eligible for auditing. Initially, though, the officer responsible for overseeing the contract told Quon that he could pay for the overages rather than undergo an audit. Quon paid for overages several times thereafter. Then, the officer in charge became tired of being a bill collector, and the police chief decided to figure out if the existing limit was too low (ensuring that employees were not being forced to pay out of their own pockets for work-related messages) or whether the overages were for personal messages.

At the police department's request Arch Wireless provided transcripts of Quon's and another employee's messages in August and September. (The Ninth Circuit concluded that

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Arch Wireless violated the SCA by releasing the transcripts. The petition for certiorari by Arch Wireless was denied.) The reviewing officer used Quon's work schedule to redact from his transcript any messages sent while off duty. The remaining transcripts revealed that many of Quon's messages were not work related and some were sexually explicit. Quon was disciplined for violating the police department's rules. Quon argued that because the officer in charge told him that an audit would be unnecessary if he paid for the overages, Quon had a reasonable expectation of privacy in the content of his messages.

The Supreme Court sidestepped the question whether Quon had a reasonable expectation of privacy in his text messages by assuming that he did and that the review was a Fourth Amendment search. *Id.* at 2629-30. The Court explained:

> "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. In *Katz*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.
>
> "Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or tolerate personal use of such equipment by employees because it often increases worker efficiency. Another *amici* brief points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.
>
> " * * * And employer policies will of course shape the reasonable expectations of their employees, especially to the extent such policies are clearly communicated.
>
> "A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrow grounds."

Id.

The old adage "possession is nine-tenths of the law" has new meaning in the digital age.

The Court then ruled that the search was reasonable because it was motivated by a legitimate work-related purpose and it was not excessive in scope. *Id.* at 2632. Whether the other respondents who texted with Quon had a reasonable expectation of privacy in their text messages to Quon was not before the Court because they did not argue that the search, if reasonable to Quon, was still unreasonable as to them. *Id.* at 2633. They only argued that if the search was unreasonable to Quon, it was unreasonable as to them.

In dissent, Justice Scalia criticized the majority's "excursus on the complexity and consequences of answering" whether there is a reasonable expectation of privacy in the content of text messages stored on a government-owned pager. He explained:

> "(To whom do we owe an *additional* explanation for declining to decide an issue, once we have explained that it makes no difference?) It also seems to me exaggerated. Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The

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> Court's implication, *ante* at 2629, that where privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty."

Id. at 2635.

He also predicted, due to the majority's approach, litigants will use "the threshold question whether the Fourth Amendment is even implicated as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media. In short, in saying why it is not saying more, the Court says much more than it should." *Id.*

There is no reported Oregon case addressing access to *content* stored by an Internet service provider. But, *noncontent information* held by an Internet service provider is discoverable. *State v. Delp*, 218 Or. App. 17, 178 P.3d 259 (2008). In *Delp*, a child sex abuse case, the FBI issued an administrative subpoena to AOL requesting the name, address, telephone number, subscriber number, local and long distance telephone billing records, length of service, and types of services utilized for "wstcoastjd@aol. com." AOL complied with the subpoena and disclosed to the FBI that the e-mail address belonged to the defendant and provided his home address.

> **There is no reported Oregon case addressing access to *content* stored by an Internet service provider.**

The defendant argued that he had privacy interests in his online subscriber information protected by Article I, § 9 of the Oregon Constitution. The court rejected that argument. The court relied on two recent cases involving subpoenas for cell phone records, *State v. Magana*, 212 Or. App. 553, 159 P.3d 1163, rev. den., 343 Or. 363, 169 P.3d 1268 (2007) and *State v. Johnson*, 340 Or. 319, 335-36, 131 P.3d 173, cert. den., 549 U.S. 1079 (2006). In those cases, the court recognized that there is a cognizable privacy interest in the content of cell phone calls, but not in the records that the cell phone provider creates and maintains to track cell phone usage on the provider's own equipment for separate, legitimate business purposes, e.g. billing. *Delp*, 218 Or. App. at 23-25, 178 P.3d at 263-64. As in *Johnson* and *Magana*, the court concluded that AOL independently maintained the information for its own business purposes and therefore the defendant did not have a protected privacy interest in that information. 218 Or. App. at 25-27, 178 P.3d at 264-65.

Most recently, in *State v. Bellar*, 231 Or. App. 80, 217 P.3d 1094 (2009), *rev den*, 348 Or. 291, 231 P.3d 795 (2010), the Court of Appeals declined to consider the defendant's cross-appeal applying Article I, Section 9 of the Oregon Constitution to electronically stored information. The majority declined to consider defendant's assignments of error because the state had withdrawn its appeal of the court's order granting in part defendant's motion to suppress. *Id.* at 82, 84, and 90. In dissent, Judge Sercombe argued that the court should have decided defendant's cross-appeal and that the defendant had a protected privacy interest under Article I, section 9, in the data stored on the hard drive of his personal computer and in the files that were copied and stored on a medium owned by someone else. *Id.* at 90-114. Consequently, Judge Sercombe stated he would hold that the trial court erred in denying defendant's motion to suppress the information obtained as a result of the warrantless viewing of the files that had been on the defendant's computer and then transferred to a CD. *Id.* at 114.

Comparing a recent case, *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. S. Ct. 2010) to an earlier case, *Scott v. Beth Israel Medical Center*, 847 N.Y.S.2d 436 (2007), exposes arguments about employer policies that Justice Scalia drew attention to in *Quon*. In *Stengart*, a former employee sued her employer for violating state laws against discrimination. Her

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employer extracted e-mail messages that Stengart had exchanged with her attorney using her personal, password-protected, web-based e-mail account from her work computer's cache file. The defense used information from those e-mails during discovery. Stengart's lawyer demanded that the defense return all copies of the e-mail messages on the grounds of attorney-client privilege.

The trial court ruled, after reviewing the company's written policy on electronic communications, that Stengart waived the attorney-client privilege by sending e-mails on a company computer. The appellate court reversed, and the New Jersey Supreme Court affirmed as modified. The New Jersey Supreme Court held, "under the circumstances, Stengart could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them. By reading e-mails that were at least arguably privileged and failing to notify Stengart promptly about them, Loving Care's counsel breached RPC 4.4(b)." *Id.* at 655.

