Oregon State Bar

Litigation Journal

FALL 2012 VOLUME 31 NUMBER 3

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40 Years (Almost) in the Wrong Profession

By Gregory R. Mowe, Stoel Rives LLP

Greg Mowe

Denny Rawlinson appointed me an editor of the *Litigation Journal* more than 15 years ago. Since then, I have dutifully solicited articles from others, but, consistent with my goal of making it through a legal career without ever being found out, I have never submitted an article myself. Having temporarily run out of contributors and on the cusp of my last year of regular law practice, I am now submitting my first (and likely last) article. This article does not represent the views of any law firm or association of which I am a member. Neither, to my knowledge, does it represent the views of any law firm or association of which I am not a member.

Life is Hard—Litigation is Harder

"You don't want to lie, not to the young..."
—Leonard Cohen

By its nature, trial is a zero sum game. Stakes and emotions are high, an equally intelligent opponent is scheming against you, a judge may eviscerate your best legal theory mid-trial, and your fate ultimately rests in the hands of an unpredictable jury. I am not aware of any comparable profession, except perhaps boxing. Anticipation of trial is also an anxiety provoking experience. Most new lawyers experience symptoms of physical illness and have difficulty sleeping before and during trial. Unfortunately, for most of us these symptoms do not abate with experience. In my own case, I keep a notepad by my bed so that I can capture ideas overnight and attempt to decipher the gibberish the next morning. My rule of thumb is that every day in trial shortens my life by one day.

Litigation has never been an easy career. It is harder now than it was when I started practice in 1974. Apart from the inherent unpleasantness of the litigation experience, litigators are at career risk in the modern law firm. The days of seniority advancement are long gone. Specialization and client development drive career success. Litigators for the most part have sporadic client contact, usually under circumstances which the client would just as soon forget. Similarly, specialization is difficult in a small legal market, and most litigators in any event enjoy the intellectual challenge of a general practice. With the exception of the relatively rare alpha dog litigator (*see Best Lawyers*© … "Bet the Company"), a mid-career general litigator without clients is at risk.

Because my own career has been with a large law firm, I am not as familiar with the stresses of smaller firm and solo litigation practice. I am aware, however, that insurance companies drive hard bargains and that many plaintiff's lawyers I have known retire and buy sailboats after collecting a big verdict. I also suspect that representation of parties who have chosen to sue once carries the risk that they may choose to sue twice.

You may well ask, given the above comments, why I have spent a career in litigation. For that matter, you may wonder why you are spending a career

in litigation. The answer, of course, is that we are not well adjusted people. My usual advice to law students and young lawyers is to avoid a litigation career unless they are psychologically compelled to pursue one. I am not a psychologist, and cannot identify all the causes of the litigation personality disorder. I do know a few of the symptoms. If you took the LSAT because it was your last opportunity to excel in a general achievement test, you are a likely candidate. If you require external validation (parents, teachers, partners, spouse, etc.), you are a likely candidate. If you need the adrenaline rush of winning or losing, you are a candidate. If you are mid-career, you likely have forgotten most of your wins, but remember each loss in vivid detail.

Many successful litigators I have known come from small towns or otherwise modest backgrounds. I do not know what drives this correlation. In my own case, I grew up as a son of a logger in a small town in Grays Harbor County, Washington. My initial vocational ambition was to work indoors when I grew up. I was fortunate to reach college age when our country was investing in public education and merit advancement, and my parents encouraged their children to succeed, even though it meant they would never have grandchildren living within a hundred miles of their home. Still, a challenge with growing up in an environment with few role models and no defined expectations is that it becomes difficult later in life to recognize success. You always wonder whether you have overachieved or underachieved. The angle of repose is elusive.

Notwithstanding, Litigation is the Highest Calling in the Law

"What God abandoned, these defended, and saved the sum of things for pay."

—A.E. Housman

Although my comments above are not entirely tongue in cheek, I am proud of the profession I have chosen and expect that you are as well. We share the tacit truth that litigators, and particularly trial lawyers, are the only real lawyers. (Just like M.D.s are the only real doctors.) We honor and sustain the tradition of trial by combat. Our business partners and associates may be part of the same economic enterprise, just as ushers and managers were part of the same enterprise as gladiators, but they are not our equals. At our best we are warriors who willingly interject ourselves into human conflict and achieve justice. This comes at a cost. But the intensity of focus (often fueled by caffeine and too often relieved by alcohol) is unequaled short of a military combat zone. And few times of life rival that singular moment of truth when a jury verdict is announced in open court after a well-fought trial.

In addition to heightened level of experience, there is inherent beauty in litigation. My recently deceased partner, George Fraser, used to say that every case can be won; it is the job of the litigator to figure out how. This "figuring out" part is to me one of the most satisfying aspects of the profession. Successful analysis and case preparation is high art. It results in a trial which flows. The trial lawyer becomes a trustworthy emcee, and the evidence mounts to an inevitable conclusion. Craft is demonstrated on a smaller scale in every deposition and evidentiary motion.

The unpleasantness of trial work is greatly tempered in Oregon by the quality and civility of judges and fellow litigators. Sanctions motions are seldom filed, and even more seldom granted. Courtesies are extended, and promises are kept. This is not the case in all jurisdictions in which I have practiced. In my experience, Oregon trial judges, with few exceptions, have been hardworking, productive (notwithstanding ever diminishing resources), and sensitive to the needs of lawyers and litigants. Bad conduct and sharp practice are not rewarded. Similarly, Oregon litigators generally adhere to the Golden Rule, which eases the burden on all of us.

How Does One Become a Successful Litigator?

"Unfold your own myth."
—Rumi

Litigation is not a "one size fits all" career. While a majority of litigators are extroverted with healthy egos, there is room in the profession for those who run counter to type. I was fortunate in my early career to try cases with Barnes Ellis and Phil Chadsey, two extraordinarily gifted and successful litigators. I learned much from each of them. I discovered, however, that I was unsuccessful in attempting to replicate either of them on my own, undoubtedly due to the fact that they were better lawyers, but also due to the fact that I could not be genuine in a style which did not encompass my own personality. By nature, I am cautious and tend to worry about what can go wrong. I am not credible when I act otherwise. Most clients, of course, do not want to hear what can go wrong, but rather the multiple ways in which they can win. Slowly, through trial and error (and some spectacular client relations failures), I came to recognize that there are some clients and some cases which I am not well suited to handle. I also learned to tell clients what I am good at and what I am not good at, and often recommend that they interview other lawyers who can better satisfy their needs. Ironically, this has often led to clients choosing to retain me. (The Bernie Madoff effect.)

The point I am driving at is not that any young litigator should emulate my style or approach, but rather that each must find a way of practicing law consistent with his or her own personality and deep values. This is not only necessary for your own mental health, but also to develop genuine connections with your clients and to succeed as a jury lawyer. Jurors do not always get everything right. They are, however, very good at detecting what was false. Falsity may lie in

the testimony of witnesses. It may also be found in the demeanor of trial lawyers. You must be in your own skin when you try a case.

A corollary to the above admonition is that, once you have discovered the style of litigation that best fits your personality, you must be consistent in that style. I have great respect for lawyers who ask for and give no quarter. I do, however, expect to be fairly warned. Conversely, I have great trouble dealing with lawyers who casually suggest during a deposition that my client and I have engaged in some deceptive practice, and then ask how the wife and family are once we are off the record. I am not able to compartmentalize my life that finely. In short, think of the law as duplicate bridge. Declare your conventions and then play by them.

It has been a privilege to serve as an editor of the *Litigation Journal* and a greater privilege to work with Denny Rawlinson, Robert Neuberger, Marie Eckert and others over the years on the program for the annual Litigation Seminar and Retreat. I have highest respect for those who have chosen this honorable and difficult profession. I wish you all well.

Comments from the Editor

"CREDIBILITY"

By Dennis P. Rawlinson, Miller Nash LLP

Dennis Rawlinson

Most jurors are suspicious and skeptical of lawyers.

After all, they expect us to be advocates for our clients. Most assume that we are smart enough to fool them. They expect us to want to prevail. They figure that we want to buy some more expensive jewelry or another sports car.

In the end, what they really want to know is whether we're the kind of people who want to win so badly that we will lie to them or will hide the truth.

With this background of skepticism and suspicion, we have the challenge of establishing our credibility. Set forth below are a few suggestions for becoming more credible.

1. Be Interested, Not Interesting.

Almost everyone likes someone who is interested in them. If you and your spouse go out to dinner with a new couple and spend the evening asking them questions about themselves, the new couple will go away thinking you are delightful. People like people who are interested in them.

As we know, the proper way to conduct voir dire is to let the jurors do the talking, not the lawyer. If we do it correctly and act interested in the jury's responses, they will like us, and our work toward establishing credibility will have begun.

2. Be Evenhanded.

At least initially when the jury expects us to overstate our case and our position, we should work hard on being evenhanded. For instance, when we are given an opportunity to make a mini opening statement during voir dire, we should strive to make it sound impartial. Such an approach will begin establishing an impression that we are attempting to be fair and helpful.

3. Be Polite.

During voir dire when one of the jurors tells us something that obviously hurts our case or our client, we should thank the juror for his comment and candor (even though we may be dying on the inside). Next we should ask whether any jurors on the panel have a contrary view (and pray that they do). After eliciting the contrary view, we should go back to the initial juror and ask him whether he could leave a little room to consider the contrary position.

Politeness, however, goes beyond communications during voir dire. It extends to being polite to the court staff and respectful to the judge, the parties, and the jurors.

Politeness also extends outside the courtroom. Credibility will be more readily established by a lawyer who holds an elevator, opens a door, or greets others with a smile than by a lawyer who honks his horn and shakes his fist when someone beats him to a parking space or curses under his breath when an elevator door closes before he can get on. Jurors listen to and watch us, particularly outside the courtroom.

4. Give Something Away.

We all know that during voir dire and opening statement, we need to disclose the problems we have with our case before our adversary discloses those problems in a way that is less flattering and makes us look as though we have been hiding the truth. Disclosing a problem with our position creates credibility. If we were truly one of those greedy advocates who would stop at nothing to win, why in the world would we be telling the jurors about weaknesses in our own case?

5. Conclusion.

We all want to be perceived as credible. Thankfully, for most of us it's simply a matter of acting as we would most of the time but perhaps being a bit more thoughtful about it.

Make no mistake: the suspicion and skepticism about our profession are real. Equally real, however, is the willingness of most jurors to be convinced that the suspicion and skepticism are not well founded.

The Oregon State Court Perpetuation Deposition: Opportunities for the Prepared and Pitfalls for the Unwary

By David B. Markowitz and Joseph L. Franco, Markowitz, Herbold, Glade & Mehlhaf, PC

Dave Markowitz

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Background.

Oregon Rule of Civil Procedure 39 I provides a mechanism by which the testimony of a witness who might be unavailable for trial may be "perpetuated" in advance for later use as trial testimony. ORCP 39 I. If the noticing party complies with the formalities of the statute and the other party does not object, then the deposition may be used as trial testimony whether or not the witness is ultimately unavailable for trial. ORCP 39 I(3). This is a significant departure from the general rule.

Generally, testimony adduced in a deposition may not be used at trial unless: 1) it is used for impeachment of a trial witness; 2) it is the admission of a party opponent; or 3) the witness is unavailable. ORS 45.250(1), (2)(a)-(c). A witness will be deemed "unavailable" if the requirements of ORS 45.250(2)(a)-(c) or OEC 804(1) are satisfied. *See Hansen v. Abrasive Eng'g and Mfg., Inc.,* 317 Or 378, 392, 856 P2d 625 (1993) (holding that if the requirements of ORS 45.250(c) are met, there is no need to separately satisfy OEC 804(1)(e)).

Hoping that a court will decide a witness is "unavailable" and therefore admit a deposition as trial testimony carries with it some degree of uncertainty. The court may find, for example, that there is insufficient evidence that a witness is too ill or infirm to testify, or that the proponent of the evidence has failed to show that a witness could not have been subpoenaed for trial. ORS 45.250(2)(b), (c); OEC 804(1)(d); *see also State v. Nielsen,* 316 Or 611, 618, 853 P2d 256 (1993) (witness "unavailability" under OEC 804 is a preliminary question of fact for the court to decide, and must be proved by the proponent of the testimony by a preponderance of the evidence).

The case of *Graham v. Brix Maritime Co.,* 160 Or App 1, 979 P2d 765 (1999), is a perfect example of how betting that a court will deem a witness unavailable can backfire. In *Graham,* the plaintiff, an injured deckhand, sued the company that owned and operated the ship upon which he was injured. *Id.* at 3. The plaintiff sought to introduce as substantive evidence the deposition testimony of one of the ship's captains, arguing that because the captain lived in the state of Washington and was at sea during a portion of the trial, the captain was "unavailable" within the meaning of ORS 45.250(2)(c). *Id.* at 3-4. The trial court excluded the testimony. The court of appeals upheld the trial court, finding that the plaintiff had not met his burden of proving that he could not procure attendance of the witness by subpoena. *Id.* The court reasoned that a witness's residence out of state does not make the witness *per se* unavailable, particularly when the witness was frequently in Oregon and attended his deposition in Oregon. *Id.* at 6.

The Rule 39 I deposition allows a litigant to avoid this uncertainty. The rule allows a party to know in advance whether it has cleared the "unavailability" hurdle. That said, 39 I depositions should be approached with caution and planning because, while unique aspects of the Rule create opportunities—usually for the proponent of the deposition—the flip side of those opportunities is risk for the other party. This article analyzes some of the unique aspects of Rule 39 I and discusses the often overlooked opportunities and pitfalls inherent to the Rule.

ORCP 39 I eliminates the need to prove unavailability AT TRIAL, and places upon the non-noticing party the burden to object TO PERPETUATION.

The first unique aspect of Rule 39 I is that it eliminates the need to prove unavailability at trial, and initially shifts the burden to the other party to object. After commencement of an action "any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice." ORCP 39 I(1). If prior to the time set for the deposition the opposing party does not file an objection, "the testimony taken shall be admissible at any subsequent trial or hearing…" *Id.* at I(3). Thus, if the non-noticing party fails to object, that party forever loses its right to require the noticing party to prove the witness is unavailable.

In addition to initially shifting the burden regarding unavailability, Rule 39 I also lowers the bar in the event of an objection. Whereas at trial the party offering a discovery deposition into evidence must prove to a preponderance that the witness *is* in fact unavailable, if a party objects to a 39 I deposition, the noticing party must only show that a witness *may* be unavailable or, in the alternative, that appearing for trial would be a hardship or that other good cause exists for perpetuation. ORCP 39 I(3). Thus, the Rule favors the ability of a litigant to perpetuate testimony and permits objections to be dealt with far in advance of trial, which allows parties to know where they stand *vis-à-vis* the subject evidence.

All objections must be made during the deposition.

The unique aspect of 39 I depositions that carries with it the most opportunity and risk—depending on your perspective—is the requirement that *all* objections be made during the deposition. "All objections to any testimony or evidence taken at the deposition shall be made at the time and noted upon the record." ORCP 39 I(6). Consequently, perpetuation depositions "follow the routine of a trial with objections to all matters being made at the time of the deposition, but reserving the ruling on the objection for the trial judge." *Grimm v. Ashmanskas,* 298 Or 206, 211-12, 690 P2d 1063 (1984) (discussing common law Oregon State court "perpetuation" deposition procedure for witnesses expected to be unavailable for trial, as that procedure existed prior to the promulgation of section "I" to ORCP 39 by the Council on Court Procedures in 1986).

Courts rigorously enforce the requirement that *all* objections be made during the 39 I deposition and that any objection not made will be waived. *Evers v. Roder,* 196 Or App 758, 760-61, 103 P3d 680 (2004) (holding that objection to admissibility of expert testimony under OEC 104 was waived when not made during 39 I deposition and objection could therefore not be raised at trial); *State ex rel. Oregon Health Sciences University v. Haas,* 325 Or 492, 511-12, 942 P2d 261 (1997) (holding that because OEC 511 postpones the effect of any waiver of privilege during a 39 I deposition until the testimony is offered at trial, objections on grounds of privilege must be made twice in order to be preserved—once during the 39 I deposition and again at trial).

The waiver of all objections not made during the 39 I deposition is a significant departure from the procedure in other depositions. The only objections that need to be made during the typical discovery deposition are objections to form and to other errors that "might be obviated, removed or cured" if an objection was promptly presented. ORCP 41 C(2). Ordinarily, objections to the "competency, relevancy or materiality of testimony are not waived" by failing to make them at the deposition. ORCP 41 C(1). Because the overwhelming majority of depositions are not 39 I depositions, practitioners sometimes assume that the usual rules apply during 39 I depositions and therefore miss crucial objections.