The court relied upon the adequacy of the notice provided by the employer's policy and important public policy concerns raised by the attorney-client privilege. *Id.* at 659. The employer's policy did not refer to personal, web-based e-mail accounts at all or warn that contents of such e-mails are stored on an employer's hard drive and can be retrieved forensically. *Id.* The policy stated that e-mails are not private, but also acknowledged that occasional personal use of e-mail is permitted. *Id.* Thus, the policy was ambiguous about whether personal e-mail use is company or private property. *Id.*

In addition, the court stated, "employers have no need or basis to read the specific contents of personal, privileged, attorney-client communications in order to enforce corporate policy." *Id.* at 665. Invoking "important public policy concerns," the court concluded, "even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system—would not be enforceable." *Id.*

In *Scott v. Beth Israel Medical Center*, a physician moved for a protective order requiring the hospital to return all e-mail correspondence between the physician and his attorney, which the hospital had because it was stored on the hospital's e-mail system. The hospital's e-mail policy stated that the hospital's computer system should be used for business purposes only, that employees had no personal privacy right in any material created, received, saved or sent using the hospital's system, and that the hospital reserved the right to access and disclose material stored on the system at any time without prior notice. As a result, the hospital argued, the physician's communications were never protected by the attorney-client privilege because the physician could not have communicated in confidence and the physician waived the privilege by using the hospital's system. The court stated, "the effect of an employer e-mail policy, such as [the hospital's], is to have the employer looking over your shoulder each time you send an e-mail," and ruled that the physician's communications were not confidential because of the policy. 847 N.Y.S.2d at 938.

The different outcomes in *Stengart* and *Scott* demonstrate that the decisions about privacy expectations are fact-specific. Consequently, it is hard to gauge when an employer's policy provides adequate grounds for discovering personal information.

Finally, a recent case, *Crispin v. Christian Audigier, Inc.*, 2010 WL 2293238 (C.D. Cal.), attempts to establish what are reasonable privacy expectations in content posted using social networks. Crispin moved to quash subpoenas sent to Media Temple, Facebook, and MySpace whereas the social network sites did not move to quash. Crispin relied upon the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 et seq. Defendants argued that Crispin did not have standing to move to quash. The court concluded that "an individual has a personal right to information in his or her profile and inbox on a social networking site and his or her webmail inbox in the same way that an individual has a personal right in employment and bank records." *Id.* at *2. Thus, Crispin had standing to move to quash the subpoenas to the social networking sites.

Defendants also argued that the SCA permits the service of subpoenas. Although the court identified cases that applied the SCA to pagers storing text

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messages, web-based e-mail providers, cell phone service providers, and electronic bulletin board services, the court could not find a case addressing whether the SCA applies to social networking sites. Relying somewhat upon the analysis used in those other cases, the court concluded that the SCA applies to social networking sites. *Id.* at *8-15. The court distinguished however between messages posted for public viewing, such as on Facebook's wall, and private messages or messages protected by turning on the social network's privacy settings.

The court reversed the trial court and granted the motion to quash as to private messaging on the social network sites, but concluded that the evidentiary record as to Facebook wall postings and MySpace comments was insufficient to determine whether the subpoenas should be quashed. *Id.* at *16. The court remanded so that the trial court could direct the parties to develop a better record about plaintiff's privacy settings and the extent of access allowed to his Facebook wall and MySpace comments. *Id.*

A trial court in New York, however, reached a different outcome in *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (2010). There, the defendant sought discovery of all information on the plaintiff's Facebook and MySpace accounts contradicting her claim that she had suffered permanent injuries. The public portions of her MySpace and Facebook pages showed her engaging in an active lifestyle and travelling out of state. The plaintiff refused to answer questions regarding her MySpace and Facebook accounts during her deposition. Based upon the publicly available information on those sites, the judge concluded there was "a reasonable likelihood that the private portions of her sites may contain further information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense." *Id.* at 654. In addition, the court concluded she had no reasonable expectation of privacy in Internet postings or e-mails based upon *U.S. v. Lifshitz*, 369 F.3d 173 (2nd Cir 2004) and upon warnings by MySpace and Facebook. *Id.* at 656. Consequently, the judge ordered the plaintiff to provide consent and authorization, required by the operators of Facebook and MySpace, allowing the defendant access to her records, including deleted and archived records. *Id.* at 657. There is also federal precedent for compelling an account holder's consent. *See, e.g., Federal Trade Commission v. Ameridebt, Inc.*, 2006 WL 618563 (N.D. Cal. Mar. 13, 2006).

The lesson learned from *Crispin* and *Romano* is to get the plaintiff's or third party's written consent to obtain records from a social networking site.

How Do You Get Social Media For Your Case?

There are several ways to discover social media:

(1) Searching social media sites – this approach may or may not be successful depending upon privacy settings and may violate Oregon's Rule of Professional Conduct 4.2 prohibiting contact with a represented party;

(2) Searching the relevant hard drives and cell phones – keep in mind that deleted e-mails can remain on the hard drive, e-mail server, or Internet service provider's server and deleted text messages still may exist on the cell phone and telecomm company's server. Decide whether deleted data is important based upon the nature of the claims and defenses in the case and the particular user's significance to the case.

(3) Document requests;

(4) Subpoenas to the individual, company, Internet service provider, and cell phone service provider. You will need the individuals' consent because most providers are concerned about violating the Stored Communications Act, 18 U.S.C. § 2701 et seq., which protects users' privacy rights. A list of mailing addresses for the service of subpoenas upon Internet service providers is available at http://www.search.org/programs/hightech/isp/. The policy governing responses to subpoenas is usually available on the provider's Web site, such as http://www.facebook.com/help/?safety=law, http://legal.web.aol.com/aol/aolpol/civilsubpoena.html and http://info.yahoo.com/privacy/us/yahoo/details.html.