A further nuance is that parties must object not only to questioning and testimony, but to any other "evidence taken" at the 39 I deposition. ORCP 39 I(6). We believe this means that any objections one might make at trial to an exhibit such as lack of foundation, prejudice, relevance, or hearsay need to be made as to any offending exhibits or demonstratives offered during the deposition. The failure to object will be a waiver and the 39 I exhibits will be admitted at trial.

What is a pitfall for one party is an opportunity for the other, and the savvy practitioner should be prepared to maximize the opportunities presented by opposing counsel's failure to object. Of course, the questioning attorney should be prepared to ask unobjectionable questions and lay the foundation for key documents to be admitted during the deposition. But that does not mean that the witness should not also be asked to speculate, opine or even to testify as to hearsay. If no objection is made, none can be made at trial. Advantageous documents which may be difficult to admit at trial due to hearsay or foundational problems can also be shown to the witness. During the deposition the questioner should offer into evidence all exhibits that have been discussed by the witness. Again, if no objection is made at the deposition, none can be made at trial.

Questioning outside the noticed subject areas may be excluded upon objection.

Another difference between discovery and 39 I depositions is the need to include in the 39 I deposition notice a "brief description of the subject areas of testimony…" ORCP 39 I(2)(a). Based upon the plain language of the Rule, the noticing party should describe the subject areas of testimony with as much detail as necessary to provide fair notice to the other party and therefore avoid objections to scope. The other party should be vigilant in objecting to questions that are outside the noticed subject matter. Objections to scope will also be waived if not made during the deposition. ORCP 39 I(3).

What is less obvious is that the party receiving the 39 I notice may need to issue its own notice in response if there are important subject areas of inquiry beyond those presented in the initial notice. Since 39 I depositions "follow the routine of trial," they are "usually restricted to non-leading questions on direct examination and follow standard cross-examination techniques." *Grimm,* 298 Or 206 at 212. This means that the noticing party will be able to successfully object to cross-examination that is outside the scope of the direct examination — just as it could at trial. If the noticing party adheres to the subject areas of the deposition notice, then the other party will be confined to those areas unless the other party issued its own notice setting forth additional subject areas for questioning.

These pitfalls may be avoided if both parties carefully consider all of the potential subject areas of testimony and describe them in the 39 I notice.

The noticing party may be stuck with the perpetuated testimony even if the witness BECOMES available for trial.

Probably the greatest unwritten trap for the proponent of the 39 I deposition is the possibility that one may be stuck with the testimony *even if* the witness ultimately ends up being available for trial. The authors are aware of an instance in which the trial court refused to allow a witness to testify live at trial regarding subject

matter that was covered during a 39 I deposition of the same witness. Although nothing in the Rule expressly permits a trial court to exclude live testimony from a 39 I deponent, arguably such authority arises by implication because the perpetuated testimony is treated in all other ways as the witness's trial testimony. This creates the possibility that because a 39 I deposition was taken, live testimony from a witness who has, for example, recovered his or her health could be excluded. This risk might be mitigated by an advance agreement between counsel that no objection will be raised to live testimony if the witness is ultimately available for trial.

You should maximize your opportunities and avoid pitfalls by preparing for the deposition as you would for trial.

Given the opportunities and risks inherent to 39 I depositions, both parties should prepare for the deposition with the same rigor and attention as they would for trial. If the witness is a "friendly witness" to the noticing party, the witness should be prepared as though that witness were testifying under direct examination at trial. If the witness is potentially adverse to a party's case, then that party should insist upon a discovery deposition prior to the 39 I deposition. ORCP 39 I(5). The Rule allows for a prior discovery deposition as a matter of right, subject to the trial court's discretion to issue orders to protect witnesses from "annoyance, embarrassment, oppression or undue burden…." ORCP 36 C; *Martin v. DHL Express, Inc.*, 235 Or App 503, 509, 234 P3d 997 (2010) (trial court's refusal to allow a discovery deposition prior to 39 I deposition of a witness suffering from acute multiple sclerosis was within the trial court's discretion pursuant to ORCP 36 C).

For convenience's sake, counsel often conduct the discovery deposition immediately prior to the 39 I deposition. This can be a mistake because it often will not afford sufficient time for counsel to develop a quality cross-examination before the 39 I deposition takes place. Therefore, a party seeking a discovery deposition should attempt to schedule it so there is sufficient time to obtain the transcript, formulate a cross-examination strategy, and decide whether additional subject areas should be noticed for perpetuation.

Using Legislative History in Interpreting Statutes After *State v. Gaines*

By Blake Robinson, Davis Wright Tremaine LLP

Blake Robinson

As most litigators know, the Oregon Supreme Court's 2009 *State v. Gaines*[1] opinion altered Oregon's statutory interpretation framework by requiring courts to consider legislative history offered by a party. Not surprisingly, in the years since *Gaines*, Oregon's appellate courts have frequently analyzed legislative history when interpreting statutes. Because of that, it is increasingly important for attorneys to know what weight legislative history will be given, as well as what types of legislative history courts find persuasive. Those topics will be explored here by examining several recent appellate court decisions.

Statutory Interpretation—A Brief Primer

Before *Gaines*, courts followed a three-step process in interpreting a statute. First, the court considered the statute's text and context. If the statute's meaning was clear after step one, the court's analysis ended. But if the statute was ambiguous, the court moved to step two and examined legislative history. If the legislative history did not resolve the ambiguity, the court proceeded to the third and final step—application of general maxims of statutory interpretation.[2]

In *Gaines*, the Supreme Court essentially collapsed the first two steps of the process into a single step. The Supreme Court stated that consideration of text and context remained the first step in interpreting a statute, but even if a court found the text and context unambiguous, the court was required to consider any legislative history offered by a party.[3] However, the Supreme Court emphasized that "text and context remain primary, and must be given primary weight in the analysis."[4] Perhaps for that reason, the Supreme Court gave courts wide latitude in determining the "evaluative weight" that should be given to legislative history.[5]

Limits on the Use of Legislative History

While it is clear that legislative history plays a more significant role in interpreting statutes post-*Gaines*, there are limiting principles to keep in mind before spending hours listening to recordings of legislative debates from decades past.

1 *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).
2 *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993).
3 *Gaines*, 346 Or at 171-72.
4 *Id.* at 171.
5 *Id.* at 172.

First, as *Gaines* expressly stated, text and context still trump legislative history in importance. While text and context are "primary" in statutory interpretation, legislative history must only be considered "for whatever it is worth—and what it is worth is for the court to decide."[6] As then Judge Landau noted in an opinion issued shortly after *Gaines*, in some cases legislative history "is worth precisely nothing."[7]

Second (and closely related to the first point), "[w]hen the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different."[8] The Supreme Court addressed this issue squarely in the 2010 case *Patton v. Target Corp.*[9]

At issue in *Patton* was whether the state's consent was required before a plaintiff and defendant could settle a case after a verdict was rendered awarding the plaintiff punitive damages, but before judgment was entered.[10] (Under ORS 31.735, the state receives seventy percent of all punitive damages awards.) The Supreme Court noted that if the state's consent was not required, both the plaintiff and defendant had strong incentive to quickly enter into a settlement that did not include punitive damages.[11] The Supreme Court acknowledged that the legislative history offered by the state with respect to amendments to the relevant statutes "clearly" evidenced that the legislature was trying to resolve this problem.[12]

But the difficulty was that the "legislative history does not disclose *how* the legislature intended to solve that problem."[13] Because "there is an unbridged gap between what the legislature is said to have intended and what the words that the legislature chose to use actually do," the Supreme Court could not adopt the state's position.[14] The take home message was that unless the legislature translates its clear "intent into operational language," a court must disregard the legislative history because "the words to be imported into the statute are not, in substance, contained in it."[15]

Keep these principles in mind if you are involved in a case where legislative history will be an issue. If the text and context are more beneficial to your argument than legislative history, hammer the primacy of text and context. Make sure that the court does not adopt the mistaken belief that crystal clear legislative history must be read into a statute.

And if the legislative history supports your position, be sure to bring it to the court's attention even if the statute's text and context appear unambiguous. But to the extent possible, try to convince the court that there is at least *some* ambiguity in the statute, even if your textual interpretation is far less plausible, so that the court has a stronger basis for its interpretation of legislative history. Finally, because of *Patton*, be prepared to explain how the legislature translated the intent expressed in the legislative history into the words of the statute.

What Kinds of Legislative History Should You Use?

Knowing that legislative history is now more important in interpreting statutes, you might be tempted to rush off to the legislative archives in an attempt to uncover the silver bullet of legislative history that will convince a court to adopt your interpretation of a statute. But before doing so, you should consider what to look for in the legislative history. Examining how the Supreme Court and Court of Appeals have used legislative history in recent cases provides a helpful guide. Several examples from various points along the persuasiveness continuum are discussed below.

Persuasive Legislative History

Ballot titles and explanatory statements in the voters' pamphlet are generally considered helpful legislative history.[16] For example, in *Hoekstre v. State ex rel. Dept. of Land Conservation and Development*, the Court of Appeals quoted from both the ballot title and explanatory statement of a ballot measure, and specifically noted that the purpose of the measure, as described in the explanatory statement, supported its interpretation of the resulting statute.[17]

In interpreting a criminal statute, the Oregon Supreme Court recently discussed at length both the official commentary of the Oregon Criminal Law Revision Commission that drafted the laws at issue, as well as discussions among Commission members about the issue that was before the court.[18] As will be seen shortly, the usefulness of isolated statements in the legislative history is questionable. That is less true with commission or committee discussions, which are more likely to reveal an intent in enacting a law that was accepted by a majority of those involved.

Staff summaries of the proposed legislation prepared by the relevant House and Senate committees can also be useful, even if they were not adopted or

6 *Id.* at 172-73.
7 *State v. Kelly*, 229 Or App 461, 466, 211 P3d 932 (2009).
8 *Gaines*, 346 Or at 173.
9 *Patton v. Target Corp.*, 349 Or 230, 242 P3d 611 (2010).
10 *Id.* at 233.
11 *Id*. at 242. For example, if a jury awarded a plaintiff $1 million in general damages and $1 million in punitive damages, the defendant would be required to pay $2 million but the plaintiff would only receive $1.3 million, with $700,000 going to the state. If the plaintiff and defendant quickly settled for $1.5 million (with none of the damages labeled as punitive damages) before judgment was entered, the plaintiff would receive an extra $200,000, the defendant would save $500,000, and the state would lose $700,000.
12 *Id.*
13 *Id.* at 243 (emphasis added).
14 *Id.*
15 *Id.* (internal quotation marks omitted).
16 *See, e.g., Hoekstre v. State ex rel. Dept. of Land Conservation and Development,* 249 Or App 626, 634-35, 278 P3d 123 (2012).
17 *Id.* at 636-37.
18 *State v. Swanson,* 351 Or 286, 294-96, 266 P3d 45 (2011).

endorsed by the committees themselves. In *State v. Kholstinin*, the Court of Appeals quoted from such summaries in support of its holding as to the meaning of a statute.[19] The court noted that the House and Senate summaries were consistent with each other and with the testimony of the witness who took the lead in explaining and supporting the legislation.[20] Moreover, nothing in the legislative history evidenced that legislators were told that the statute would have a different meaning.[21] Although it is unclear if the Court of Appeals would have still found the legislative history persuasive had one or more of these pieces not been present, the decision highlights the types of legislative history to consider using.

Isolated Statements by Legislators and Nonlegislators—Persuasive or Unpersuasive? It Depends

In *Patton*, the Supreme Court stated that "the comment of a single legislator at one committee hearing generally is of dubious utility" in determining legislative intent.[22] After all, the entire legislative body votes on a statute, and more than one legislator might have a hand in drafting the final legislation or voice an opinion on the proposed law. Not surprisingly, the Supreme Court has been similarly dismissive of statements by nonlegislator witnesses, calling them "even less helpful" than statements by legislator witnesses.[23] Accordingly, expect to face skepticism when attempting to convince a judge that a single statement in the legislative history definitively reveals the statute's meaning.

But that does not mean that single statements should be disregarded outright. In fact, the Court of Appeals, while acknowledging that isolated statements are "relatively weak legislative history," has given such statements "considerable credibility nonetheless."[24] In *Cardenas v. Farmers Ins. Co.*, the Court of Appeals found isolated testimony compelling for two reasons.

First, it was given by "a spokesperson for the interest group that proposed the legislation."[25] This illustrates that not all isolated statements are equal. The key is *who* gave the statement and *why* that person's testimony is particularly insightful.[26]

Second, "the testimony accurately reflects what the bill actually does."[27] This ties in with the point the Supreme Court made in *Patton*—the closer the connection between the legislative history and the actual words used in a statute, the more persuasive the legislative history will be.

Subsequent Legislative History—Persuasive or Unpersuasive? That Remains to be Seen

The use of subsequent legislative history has not been expressly endorsed or condemned by Oregon's appellate courts. Subsequent legislative history can encompass many things, such as statements made by one legislature as to the meaning of a statute enacted by a prior legislature,[28] or post-enactment testimony by a legislator as to what the enacting legislature (of which the legislator was a member) intended a statute to mean.[29] In *State v. Cloutier*, the Supreme Court admitted that its treatment of subsequent legislative history has been mixed—at times it has deemed it "irrelevant," while at other times it "has been less categorically dismissive."[30] Ultimately the *Cloutier* court concluded that it did not need to clarify the confusion to decide the case before it, so it declined to "address the weight, if any," that subsequent legislative history should be given.[31]

By highlighting the issue but not resolving it, the Supreme Court has opened the door (at least for now) for litigants to offer subsequent legislative history and argue why a court should consider it. Keep in mind that a court will likely be more receptive to the argument if you can explain *why* the subsequent legislative history is informative, remembering that the overall goal of statutory interpretation is "to pursue the intent of the legislature."[32]

Conclusion

The post-*Gaines* era is still in its relative infancy, and the Supreme Court rarely used legislative history in interpreting statutes in the *PGE* era.[33] Moreover, after the current election cycle is completed, three of the seven members of the Supreme Court will have joined the court after *Gaines* was decided. Accordingly, expect the case law on the use of legislative history to continue to develop, and perhaps change.

In the meantime, continue to offer legislative history that supports your interpretation of a statute, but understand that text and context still reign supreme. If you do use legislative history, do more than simply offer it as conclusory evidence of legislative intent.

19 *State v. Kholstinin*, 240 Or App 696, 704, 249 P3d 133 (2011).
20 *Id.* at 703-05.
21 *Id.* at 705.
22 *Patton,* 349 Or at 242.
23 *Id.*
24 *Cardenas v. Farmers Ins. Co.,* 230 Or App 403, 411, 215 P3d 919 (2009).
25 *Id.*
26 *See also State v. N.R.I.,* 249 Or App 321, 329-30, 277 P3d 564 (2012) (relying on statements made by Attorney General Meyers in introducing a bill that amended the juvenile delinquency restitution statute).
27 *Id.*
28 *See, e.g., State v. Clum*, 216 Or App 1, 14, 171 P3d 980 n 7 (2007).
29 *See, e.g., United Tel. Employees PAC v. Sec. of State*, 138 Or App 135, 139, 906 P2d 306 (1995).
30 *State v. Cloutier*, 351 Or 68, 103-04, 261 P3d 1234 (2011).
31 *Id*. at 104.
32 ORS 174.020(1)(a).
33 According to one law review comment, from 1999 through 2006 the Supreme Court published 150 decisions citing to *PGE*, but in only nine decisions did the court consider legislative history. Robert M. Wilsey, *Paltry, General & Eclectic: Why the Oregon Supreme Court Should Scrap PGE v. Bureau of Labor and Industries,* 44 Willamette L. Rev. 615, 616-17 (2008).

Instead, tell the court *why* this particular legislative history is indicative of the intent of the legislature as a whole. A compelling argument could be the difference between the court adopting your interpretation or your adversary's.

From Business Initiative to Regulatory Imperative: What the New Era of Corporate Social Responsibility Means for Oregon Businesses

By Sarah Crooks and Nathan Christensen, Perkins Coie LLP

Sarah Crooks

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In 1953, economist Howard Bowen coined the phrase "corporate social responsibility" in his book, *Social Responsibilities of the Businessman*. Although Bowen gets credit for the phrase, most people agree that the concept underlying it—companies taking into account their impact on the environment and social welfare—has been around for much longer than that.

In the 60 years since the phrase was born, corporate social responsibility ("CSR," for short) has become a significant part of business. Business schools now include courses on business ethics and corporate social responsibility. Watchdog groups have been organized to monitor companies' adherence to principles of social responsibility. New companies have arrived offering as their primary value proposition a socially-responsible supply chain and product. And new institutes and associations—not to mention law firm practice groups—have formed to develop social responsibility guidelines, standards, strategies and investigations.