(5) Subpoenaing the individual's online friends;

(6) Commercially available tools on marketing and branding, such as Radian6 and Scout Labs, and iPhone applications like BeenVerified; and

(7) Impersonating someone else

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to get online or in a chat – This approach would likely violate a lawyer's ethical duty not to engage in deceit or deception. *See Oregon's Rule of Professional Conduct 8.4(3); In re Ositis*, 333 Or 366, 40 P3d 500 (2002) (lawyer disciplined for directing another person's deception); *In re Gatti*, 330 Or 517, 8 P3d 966 (2000). *See also, U.S. v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009), where a cyber bully mom was convicted of a misdemeanor for impersonating a teenage boy on MySpace in violation of MySpace's terms of service, which contributed to girl's suicide. Jury found Drew guilty of violating the Computer Fraud and Abuse Act. The judge overturned the conviction on the grounds that the Act is too vague and provides too little guidance to support a misdemeanor crime based on violation of web service terms.

What Should the Scope of Requests or Subpoena Be?

The requests for social media should be tailored to the claims and defenses in the case. Common objections are overbroad, unduly burdensome, oppressive, and an unreasonable invasion of privacy. *EEOC v. Simply Storage Management*, 270 F.R.D. 430 (S.D. Ind. 2010) and *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004) shed light on what the proper scope is.

In the *EEOC* case, two plaintiffs alleged that they suffered severe emotional distress from sexual harassment. Defendant sought production of plaintiffs' social networking site ("SNS") profiles from Facebook and MySpace. Defendants asked for:

> Request No. 1: All photographs or videos posted by [plaintiff] or anyone on her behalf on Facebook or MySpace from April 23, 2007 to the present.
>
> Request No. 2: Electronic copies of [plaintiff's] complete profile on Facebook and MySpace (including all updates, changes, or modifications to [plaintiff's] profile) and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications (including, but not limited to, "How well do you know me" and the "Naughty Application") for the period from April 23, 2007 to the present. To the extent electronic copies are not available, please provide the documents in hard copy form.

The requests for social media should be tailored to the claims and defenses in the case.

The EEOC objected to production of all SNS content as overbroad, not relevant, unduly burdensome because the requests improperly infringed upon plaintiffs' privacy, and would embarrass and harass plaintiffs. The EEOC did not argue that Facebook and MySpace profiles contain no relevant information. Instead, the EEOC argued that production should be limited to content that directly addresses or comments on matters alleged in the complaint.

First, the court concluded that "a person's expectation and intent that her communications maintained as private is not a legitimate basis for shielding those communications from discovery." 270 F.R.D. at 434. The court relied upon *Leduc v. Roman*, 2009 CanLII 6838 (ON S.C.) and *Murphy v. Perger*, 2007 WL 5354848 (ON S.C.), which "held that a requesting party is not entitled to access all non-relevant material on a site, but that merely locking a profile from public access does not prevent discovery either." 270 F.R.D. at 434. A protective order can resolve privacy concerns about relevant material. *Id.*

The court stated that the plaintiffs put their emotional health "at issue beyond that typically encountered with 'garden variety emotional distress claims.'" *Id.* at 433, 437. But, the court also acknowledged that the subject of emotional and mental health is somewhat amorphous. *Id.* at 434.

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The court concluded that limiting production to "communications that directly reference the matters alleged in the complaint is too restrictive. * * * It might not, for example, yield information inconsistent with the claimants' allegations of injury or about other potential causes of injury." *Id.* at 435.

On the other hand, the court explained, merely having "social communications is not necessarily probative of the particular mental and emotional health matters at issue in the case." *Id.* Relying upon *Rozell v. Ross-Holst*, 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006), the court stated, "it must be the substance of the communication that determines the relevance." *Id.* The court also relied upon *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, 2007 WL 119149 (D. Nev. 2007), where the court allowed discovery of private messages exchanged with third parties regarding the plaintiff's sexual harassment allegations or her alleged emotional distress, but not sexually explicit communications between the plaintiff and third persons that did not relate to her employment. *Id.*

The court then held that "the appropriate scope of relevance is any profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SNS applications for [plaintiffs] for the period from April 23, 2007 through the present that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling or mental state." *Id.*

The... case shows the danger clients and lawyers may encounter if they issue overly broad subpoenas to providers.

at 436. The court also held that third party communications to plaintiffs had to be produced as well if they put plaintiffs' communications into context. *Id.* Finally, the court held that the same test applies to photos: the context of the picture and the plaintiff's appearance may reveal the plaintiff's emotional or mental status. *Id.* In contrast, pictures posted on a third party's profile in which the plaintiff is "tagged" are less likely to be relevant. *Id.*

The *Theofel v. Farey-Jones* case shows the danger clients and lawyers may encounter if they issue overly broad subpoenas to providers. The plaintiffs were officers of Integrated Capital Associates, Inc. Defendant Farey-Jones sought access to ICA's e-mail and told its lawyer to subpoena ICA's Internet service provider, NetGate. The lawyer sent a subpoena for "all copies of e-mails sent to or received by anyone" at ICA, with no time or subject matter limitation, even though FRCP 45(c)(1) requires that the requesting party "take reasonable steps to avoid imposing undue burden or expense" on NetGate. NetGate told defendant's lawyer that the amount of e-mail covered was substantial, but defendant did not offer any compromise. Netgate then posted a sample of the responsive e-mails to a website for defendant's review, where without notifying opposing counsel, defendant and defense counsel reviewed them. When the plaintiffs found out, they moved to quash the subpoena and for sanctions. The magistrate judge granted the motion, calling the subpoena "patently unlawful," and imposed $9,000 in sanctions. Farey-Jones and defense counsel did not appeal that award.

Plaintiffs and other ICA employees whose e-mail was included in the sample then sued Farey-Jones and defense counsel for violating the Stored Communications Act, 18 U.S.C. § 2701 et seq., the Wiretap Act, 18 U.S.C. § 2511 et seq., and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 and various state laws. The district court dismissed the federal claims without leave to amend. On appeal, the Ninth Circuit reversed as to the Computer Fraud and Abuse Act and Stored Communications Act claims.

The Computer Fraud and Abuse Act provides for legal action against anyone who "accesses a computer without authorization or exceeds authorized access and thereby obtains… information from any protected computer if the conduct involved an interstate or foreign communication." 18 U.S.C. § 1030 (a)(2)(C), (g). The district court ruled that NetGate had the right to challenge the subpoena,

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but did not, and therefore NetGate consented to it. The Ninth Circuit held that NetGate's "consent" was invalid because it was obtained through the false premise that defendants' subpoena was legally valid. The court stated, "The subpoena's falsity transformed the access from a bona fide state-sanctioned inspection into private snooping." 359 F.3d at 1073. Thus, plaintiffs had adequately alleged a claim under the Computer Fraud and Abuse Act.

The Stored Communications Act provides for legal action against anyone who "intentionally accesses without authorization a facility through which an electronic communication service is provided" and obtains access to a communication in electronic storage. 18 U.S.C. § 2701(a)(1), 2707(a). The Ninth Circuit held that there were alleged facts vitiating NetGate's authorization. 359 F.3d at 1073. It also held that e-mail messages are in electronic storage for purposes of the Stored Communications Act even after they are downloaded by recipients because the Internet service provider keeps messages in backup in part for the recipient's benefit. *Id.* at 1075. Thus, the Ninth Circuit reversed the district court's decision dismissing the plaintiff's claim under the Stored Communications Act as well.

Discovering the Identity of a Defendant Engaged in Anonymous Speech

Finally, getting evidence from on line can be difficult because it is easy to disguise a person's true identity, and the First Amendment protects the rights of individuals to speak anonymously. In addition, privacy laws can restrict a client's ability to respond to defamatory comments on blogs and consumer ratings sites. Furthermore, the Communications Decency Act, 47 U.S.C. 230, protects websites and providers from third party liability for merely posting user-generated content.

There is no Supreme Court or Ninth Circuit case yet explaining what a plaintiff must do to discover the identity of a defendant engaged in anonymous Internet speech. District courts and state courts have adopted a range of tests. Most courts adhere to the framework from *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super.Ct.App.Div. 2001). Relying upon *Dendrite Int'l, Inc.*, a plaintiff must (1) give notice to the defendant of the attempt to discover his or her identity and provide a reasonable opportunity to respond (usually accomplished by subpoenaing the Internet service provider), (2) identify the exact statements made by the posters, (3) establish a prima facie cause of action against the defendant based on the complaint and produce sufficient evidence supporting each element of the claim. *Id.* at 760-61. After the plaintiff makes a prima facie case, then the court has to balance the First Amendment right of anonymous free speech against the strength of the prima facie case and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed. *Id.*

Recently, the federal court in the Western District of Washington applied the *Dendrite Int'l, Inc.* test in *Salehoo Group, Ltd. v. ABC Company, et al*, 2010 WL 2773801 (W.D. Wash. 2010). In that case, an Internet marketing company sued an anonymous Internet domain name holder/website operator for trademark infringement, false designation of origin, unfair competition, and a state law defamation claim. The domain name holder moved to quash the subpoena and dismiss the amended complaint. The court granted the motion to quash and denied the motion to dismiss.

The takeaway from the cases and statutes in this article is that the law regarding discovery of electronic and on line evidence is evolving still and is often fact specific. Reported decisions in Oregon in this area are almost non-existent. Criminal law cases are more likely to be appealed and provide guidance. Consequently, civil law practitioners should look to cases in other jurisdictions and criminal law to guide them in this area. ❐

Aiding and Abetting Claims:

A Growing Trend

By Christie S. Totten
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Lying fairly dormant for decades, aiding and abetting claims have erupted in employment discrimination litigation, thanks in large part to a 2008 expansion of remedies and changing case law. The rising popularity presents new opportunities for plaintiff's attorneys, challenges for defense counsel, and a heavier docket for Oregon state courts, as plaintiffs are avoiding removal by naming an individual employee as an abetting party and thus destroying diversity. With little appellate guidance, litigators are citing heavily to analogous decisions in tort law and in other jurisdictions—and as these employment cases wind their way through the courts, they will likely affect the existing analysis in tort law and other contexts.

Common Law Aiding and Abetting Claims

Aiding and abetting liability is a familiar concept in civil cases. For well over a century, Oregon courts have recognized that an individual can be held liable for encouraging or aiding another's commission of a tort.[1] In 1999, Oregon courts formally adopted the Restatement (Second) of Torts § 876 formulation, which provides three ways to hold a second actor liable for assisting a wrongful act:

(a) does a tortious act in concert with the other or pursuant to a common design with him, or
(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[2]

Some distinctions may be drawn between the joint liability described in *Granewich* and the statutory liability under ORS 659A.030(1)(g), but both theories hold individuals liable for aiding or assisting others' conduct. This theory has been asserted in a variety of tort contexts—assisting another in breaching a fiduciary duty[3] and aiding another in conversion[4] for example—and also exists by virtue of several state statutes.[5]

The Employment Discrimination Statute – ORS 659A.030(1)(g)

Together with the general prohibition against discrimination by employers because of a protected characteristic, such as race, sex, religion or age,[6] ORS 659A.030(1)(g) further makes it unlawful "[f]or any person, whether an employer or employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so."

Christie S. Totten

Prior to 2008, remedies for statutory violations involving most discrimination claims against employers were limited to injunctive relief or equitable remedies, such as reinstatement or backpay.[7] Compensatory and punitive damages were generally not available.[8]

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Aiding and Abetting Claims

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Even where a co-employee could theoretically be held liable on an aiding and abetting theory, courts dismissed such defendants from lawsuits because the relief plaintiff sought could not be recovered against the individual defendant.[9] And even if the plaintiff avoided that hurdle by seeking injunctive relief against a co-worker, the monetary incentive for bringing the claim was lacking. Plaintiffs therefore brought discrimination claims based on federal statutes seeking fuller remedies against employers and those claims were litigated most often in federal court.