While the concept of corporate social responsibility has become an important organizing principle in business, it has rarely been the subject of law and litigation. In a search of every state and federal opinion available on Westlaw, we found only 17 that used the phrase "corporate social responsibility." Most of those references are to titles of authorities or background facts. That may soon change.

Principles of corporate social responsibility are quickly transitioning from the realm of business initiative to the realm of regulatory imperative. In particular, state and federal lawmakers are drafting new regulations requiring businesses to disclose information

The Oregon *Litigation Journal* is published three times per year by the Litigation Section of the Oregon State Bar, with offices located at 16037 S.W. Upper Boones Ferry Road, Tigard, Oregon 97224; mailing address: Post Office Box 231935, Tigard, Oregon 97281; 503-620-0222.

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about their products, practices and supply chains, and enforcement agencies are reinvigorating existing legislation for similar purposes.[1]

The United States is not alone in this shift. For instance, since 2009 Denmark has required companies to disclose their social responsibility policies and practices (not to mention a self-assessment) in their annual reports. As the government reports: "Danish businesses are free to choose whether or not they wish to work on CSR... [but] the aim is to inspire businesses to take an active position on social responsibility and communicate this."[2]

In this article, we'll review three examples that we believe illustrate this trend in the U.S.—(1) a new federal law regarding conflict minerals, (2) a new state law regarding forced labor, and (3) increased federal enforcement of existing laws prohibiting foreign corruption. Each of these laws has the potential to affect Oregon business and, as discussed at the end of the article, to spark litigation.

Stopping Atrocities Abroad: The SEC's Final Conflict Minerals Rules

Last month, the Securities and Exchange Commission announced final rules requiring businesses to investigate the origins of certain minerals used in their manufacturing processes and products, and to publicly disclose the results of their findings.[3] The rules were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act and focus on "conflict minerals," or minerals that are mined under abusive and violent conditions, primarily in the Democratic Republic of the Congo. The final rules span over 350 pages, so we provide only a brief synopsis here.[4]

Any company that meets the following three conditions must comply with the new investigation and disclosure requirements:

1. Files reports with the SEC under Section 13(a) or 15(d) of the Exchange Act;

2. "Manufactures" or "contracts to manufacture" a product; and

3. Conflict minerals, such as gold, tin, tantalum and tungsten, are "necessary to the functionality or production" of the product manufactured or contracted to be manufactured.

Any company that meets these three conditions is now required to investigate the origins of its non-scrap conflict minerals to determine whether they may originate from a covered country, including the Democratic Republic of the Congo, Angola, Rwanda, Tanzania and Uganda. If, after conducting a country of origin inquiry, a company determines (or should know) that its conflict minerals may originate from one of these countries, then the company is required to conduct due diligence on the source and chain of custody of these minerals and, in many cases, file a Conflict Minerals Report with the SEC. These reports must be audited by an independent private sector auditor. Even companies that determine that their minerals are not from a covered country must disclose to the SEC their efforts to determine the country of origin and the results of those efforts.

"Conflict minerals" (e.g., gold, tin, tantalum and tungsten) are widely-used, and these rules are likely to affect a number of Oregon businesses. Further, between the wide range of companies and products that use "conflict minerals" and the complex process of retracing the origins of these minerals—perhaps through layers of suppliers—the final rules are expected to have a major impact on U.S. companies, not to mention their suppliers, whether located in the U.S. or elsewhere. The SEC estimated that the initial cost of compliance will be between $3 billion and $4 billion, with ongoing compliance costs of between $207 million and $609 million annually. Companies must begin complying with these rules on January 1, 2013, and the required disclosures for calendar year 2013 will be due on May 31, 2014 (and every May 31 thereafter).

Preventing Human Trafficking and Child Labor: California's Transparency in Supply Chains Act

State governments have also begun to regulate issues traditionally considered part of voluntary corporate social responsibility. In 2010, for example, the California legislature passed the Transparency in Supply Chains Act.[5] The landmark law, which became effective on January 1 of this year, requires every manufacturer or retailer that (1) has annual gross worldwide sales of more than $100 million and (2) is "doing business" in California to make new disclosures regarding the labor used in its global supply chain.

This law is likely to affect numerous Oregon companies. Even if a company is not organized or domiciled in California, a company is considered to be doing business there if it (1) generates more than $500,000 in sales from California; (2) owns more than $50,000 in real or tangible property in California; (3) has a California payroll of more than $50,000; or (4) has any California-based sales, property or payroll that account for more than 25% of the company's overall

1 For an interesting argument that government regulation is the key to institutionalizing socially responsible practices, see Aneel Karnani, "The Case Against Corporate Social Responsibility," The Wall Street Journal, June 14, 2012, available at http://online.wsj.com/article/SB10001424052748703338004575230112664504890.html.

2 *See* www.csrgov.dk/sw51190.asp.

3 The text of the SEC's final rules is available at www.sec.gov/rules/final/2012/34-67716.pdf.

4 For a more comprehensive summary, *see* www.perkinscoie.com/new-form-sd-filing-required-for-public-companies-that-manufacture-or-contract-to-manufacture-products-utilizing-or-containing-conflict-minerals-09-05-2012/.

5 The text of the Act is available at http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.html.

sales, property or payroll. California initially estimated that at least 3,200 companies would fall under the Act, likely including a number of Oregon-based companies with a significant presence in California.

As in Denmark, companies are free to choose not to oversee the labor conditions in their supply chains. But companies must make that choice known to their consumers. In particular, the Act requires qualifying companies to disclose their efforts to:

1. Evaluate and address risks of human trafficking and slavery;

2. Audit suppliers and evaluate supplier compliance;

3. Require suppliers to certify that materials used comply with local labor laws;

4. Maintain internal accountability standards and procedures; and

5. Train employees and managers regarding human trafficking and exploitative labor.

These disclosures must be posted on the companies' websites, including through a "conspicuous and easily understood link" on the homepage. Further, as with the conflict minerals rules discussed above, these requirements are likely to travel up the supply chain, as suppliers will be pressed to initiate their own due diligence programs in order to provide certificates and assurances regarding their labor standards.

Given that California's economy is the ninth largest economy in the world, regulations targeting companies conducting business there have far-reaching effects beyond the California border.[6] Other states, including Oregon, may soon follow California's lead.

In addition, Congress is currently considering similar legislation. The federal bill, which was introduced in August 2011, observes that "the United States is the world's largest importer, and in the twenty-first century, investors, consumers, and broader civil society increasingly demand information about the human rights impact of products in the United States market."[7] As currently drafted, the federal version would impose even more exacting disclosures than the California law requires.

Fighting Public Corruption Abroad: The Reinvigorated Foreign Corrupt Practices Act

At its core, the Foreign Corrupt Practices Act ("FCPA") makes it illegal to offer or provide anything of value to foreign officials or candidates for office in exchange for business.[8] Importantly, the prohibition extends not just to offers made directly, but also to offers made by a third party agent, assuming the principal knew about the offer or ignored red flags that should have put it on notice. The Act also requires companies to keep detailed records of their transactions and to implement internal controls to prevent and detect violations.

Unlike the SEC's rules on conflicts minerals and California's Transparency in Supply Chain Act, the FCPA is not new. It was signed into law by President Carter 35 years ago. But it illustrates the trend towards regulating issues traditionally considered to be the domain of "socially responsible business" because, according to the U.S. Department of Justice, "we are in a new era of FCPA enforcement; and we are here to stay."[9]

For many years, the Foreign Corrupt Practices Act was relatively obscure and rarely-enforced. As recently as 2004, there were only 5 FCPA enforcement actions brought by the SEC or DOJ. Compare that total with the totals for the last 3 years—2009: 40, 2010: 74, 2011: 48.[10]

What the "New Era" of Corporate Social Responsibility Means for Oregon Businesses and Litigators

The trend is hard to miss—lawmakers and regulators are taking up the mantle of corporate social responsibility. And when they do, whether at the state or federal level, their actions will impact Oregon businesses.

In addition to being aware of the new regulations, Oregon lawyers should anticipate the litigation that may be prompted by the new CSR regulations, including:

- Shareholder suits alleging that directors and officers breached their fiduciary duties by failing to adequately monitor their companies' supply chains for use of forced labor or conflict minerals. (We are seeing a spike in similar follow-on civil suits after the SEC or DOJ announces FCPA enforcement actions.)
- Claims of fraud, misrepresentation or unfair trade practices relating to inaccuracies in the CSR disclosures now required on company websites or in SEC filings.
- Claims of malpractice or negligence against independent auditors reviewing company CSR reports or disclosures.
- Business tort claims, such as for intentional interference with economic relations, or claims of defamation by suppliers identified as using conflicts minerals, forced labor, or corrupt practices.

6 *See* "Capitol Alert," The Sacramento Bee, Jan. 11, 2012, available at http://blogs.sacbee.com/capitolalertlatest/2012/01/california-slips-to-number-9-in-world-economic-rankings.html.

7 H.R. 2759: Business Transparency on Trafficking and Slavery Act, available at www.govtrack.us/congress/bills/112/hr2759/text.

8 *See* 15 U.S.C. § 78dd-1, et seq.

9 Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

10 *See* Gibson Dunn, "2012 Mid-Year FCPA Update," July 9, 2012, available at www.gibsondunn.com/publications/pages/2012MidYearFCPAUpdate.aspx.

- Legal challenges to the scope and enforceability of the CSR regulations themselves.

As the U.S. Department of Justice is fond of pointing out, we are in a new era of regulation. Business practices once thought to be a matter of "good business" are now becoming regulatory imperatives, motivated by noble and important causes, such as protecting human rights and fighting foreign corruption. It is therefore important for Oregon lawyers to be sensitive to these new regulations, to stay informed about the increasing constellation of requirements, and to anticipate both the legal risks and opportunities they carry.

Presenting and Challenging Expert Testimony: Winning the Battle and the War

by Janet Hoffman and Sara F. Werboff

Janet Hoffman

Sara Werboff

Trials are at times won or lost based on experts and the lawyer's ability to make the most of the rules governing the admissibility of expert testimony. This article provides tips to ensure that your expert's opinion reaches the jury, or conversely, that your opponent's expert opinion does not.

There is no question that an expert can provide valuable—even case-ending—testimony. For example, the expert's well-reasoned opinion can lend credibility to counsel's arguments made to the jury by narrating and reinforcing the major themes of your case. Moreover, through the expert, counsel can often introduce helpful evidence that is otherwise inadmissible. Importantly, the expert can tie together counsel's theories into a final opinion that proves the ultimate issue of the case.

A good expert is a competent narrator who helps to advance the theme of your case. In a federal criminal case I tried, over strenuous objection I called a psychologist who had diagnosed the government's informant as a pathological liar. In support of my expert's opinion, the court also permitted me to introduce examples of the informant's behavior that the expert had relied upon for his diagnosis. With this one expert, I was able to both discredit the government's main witness and provide a counter-narrative to the one that was presented by the government, namely that my client purportedly confessed an intent to commit the crime in a statement to an alleged co-conspirator, the government's informant and the person who prompted its investigation. Through expert testimony, we developed a forceful narrative centering on the theme that the government had unwittingly based its entire investigation on the statements of a pathological liar. We succeeded in showing the jurors that the government had been seriously misled by its own informant.

The range of subject matter of relevant permissible expert testimony is only limited by the trial lawyer's creativity. Experts can take the lawyer and jurors into areas they previously knew little about. Experts can recreate for the jury experiences about which they could otherwise only guess—experiences that are far removed from the juror's own life experience. In another case I tried, the court allowed me to call a retired Rand Corporation research expert to testify as to the traumatic impact that specific events of the Vietnam War had on Vietnamese immigrants in general and on my clients in particular.

Recreation of events occurs regularly in courtrooms through the use of scientific techniques, experts can vividly recreate for jurors accident scenes or other relevant conditions. The only requirement is that the demonstration or experiment must be sufficiently similar so that it fairly replicates the conditions it purports to represent.[1] In another case I tried, my client had a profound hearing loss. The government had a tape-recorded telephone conversation of my client purportedly expressing joy that the alleged crime had been carried out. Recognizing that my client might not be believed if he simply testified that he did not comprehend what was said during the conversation, and knowing the potential numbing effect of technical evidence, I used an expert audiologist to highlight my client's hearing deficits.

The audiologist demonstrated what my client actually heard during the critical tape-recorded phone call. He accomplished this by removing certain sounds from the government's recording to replicate the limitations of my client's hearing, thereby illustrating precisely what my client could and could not hear during the telephone conversation. By recreating the conversation as my client experienced it, and by allowing the jurors to hear the conversation just as my client heard it, we had evidence that engaged the jury and made a far greater impact. The jurors became experts on my client's profound hearing loss and accepted our theory of the case. Consequently, the jury acquitted my client.

Because expert testimony is so significant, counsel must ensure that the testimony will withstand an

1 *See e.g., Dyer v. R.E. Christiansen Trucking, Inc.*, 318 Or 391, 400 (1994) (trial court did not err in excluding videotape demonstration of "trailer sweep" when it was not sufficiently similar to facts of case to be relevant); *Myers v. Cessna Aircraft Corp.*, 275 Or 501, 509-10 (1976) (admitting expert testimony and lab results where experiment conditions were the same as the conditions under which the evidence indicates the plane was operating).

evidentiary challenge. For this reason, it is worthwhile to remind ourselves of some basic legal principles governing expert evidence. Counsel should also be familiar with the tools available to ensure that your expert's testimony is admitted and conversely must understand how to use the Rules of Evidence to exclude the opponent's expert.

The Rules of Evidence define the permissible scope of expert testimony. We are permitted to call experts when there are issues in a case that are beyond the common knowledge of the jury. Expert witnesses therefore must have scientific, technical, or other specialized knowledge through advanced education or significant training. They can testify to ultimate issues in a case and render opinions without personal knowledge of the events. For example, an expert may be called to provide an opinion about the cause of injury or illness, an essential element of the claim. In this regard the expert is uniquely qualified to testify to that ultimate issue.[2] However, trial counsel still needs (i) to be familiar with the qualifications of each party's expert, (ii) to understand the record the expert relied on in rendering her opinion, and (iii) to know whether her opinion is based on proper methodologies.

Courts often admit expert testimony over the objections of counsel, leaving the jury to determine the weight that the testimony should be given. Thus, an advocate should think twice about challenging an expert where there is simply a dispute within the relevant community over the expert's opinion. If the expert's testimony is likely to be admitted over your objection, you will have probably previewed to opposing counsel and the expert the nature of your cross-examination thereby providing them with an opportunity to shore up their arguments.

This concern, of course, should not prevent you from waging a challenge where the expert's procedures render the opinion unreliable, or where the opinion itself is without basis. In such cases, the expert's opinion will not be admitted. For this reason, counsel must be prepared to challenge the expert's theory or scientific methods. For example, a litigant might try to use a psychologist to explain why a victim changed her story or recalled a memory after many years. You must be ready to challenge these likely unreliable theories or the scientific methodology underlying the evidence through a hearing where the expert is subject to cross-examination or will be challenged through the presentation of competing expert testimony.[3]

Because expert testimony can be so persuasive, courts have a duty to disallow unreliable or unduly prejudicial expert evidence. Courts have developed a process to assess the reliability of the expert's opinion pretrial and determine whether the jury should hear it. Your chance of prevailing at trial may depend on the outcome of these challenges. Therefore, it is important to resolve these issues by motion as soon as possible.

I. Expert Testimony is Generally Admissible if Reliable and Helpful to the Trier of Fact

"Believe the one who has proved it. Believe an expert."
—Virgil, Aeneid

Expert testimony generally will be admitted if the expert is qualified and the opinion is reliable. Oregon and federal rules provide a liberal standard for admissibility of expert testimony. If a qualified expert's "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" then the testimony is admissible.[4] Even though the standard is liberal, the rules do not permit all expert testimony. Trial courts perform a crucial "gatekeeper" function. First, the trial court must determine whether an expert possesses the appropriate qualifications through either training or experience, or both. The trial court must then decide whether that opinion will ultimately assist the fact finder.[5]

2 *See Madrid v. Robinson*, 324 Or 561 (1997) (accident reconstruction expert permitted to testify to what "caused" the accident). *See generally* Rule 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

3 In federal court and in state criminal proceedings, challenges to experts often occur pretrial. In both state and federal court, the parties are provided expert discovery pretrial, enabling us to make pretrial challenges to this evidence. I am a criminal law practitioner and therefore my experience is with pretrial hearings and this article does not discuss the nuances of setting up challenges when you learn of an expert for the first time during the trial itself. *See Stevens v. Czerniak*, 336 Or 392, 404-05 (2004) (Oregon Rules of Civil Procedure do not permit court to require pretrial discovery of experts).