The 2008 Engine Driving the Growing Trend

Successful state law discrimination claims brought on or after January 1, 2008 now provide the full panoply of remedies because of statutory amendments. ORS 659A.885 now lists remedies more robust than what exists under federal law for discrimination claims. The result is plaintiffs now have a viable option of pursuing only state law claims in order to remain in state court, unless there is diversity. To avoid defendants removing cases to federal court, plaintiffs began adding aiding and abetting claims as a way to destroy diversity and remain in state court.[10]

As a result, trial courts are now grappling with more statutory aiding and abetting claims[11] and with the defense bar's associated motions to dismiss claims based on sometimes tenuous allegations regarding the employee defendant's requisite involvement in the alleged discrimination. The focus has now shifted to what conduct constitutes actionable aiding and abetting.

The Next Wave

With no recent appellate decisions on ORS 659A.030(1)(g), it remains unclear what framework will shape the aiding and abetting analysis. The dictionary definitions of the statutory terms to "aid, abet, incite, compel, or coerce" are a natural starting point. Litigators also urge turning to the same Restatement formulation adopted for tort cases,[12] which formula requires some level of knowledge, and has been adopted in other jurisdictions for analyzing employment discrimination statutes.[13] The Comments to the Restatement explain that "acting in concert" under subsection (a) requires "acting in accordance with an agreement to cooperate," which agreement may be implied.[14] Under subsections (b) and (c), "substantial assistance" is a fact specific inquiry, which does not include assistance "so slight that he is not liable for the act of the other" and does not include tortious acts not foreseeable to the encourager.[15]

Whatever framework the courts eventually adopt will impact what type of conduct is actionable. In December 2010, a district court granted summary judgment for four individuals alleged to have aided and abetted the employer in discriminating against him based on his disability and in depriving him of rights under the Oregon Family Leave Act.[16] Allegations that individual defendants had taken actions including advising plaintiff to seek disability payments even though plaintiff did not consider himself disabled and expected to return to work; informing plaintiff that his job duties had changed following his medical leave; and approving a county budget that eliminated plaintiff's position, were not sufficient.[17] Future decisions may more fully spell out the parameters of actionable conduct. For example:

- When a discrimination claim against the employer fails, then the aiding and abetting claim must be simultaneously defeated.[18] However, where the employer is adjudged liable, what causation standard will be used to determine liability by an aider and abettor who urged the employer to take a discriminatory action?
- What level of knowledge or intent must be shown?[19]
- Who is "any person" liable under ORS 659A.030(1)(g)? Does "any person, whether an employer or an employee," mean that the aider and abettor must be either an employer or employee, or are those merely examples of potential defendants?[20]
- Is the decisionmaker or an "active participant in the alleged wrongful" act liable for aiding and abetting? These claims appear attractive because of facts supporting the individual's involvement, but the argument is circular if the aider and abettor is the same person as the alleged main discriminatory actor.[21]

This developing law also presents strategic decisions for plaintiff and defense attorneys. Defense counsel must weigh the burden of having an additional defendant and claim in the case (which burden will vary by case) and are often incentivized to move

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to dismiss for failure to state a claim when an individual employee is named as an aider and abettor, where plaintiff may have avoided an attack on the pleadings absent the claim. Careful plaintiff's attorneys will consider whether naming an individual as an aider and abettor in a state court case will survive a motion to dismiss and, if so, whether litigating that issue will eat up potential settlement dollars; if the claim will serve as a distraction; and if the claim provides additional leverage, funds for settlement or judgment, or other benefits. Similar considerations exist outside the employment context, although the answers may be different—it may be more likely, for example, that a joint tortfeasor adds settlement dollars where two individual defendants are named, versus where a corporate employer and an individual employee are named defendants.

Conclusion

Aiding and abetting claims are increasingly used litigation tools and show no signs of slowing down. With court dockets containing a healthy supply of employment discrimination cases, employment decisions coming down in the coming years should contain analysis providing guidance for litigators in all areas.

Endnotes

[1] *See Perkins v. McCullough*, 36 Or 146, 59 P 182 (1899); *Stull v. Porter*, 100 Or 514, 196 P 1116 (1921).
[2] *Granewich v. Harding*, 329 Or 47, 53-55, 985 P2d 788 (1999).
[3] *Granewich*, 329 Or at 59; *see also Reynolds v. Schrock*, 341 Or 338, 344-45, 142 P3d 1062 (2006). In the

fiduciary duty context, it may be easier to avoid liability under subsection (c) of the Restatement, because an aider and abettor may well lack a fiduciary duty to the plaintiff. *See Reynolds*, 341 Or at 345-46.
[4] *Perkins*, 36 Or at 149 (recognizing liability for those "who aid, command, advise, or countenance the commission of a tort by another…").
[5] *See e.g.* ORS 659A.406 (making it unlawful for "any person to aid or abet any place of public accommodation" from discriminating against others); ORS 59.995 (securities regulation of mortgage bankers and brokers); ORS 86A.992 (mortgage lending); ORS 677.190 (unlicensed practice of medicine); ORS 709.280 (regulation of trust companies).
[6] *See* ORS 659A.030(1)(a).
[7] *See Logan v. West Coast Benson Hotel*, 981 F Supp 1301, 1318 (D Or 1997).
[8] *Id.* at 1318 (citing then-remedial statute ORS 659.121(1)).
[9] *See Hardwick v. Curtis Trailers, Inc.*, 896 F Supp 1037, 1039 n. 3 (D Or 1995) (noting that "[t]his court has repeatedly dismissed claims brought against co-employees pursuant to ORS 659.030(g), where the remedy sought is equitable relief and not injunctive relief"); *Logan v. West Coast Benson Hotel*, 981 F Supp 1301, 1318-19 (1997) (holding that even if individual liability existed, plaintiffs were not seeking injunctive or equitable relief available from the individual defendant and therefore had no viable remedy against the defendant).
[10] Aiding and abetting liability is unavailable under the federal employment discrimination statutes. *See Hale v. Hawaii Publications, Inc.*, 468 F Supp 2d 1210, 1228-29 (D Hawaii 2006 (explaining that state law can hold aiders and abettors liable but that Title VII lacks that provision under federal law).
[11] *See Schram v. Albertson's, Inc.*, 146 Or App 415, 422, 934 P2d 483 (1997); *Demont v. Starbucks Corp.*, 2010 WL 5173304, *3 (D Or 2010) (noting that the law now "plainly permits" such an action); *but see Chambers v. United Rentals, Inc.*, 2010 WL 2730944, *1-2 (D Or July 7, 2010) (rejecting defendant's argument that no individual liability attaches under ORS 659A.030(1)(g) but also noting that Oregon law is not "settled" as to supervisor liability under the statute).
[12] *See e.g. Duke v. F.M.K. Const. Services, Inc.*, 739 F Supp 2d 1296, 1305 (D Or 2010) (noting plaintiff's argument under ORS 659A.030(1)(g) "that defendants acted in concert with one another and gave substantial assistance to one another for purposes of firing" plaintiff).

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[13] *See e.g. Failla v. City of Passaic*, 146 F3d 149, 157-58 (3d Cir. 1998) (rejecting the shared intent requirement of criminal law under the New Jersey state statute for civil aiding and abetting discrimination liability, but requiring that defendant *knowingly* give assistance or encouragement).

[14] Restatement (Second) Torts § 876, Comment on Clause (a). Note that committing a tortious act in concert makes each actor liable for the other's acts, which presents an interesting complication in employment cases, given the agency relationship existing between an employer and its employee alleged to have aided and abetted the wrongful conduct. *See id.*

[15] *Id.*, Comment on Clause (b); *see also Stahly v. Salomon Smith Barney, Inc.*, 319 Fed. Appx. 654, *2 (9th Cir. 2009) (not reported) (affirming summary judgment for defendant because a failure to disclose information did not rise to the level of "substantial assistance or encouragement" to violate fiduciary duties, which instead required some affirmative conduct).

[16] *Wellington v. Lane County*, 2010 WL 5129707, *8-9 (D Or Dec. 10, 2010). Interestingly, plaintiff appeared to argue that the County employer was liable for the aiding and abetting acts of its agents. *Id.* at *8.

[17] *Id.* at *1-2.

[18] *See Grosz v. Farmers Ins. Exchange*, 2010 WL 5812667, *9 (D Or 2010); *Young v. Yellow Book Sales and Distrib. Co., Inc.*, 2008 WL 2889398, *6 (D. Or. July 21, 2008) (not reported).

[19] For example, the Court of Appeals has interpreted "in concert" in tort cases to mean "the performance of an action that is 'mutually contrived or planned,' 'agreed on,' 'performed in unison,' or 'done together.'" *Slagle v. Hubbard*, 176 Or App 1, 29 P3d 1195, 1197 (2001) (holding that alleging that two actors agreed to race at high speeds properly pleads a claim for acting in concert or pursuant to a common design); *see also Failla v. City of Passaic*, 146 F3d 149, 159 (3d Cir. 1998) (analyzing employment discrimination liability under the Restatement standard and concluding that an employee's mere role, knowledge, or involvement is insufficient for aiding and abetting liability "lest a reverse respondeat superior liability could be created under the guise of aiding and abetting").

[20] *See e.g. Duke v. F.M.K. Const. Serv., Inc.*, 739 F Supp 2d 1296, 1305-06 (D Or 2010) (concluding that "any person" means plaintiff's employer or its employees, and not a separate entity that did not employ plaintiff).

[21] *See Reid v. Evergreen Aviation Ground Logistics*, 2009 WL 136019, *26 (D Or 2009) (granting summary judgment on an aiding and abetting discrimination claim because the individual defendant was an active participant in the alleged wrongful termination, and explaining that "aiding and abetting liability makes little sense" in that context); *see also Walthers v. Gossett*, 148 Or App 548, 553, 941 P2d 575 (1997) (reasoning that, under an "aiding and assisting" theory against a corporation for its employee's intentional tort of battery, "the corporation itself is not alleged to have committed the offense or harmful contact. Rather, it is only alleged to have engaged in acts that *facilitated* another's torts, with the intent or knowledge that tortious conduct would occur") (emphasis in original). ❐

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Hon. Stephen K. Bushong
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Claims and Defenses

Abraham v. T. Henry Construction, Inc., 350 Or 29 (2011)

The plaintiffs in *Abraham* hired the defendant contractor to build a house. After plaintiffs discovered extensive water damage, they sued for breach of contract and negligence, alleging that the damage was caused by defendants' faulty work and failure to comply with the Oregon Building Code. The trial court granted defendants' motion for summary judgment, holding that (1) the contract claim was barred by the statute of limitations, and (2) plaintiffs did not have a viable negligence claim "because plaintiffs did not have a 'special relationship' with defendants that implicated a standard of care independent of the contract." 350 Or at 33. The Court of Appeals agreed that the contract claim was time-barred, but concluded that the negligence claim was viable because "the building code provided a standard of care independent of the terms of the contract." *Id.* The Supreme Court affirmed, but on different grounds. The court concluded that "neither a special relationship nor a statutory standard of care, such as the building code, is necessary to bring a negligence claim" under these circumstances. *Id.* at 36. To state a viable negligence claim, it was sufficient to allege a "failure to exercise reasonable care to avoid foreseeable harm to plaintiffs' property" as long as the claim "is not foreclosed by [plaintiffs'] contract with defendants, because the terms of the contract do not purport to alter or eliminate defendants' liability for the property damage plaintiffs claim to have suffered." *Id.* The court explained that "a negligence claim for personal injury or property damage that would exist in the absence of a contract will continue to exist *unless* the parties define their respective obligations and remedies in the contract to limit or foreclose such a claim." *Id.* at 40 (emphasis in original).