According to my experienced colleagues who try civil cases in state court, litigants are required to make their challenges to expert witnesses often during trial because of the lack of pretrial discovery of experts. Thus, it is even more important to know the law and be familiar with the science. The downfall of litigating these objections during trial is the risk that the case may end up gutted of its experts and unable to proceed. As discussed below, in some civil cases, the parties challenge an expert pretrial, but in others, these decisive issues are litigated during trial.

4 Rule 702. The federal rule is similar, and provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

5 Rule 702.

A. An Expert Must Be Qualified

"An expert is a man who has made all the mistakes that can be made, in a very narrow field."
—Neils Bohr

An expert must be qualified by knowledge, experience, education, or training to testify about a particular subject-matter. "The witness must have such skill, knowledge or experience in the field or calling in question as to make it appear that his opinion or inference-drawing would probably aid the trier of the facts in his search for the truth."[6]

Professional degrees are not necessarily required in order for an expert to be qualified to testify about an area where that expert has practical or technical experience. In *State v. Rogers*, for example, the Oregon Supreme Court determined that the expert, who was a properly qualified psychologist, had focused on neuropsychological issues and therefore was qualified to testify on a neuropsychological matter despite not having a degree in that particular discipline.[7] In *State v. Moore*, however, the court found an expert unqualified to testify regarding battered spouse syndrome when that expert did not have any degrees in the subject matter. Notably in *Moore*, the expert witness not only lacked a degree in the subject matter, she also had limited experience as a counselor. Given the inherent complexity of a battered spouse defense, requiring the expert to "evaluate the literature and the various phases of the syndrome and to apply the syndrome to the particular facts of the case[,]" the expert's lack of training and education rendered her unqualified to testify and the jury did not hear her opinion.[8]

Training or job experience may also qualify a witness as an expert. In *State v. Park*, a forest service officer qualified to testify that marijuana plants were "clones." The court found he was qualified because he had over 16 hours of training in differentiating different types of marijuana plants.[9] Importantly, the training or experience must be relevant to the issue. For example, a police officer's general training is not sufficient to qualify him as an expert in the cause of an accident.[10] An expert's qualifications depend heavily on the facts of a particular case; thus if the subject-matter of the testimony is an area that requires special training, an expert will not be qualified without that training.[11]

The determination of the expert's qualifications relates directly to the purpose of Rule 702—assisting the trier of fact—because an expert is only helpful to the jury if he or she is qualified. As the Oregon Supreme Court explained it:

> Because of these qualifications he is permitted to express his opinion as a witness so that the jury may have the benefit of his special ability to draw inferences from the facts in evidence. "The expert witness is granted the privilege of expressing to the jury an opinion because his superior training enables him to arrive at a conclusion which is more likely to be sound than that of the average juror."[12]

Thus, it is very important for advocates to understand the qualifications of their own experts and their opponent's experts and raise issues of qualification before the expert ever meets the jury.

B. An Expert's Opinion Must Be Reliable

"For every expert there is an equal and opposite expert; but for every fact there is not necessarily an equal and opposite fact."
—Thomas Sowell

An expert witness is only helpful to the trier of fact if the expert's opinion itself is reliable. If an expert is offering a scientific opinion, one that "draws its convincing force from some principle of science, mathematics and the like"[13] the court applies a more rigorous test and analyzes multiple factors that go to the reliability of the expert's proffered testimony. Challenges to expert witnesses go to two different areas: whether the advocate's theory that the expert's testimony supports is valid and whether the methods or protocols used to reach that theory are valid.[14]

For example, in a recent case I handled, I challenged the government's key expert in a pretrial hearing. I argued that the expert relied on outdated methods and protocols and therefore his results were unreliable. Because I effectively discredited the expert's conclusions during the pretrial hearing, the government realized that it could not establish a central element of its case and voluntarily dismissed the charges. Testing the reliability of your adversary's expert can have case-altering effects. Below are the factors to be aware of as you craft your arguments.

1. Daubert *and the Federal Standard*

The standards for admissibility of scientific evidence have changed over time. Under federal law, courts were hamstrung by the burdensome *Frye* test, which only permitted scientific evidence to come in when it was generally accepted in the field.[15] This excluded too much evidence as science and research progressed.

6 *Sandow v. Weyerhaeuser Co.*, 252 Or 377, 380 (1969).
7 *State v. Rogers*, 330 Or 282, 317 (2000).
8 *State v. Moore*, 72 Or App 454, 459, *rev den* 299 Or 154 (1985).
9 *State v. Park*, 140 Or App 507, 514 (1995), *rev den* 323 Or 690 (1996).
10 *See Davis v. County of Clackamas*, 205 Or App 387, 395, *rev den* 341 Or 244 (2006) (officer could not give opinion as an expert because he did not apply specialized knowledge as an accident reconstructionist).
11 *See State v. McFarland*, 221 Or App 567, 577 (2007) (trainee in Drug Recognition Expert (DRE) protocol was not qualified to testify as an expert because not adequately trained).
12 *State By & Through State Highway Comm'n v. Arnold*, 218 Or 43, 64-65, *reh'g denied and opinion modified*, 218 Or 43 (1959).
13 *State v. Brown*, 297 Or 404, 407 (1984).
14 *State v. O'Key*, 321 Or 285, 292-93 (1995).
15 *United States v. Frye*, 293 F 1012 (DC Cir 1923).

Novel but otherwise reliable evidence was not admissible. In *Daubert v. Merrell Dow*, the United States Supreme Court determined that the Rules of Evidence superseded the *Frye* test and adopted a "flexible approach" designed to liberalize the introduction of scientific evidence:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, * * * whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.[16]

Daubert proposed four principal factors to aid in this analysis: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique can be and has been subject to peer review; (3) the known or potential rate of error; and (4) the degree of acceptance in the relevant scientific community. Although *Daubert* involved a question of scientific evidence, later in *Kumho Tire Co., Ltd. v. Carmichael*, the United States Supreme Court held that the trial court's gatekeeping obligation to determine the reliability of the evidence extended to "technical or other specialized knowledge" as well.[17]

2. Brown/O'Key *and the Oregon Standard*

The Oregon Supreme Court also adopted a different multi-factor test for the admissibility of scientific evidence. Under *State v. Brown* and *State v. O'Key*, courts must determine the probative value of the scientific evidence or whether the "proposed evidence is based on scientifically valid principles and is pertinent to the issue to which it is directed."[18] But this test is not "a mechanical checklist of foundational requirements."[19] The overall touchstone is the reliability of the scientific opinion.

In *Brown*, a case about polygraph tests, the court set forth seven factors that Oregon trial courts had to consider before ultimately deciding that the polygraph technique was not admissible.[20] Thus, *Brown*, which predated *Daubert v. Merrell Dow*, established a separate and distinct multi-factor test for Oregon courts. Those factors are: (1) the technique's general acceptance in the field; (2) the expert's qualification and stature; (3) the use that has been made of the technique; (4) the potential rate of error; (5) the existence of specialized literature; (6) the novelty of the invention; and (7) the extent to which the technique relies on the subjective interpretation of the expert.[21] The court in *Brown* concluded that "under proper conditions polygraph evidence may possess some probative value and may, in some cases, be helpful to the trier of fact[;]" however, the court determined the evidence was inadmissible based on different considerations than its potential reliability "under proper conditions," demonstrating that evidence that otherwise meets the scientific hurdle may still be excluded. The court reasoned the introduction of polygraph evidence might lead to undue delay in proceedings, and to confusing battles of the experts. The court also concluded that jurors might overvalue polygraph evidence, and found that polygraph evidence impermissibly comments on the credibility of witnesses.[22]

A few years later, in *O'Key*, the Oregon Supreme Court incorporated the test set forth by the United States Supreme Court in *Daubert v. Merrell Dow*. No one factor is dispositive.[23] Unlike the United States Supreme Court's ruling in *Kumho Tire*, Oregon courts have not ruled that the *Brown/O'Key* test applies to "technical or other specialized knowledge" as well as *scientific* evidence; however, Oregon courts define scientific evidence broadly. For instance, the courts routinely allow testimony on issues of medical causation,[24] psychological syndromes,[25] and drug or alcohol testing.[26] Oregon courts also have recognized that it is often difficult to distinguish between scientific evidence and evidence involving technical or other specialized knowledge because "[m]ost expert testimony rests at least partly on science."[27]

3. The Court's Belief of the Jury's Perception Categorizes Evidence as "Scientific"

An advocate must be on the lookout for expert opinions that appear to be scientific and will be relied