Malan v. Tipton, 349 Or 638 (2011)

Judge Bushong

The plaintiff in *Malan* sought to foreclose a trust deed, alleging that the defendant defaulted on the underlying debt. Defendant contended that she was not in default because she had made a written offer under ORS 81.010 to pay the amount due. Under that statute, "when a debtor makes a written offer to pay a particular sum of money to a creditor and the creditor does not accept the offer, the offer is equivalent to the actual production of the money." 349 Or at 641. The trial court concluded that plaintiff was not entitled to foreclose because defendant had made a valid written offer of payment under ORS 81.010. The Court of Appeals reversed, holding that (1) a letter to plaintiff did not comply with the statute because it was "at best only a naked offer to pay, unaccompanied by any

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readiness or ability to pay" (*Id.* at 644 (quoting Court of Appeals' decision, 232 Or App at 469)); and (2) even if the letter complied with the statute, plaintiff's failure to respond meant that "defendant had a continuing duty to make timely payment and did not do so." *Id.* at 645. The Supreme Court reversed. The court first construed the statute, examining its text and context, concluding that, "[t]o constitute a valid offer of payment under ORS 81.010, a communication must contain a present offer of timely payment and cannot include any contradictory indication that the debtor is not ready and able to make that offer good." *Id.* at 647. The court explained that a debtor seeking the benefit of the statute "must prove, at trial that he or she had the funds necessary for payment at the time the offer of payment was made" but the statute did not require "that a debtor's offer to pay a particular sum include an express statement that the debtor has the funds necessary to do so." *Id.* at 649. In addition, the court concluded that, in enacting ORS 81.010, "the legislature intended to require a creditor who receives a valid offer of payment to accept that offer or have the offer deemed equivalent to actual payment." *Id.* at 652. The creditor's silence in this case did not constitute acceptance, so "under the terms and for the purposes of ORS 81.010, defendant's offer of payment was the equivalent of the actual production" of the sum offered on that date. *Id.* at 653.

***Snyder v. Espino-Brown,* 350 Or 141 (2011)**
***State Treasurer v. Marsh & McLennan Companies, Inc.,* 241 Or App 107 (2011)**
***Son v. Ashland Community Healthcare Services,* 239 Or App 495 (2010)**

In *Snyder*, the Supreme Court held that "the class of persons described in ORS 12.155(1) [to whom notice of the date the statute of limitations expires must be given to prevent tolling] includes each person who has a legal right to bring an action to recover damages for the injury to or destruction of the property for which an advance payment was made[.]" 350 Or at 143. In *Marsh & McLennan*, the Court of Appeals held that, to survive summary judgment on a securities fraud claim under ORS 59.137, plaintiff "had to present evidence that it had purchased Marsh stock in actual reliance of Marsh's violations of ORS 59.135." 241 Or App at 122-23. Based on that conclusion, the court found it unnecessary to address (1) "whether the plaintiff in a claim under ORS 59.137 needs to prove *scienter*"; and (2) whether the Oregon statutes violate the Commerce Clause "because they impose more onerous duties on securities issuers than the federal law or the laws of other states." *Id.* at 123, n. 9. In *Son*, the Court of Appeals held that "a valid defense of comparative fault in medical malpractice cases requires that the plaintiff's negligent conduct relate and contribute to the negligent treatment, because it is the negligent treatment that causes the injury that is at issue." 239 Or App at 509. As a result, "it is inappropriate to use the patient's negligence that led to the condition that required medical attention" as the basis for assessing comparative fault. *Id.* The court also concluded that "the conduct of a statutory beneficiary [under Oregon's wrongful death statute] that contributed to the medical condition for which a patient required treatment" cannot be the basis for a comparative fault defense. *Id.* at 513.

Procedure

***Cler v. Providence Health System-Oregon,* 349 Or 481 (2010)**

In *Cler*, a divided Supreme Court held that a trial court abused its discretion in allowing defense counsel in a medical malpractice case to explain to the jury during closing argument that defendant did not call a nurse expert to testify at trial—as defense counsel had promised during opening statements—because the expert had waited all day to testify and then left on vacation when plaintiff's case took longer than expected. Defendant contended that the explanation was proper even though not based on facts in the record because (1) "during closing argument, plaintiffs' counsel had commented on defendant's failure to call a nurse expert, asking the jury to draw the inference that defendant could not find a nurse expert who would have testified that the nurse who treated Mr. Cler had acted within the applicable standard of care"; and (2) that comment "was improper because plaintiffs' counsel was aware that the nurse expert had not testified because of scheduling issues." 349 Or at 488. Justice Durham, writing for the court, explained that, under those circumstances, defense counsel "may timely object, and if necessary, move to strike or request a curative jury instruction" or explain why the

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party did not call the nurse expert "[i]f evidence in the record provides an alternative explanation[.]" *Id.* at 489. But defendant "may not deprive the court of the opportunity to rule on the propriety of an opponent's statement by remaining silent during the opponent's closing argument, and then resorting to self-help by presenting argument based on facts not in evidence." *Id.* The court reversed and remanded for a new trial, concluding that "the trial court's failure to sustain plaintiffs' objections to defense counsel's comments substantially affected plaintiffs' rights." *Id.* at 493. Justice Linder (joined by Justices Balmer and Kistler) dissented. The dissent agreed with the majority that "the fact that one party engages in improper argument does not mean that the opposing party may do the same in response." *Id.* at 494 (Linder, J., dissenting). The dissent concluded, however, that plaintiffs were not entitled to a reversal and a new trial because "defendant's argument merely offset the improper inference that plaintiffs had invited the jury to make. The only 'prejudice' to plaintiffs was that they may have been deprived of the benefit of their own improper argument." *Id.*

Griffin v. Allis-Chalmers Corp. Product Liability Trust, 240 Or App 137 (2010)

The plaintiff in *Griffin*, a truck driver, alleged that he was exposed to asbestos at a U.S. Gypsum (USG) manufacturing facility. Defendant Union Carbide, a supplier of raw asbestos, moved for summary judgment, contending that (1) "plaintiff did not present evidence from which a reasonable juror could infer that asbestos fibers supplied by Union Carbide were present in the USG facility on any of the occasions when plaintiff was there"; and (2) "in any event, Union Carbide could not be liable for damage caused by its asbestos because it was raw material incorporated by USG into a finished product." 240 Or App at 140. The trial court granted the motion; the Court of Appeals reversed. The court explained that, "[t]o survive a motion for summary judgment in a products liability and negligence case involving asbestos, a plaintiff needs to establish the presence of the defendant's asbestos in the plaintiff's workplace; that fact is sufficient to create a jury question as to whether the presence of that asbestos played a role in the occurrence of the plaintiff's injuries." *Id.* at 142 (internal quotes omitted). The evidence here (testimony supplemented by an ORCP 47 E affidavit) was sufficient to support plaintiff's theory that "his work at Southgate [the USG facility] caused him to be exposed to the *raw asbestos fibers* that Union Carbide delivered to Southgate, which were respirable in the plant as a result of the manufacturing process that took place there." *Id.* at 144 (emphasis in original). The court also concluded that the "raw material supplier" doctrine did not shield Union Carbide from liability because "that doctrine does not extend to cases like this one, where the plaintiff alleges injurious exposure to a raw material and not to a finished product *containing* the raw material as a component part." *Id.* at 145 (emphasis in original).

Benson v. Harrell, 241 Or App 362 (2011)
Saldivar v. Roberts, 240 Or App 371 (2011)
Unifund CCR Partners v. Kelley, 240 Or App 23 (2010)

In *Benson*, one plaintiff moved to set aside a judgment awarding attorney fees to defendant, contending that "she had been mistakenly named as a plaintiff by Woodard, the attorney who filed the complaint, and…that she should never have been a plaintiff because she could not have obtained relief." 241 Or App at 365. The trial court granted relief; the Court of Appeals reversed, concluding that this "is simply not a 'mistake' for which the rule [ORCP 71 B(1)] provides a remedy." *Id.* at 369. In *Saldavar*, "defendant disregarded plaintiff's action because he was overwhelmed with the other issues in his life." 240 Or App at 374. The trial court granted defendant's motion to set aside a default judgment under ORCP 71 B(1) on the grounds of excusable neglect. The Court of Appeals reversed, concluding that "simply choosing to ignore a matter—even in the face of difficult circumstances—does not qualify as a reasonable explanation so as to give rise to excusable neglect." *Id.* at 377. In *Unifund*, defendant moved for relief from a default judgment under ORCP 71 B(1)(d), "arguing that, because she had not received notice of intent to seek a default, the judgment was void." 240 Or App at 25. The trial court granted the motion; the Court of Appeals affirmed. The court rejected plaintiff's argument that "the failure to comply with the notice

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requirements of ORCP 69 A(1) amounts to a mere procedural defect that results in a voidable judgment[,]" concluding instead that a "[f]ailure to comply with the notice requirement before obtaining a default judgment results in the judgment being void." *Id.* at 28.

***Taylor v. Portland Adventist Medical Center,* 242 Or App 92 (2011)**

The plaintiff in *Taylor* brought a medical malpractice action against Portland Adventist Medical Center, alleging that two physicians employed by the Medical Center negligently failed to diagnose and treat a patient's acute infection, resulting in her death. The physicians sought to intervene as defendants. The Court of Appeals held that "the physicians' indemnity obligations toward defendant are sufficient legal interests to qualify for permissive intervention under ORCP 33 C...[but] the trial court nevertheless properly exercised its discretion to deny intervention, because (1) the prejudice to plaintiff's interests that would result from the physicians' intervention is significant, whereas (2) denial of intervention would not unfairly prejudice the physicians, because (a) their intervention would not result in the final adjudication of claims between and among the physicians and the original parties and (b) even though defendant does not represent the physicians' interests in this action, defendant is highly motivated to vigorously defend against plaintiff's claims in order to avoid the entry of a judgment against it based on the physicians' alleged negligence." 242 Or App at 110-11.

Miscellaneous

***Hamlin v. Hampton Lumber Mills, Inc.,* 349 Or 526 (2011)**

The defendant employer in *Hamlin* refused to reinstate plaintiff in violation of ORS 659A.043 after plaintiff suffered a compensable injury. A jury awarded plaintiff lost wages of $6,000 and punitive damages of $175,000. The Court of Appeals held that the punitive damages award violated the Due Process Clause and reduced the award to four times the amount of the compensatory damages. A divided Supreme Court reversed and reinstated the punitive damages award. Justice Walters, writing for the court, concluded that the ratio between punitive and compensatory damages—22 to 1—"is higher than would be constitutionally permissible if the compensatory damages were more substantial, but is not so high that it makes the award 'grossly excessive.'" 349 Or at 543. And the amount of the punitive damages award was "not so high that we can say that it exceeds, rather than serves, this state's interests in deterring and punishing the violation of ORS 659A.043." *Id.* Justice Gillette, joined by Justice Balmer, dissented. The dissent explained its disagreement with the majority's analysis, and concluded with a plea to the US Supreme Court, stating that "it would be a responsible act of comity for the Court to say something clear to help in future cases." *Id.* at 552 (Gillette, J, dissenting).

***Karuk Tribe of California v. TriMet,* 241 Or App 537 (2011)**
***Deason v. TriMet,* 241 Or App 510 (2011)**
***Capital One Bank v. Fort,* 242 Or App 166 (2011)**

In *Karuk Tribe*, the Court of Appeals held that TriMet violated Article I, section 8 of the Oregon Constitution when it rejected a proposed display about salmon restoration efforts based on its policy to accept only certain types of commercial advertisements and public service announcements. The court, applying the analytical framework adopted in *State v. Robertson*, 293 Or 402 (1982), concluded that the advertising policy violated Article I, section 8, "to the extent that it classified speech on the basis of its content, notwithstanding that the policy regulated the use of government property." 241 Or App at 549. In *Deason*, the Court of Appeals held that the trial court properly instructed the jury that TriMet, as a common carrier, owes its passengers "the highest degree of care and skill practicable for it to exercise" but had "no duty to assist a passenger in alighting unless the circumstances demonstrate that such assistance is needed." 241 Or App at 515. In *Capital One Bank*, the Court of Appeals held that a defendant who prevailed in an action to collect on a credit card debt is entitled to recover his attorney fees under Oregon's reciprocal attorney fee statute (ORS 20.096) even though the credit card agreement specified that the agreement would be governed by Virginia law. The court concluded that "defendant's residence in Oregon at the time he entered into the cardholder agreement, the unequal bargaining power between the parties, and the initiation of the breach-of-contract action in an Oregon court establish that Oregon has a materially greater interest than Virginia" on this issue. 242 Or App at 174. ❐

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