16 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 592-93 (1993).
17 526 US 137, 141-42 (1999).
18 *O'Key*, 321 Or at 303.
19 *Id.* at 300.
20 *Brown*, 297 Or at 445.
21 *Id.* at 422-37.
22 *Id.* at 440-41.
23 The factors enunciated in *Brown/O'Key* are not the only relevant considerations. In a footnote in Brown, and recognized again by the Supreme Court in *Marcum v. Adventist Health System*, 345 Or 237, 244 n 7 (2008), are 11 more factors: (1) the potential rate of error in using the technique; (2) the existence and maintenance of standards governing its use; (3) presence of safeguards in the characteristics of the technique; (4) analogy to other scientific techniques whose results are admissible; (5) the extent to which the technique has been accepted by scientists in the field involved; (6) the nature and breadth of the inference adduced; (7) the clarity and simplicity with which the technique can be described and its results explained; (8) the extent to which the basic data are verifiable by the court and the jury; (9) the availability of other experts to test and evaluate the technique; (10) the probative significance of the evidence in the circumstances of the case; and (11) the care with which the technique was employed in the case.
24 *Jennings v. Baxter Healthcare Corporation*, 331 Or 285, 304 (2000).
25 *State v. Milbradt*, 305 Or 621, 631 (1988).
26 *State v. Sampson*, 167 Or App 489 (2000).
27 *O'Key*, 321 Or at 291 (quoting Christopher B. Mueller and Laird C. Kirkpatrick, Modern Evidence § 7.8, 990 (1995)).

upon by the jury as such. The Oregon Supreme Court concluded that whether proffered expert testimony is scientific, requiring the proponent to establish an appropriate foundation, "depends primarily on whether the trier of fact will perceive the evidence as such."[28] In that case, *State v. Marrington*, the state called a psychologist to testify that the victim's delay in reporting sexual abuse was a common occurrence. The state did not lay any foundation for scientific evidence required under *Brown/O'Key*. The defendant objected and argued that because this assertion was scientific evidence, the state was required to demonstrate that it was scientifically valid. The court in *Marrington* explained that trial courts "must determine whether the expert's assertions 'possess significantly increased potential to influence the trier of fact as scientific assertions.'"[29] Thus, the court concluded:

> An expert * * * who has a background in behavioral sciences and who claims that her knowledge is based on studies, research, and the literature in the field, announces to the factfinder that the basis of her testimony is 'scientific.'* * * Because that is how the factfinder would understand it, a court has a duty to ensure that such information possesses the necessary indices of scientific validity.[30]

The court reversed the trial court for failing to require that the state demonstrate that the expert's opinion was scientifically valid.

4. The Three-Step Process

With any challenge to expert testimony, scientific or otherwise, trial courts must engage in a three-step process in determining whether expert evidence is admissible. First, the court determines whether the evidence is relevant under Rule 401.[31] Next, the courts apply Rule 702 to determine whether the expert is qualified and whether the expert's opinion will assist the fact finder (for scientific evidence, this includes application of the multifactor *Brown/O'Key* or *Daubert* tests). Finally, the court will apply the Rule 403 balancing test, and if the expert evidence is more prejudicial than probative, it will be excluded.[32] The 702 factors are relevant to the Rule 403 balancing analysis. In one case, the defendant argued that the state did not lay a proper foundation for the evidence and therefore the probative value was outweighed by the prejudicial effect. The defendant, however, did not challenge the admissibility of evidence under Rule 702. Nonetheless, the Court of Appeals, although recognizing that a Rule 702 argument was not adequately raised, nonetheless agreed that the state did not lay a proper foundation for the evidence and applied the *Brown/O'Key* factors to determine that the urinalysis test results were not scientifically valid and therefore were not probative. Because the test results appeared scientific, it was unduly prejudicial to admit them.[33]

Although both the state and federal Rule 702 are rules of inclusion for expert testimony, the importance of the trial court's gatekeeping function cannot be overemphasized. Experts may supplant the jury in its role as finder of fact. As one commentator notes, expert testimony poses a "paradox":

> when experts give an opinion they generally tell the trier of fact what meaning it should give to other evidence. But determining the meaning of the evidence is the central function of the trier of fact. If the trier of fact is unable or disinclined to question the expert's opinion, it surrenders its central function to an expert whose testimony may be unreliable.[34]

Or, as the Oregon Supreme Court aptly stated in *O'Key*: "Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power. The function of the court is to ensure that the persuasive appeal is legitimate. The value of proffered expert scientific testimony critically depends on the scientific validity of the general propositions utilized by the expert."[35]

II. Balancing the Trial Court's Gatekeeper Function with the Jury's Role

"If an expert says it can't be done, get another expert."
—David Ben-Gurion

It is, of course, more desirable for a questionable expert espousing questionable science to be excluded from the jury entirely—and that argument might be meritorious on appeal—but the so-called "battle of the experts" is at times inevitable. Ultimately, this is because the policy of Rule 702, and the Rules of Evidence more generally, favor the admission of relevant evidence and the bar for relevance is low.[36] Thus, some courts seem willing to admit doubtful evidence and let the jury sort it out, repeating the now-familiar refrain that challenges to the reliability of an expert's opinion more often go to "weight, not

28 *State v. Marrington*, 335 Or 555, 561 (2003).
29 *Id.* at 562 (quoting *O'Key*, 321 Or at 292).
30 *Id.* at 563-64.
31 *Id.* at 297-98.
32 *Id.*
33 *State v. Jayne*, 173 Or App 533, 541-43 (2001).
34 Wright and Gold, Federal Practice and Procedure § 6262 at 179.
35 *O'Key*, 321 Or at 291.
36 Rule 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

admissibility."[37] Even the uniform jury instruction states: "You are not bound by the opinion. Give it the weight, if any, to which you consider it is entitled."[38] But this policy favoring admissibility conflicts to some extent with the court's "gatekeeper" function. Trial courts have a duty to ensure that expert testimony is reliable. This is because expert testimony, as discussed above, has several features that could interfere with the jury's role. Experts can testify to ultimate conclusions under Rule 704. Experts necessarily testify to issues that are beyond everyday understanding. And experts, owing to their specialized training and experience, appear credible to a jury. Thus, the rules must strike a delicate balance between the role of the court and the role of the jury to ensure that the jury's role is not supplanted by the expert.

A. Advocates Present the Basis of an Expert's Opinion, and the Jury Assesses the Weight of that Opinion

"The public do not know enough to be experts but know enough to decide between them."
—Samuel Butler

If the court admits the proffered expert evidence, the jury must then determine for itself what weight to give the opinion. Jurors then perform a similar task to the trial court in a Rule 104 hearing. For example, the criminal model jury instruction provides:

> Even though expert witnesses may testify about their opinions, you are not required to accept those opinions. To determine the value, if any, you will give to an expert's opinion, you should consider such things as the expert's qualifications, the expert's opportunity and ability to form the opinion, the expert's believability, and how the expert reached the opinion or conclusion.[39]

Thus, if the evidence is admitted, it is incumbent on counsel to demonstrate for the jury the flaws of the opponent's expert's opinion. As the Oregon Supreme Court has explained, "the witness who testifies to an expert opinion is subject to cross-examination concerning how she arrived at that opinion, and the cross-examiner is given 'great latitude' in eliciting testimony to vitiate the opinion."[40] Necessarily, trial courts provide advocates leeway to essentially re-litigate issues that arose in an unsuccessful challenge under Rule 104, or in those cases where there was no opportunity for a pretrial hearing, to litigate those issues for the first time. To be sure, in a Rule 104 hearing, the trial court and counsel are not constrained by the other rules of evidence.[41] But if counsel is forced to discredit the opponent's expert during trial, counsel must do so within the bounds of the rules of evidence.

Yet even when the Rules of Evidence apply to the particular proceeding, counsel can introduce evidence underlying the expert's opinion. For example, Rule 705 provides that the expert may be required to disclose the underlying facts or data he or she relied upon during cross-examination. Under Rule 706, an expert may even be impeached with statements from a learned treatise.

Generally, if the opposing expert's conclusions are flawed, you have an opportunity to challenge that expert for relying on an incomplete factual record in rendering the opinion. You can force the opposing expert, on cross-examination, to disclose the bases of her opinion, and, if it is based on inaccurate or incomplete information, then the jury should discount her opinion. Indeed, you have an opportunity to expose the weaknesses in the expert's opinions, including poor quality control, lack of documentation, failure to

37 *See e.g., Jennings*, 331 Or at 309 (expert's inability to explain mechanism causing plaintiff's injury went to weight of the evidence, not admissibility); *Barrett v. Coast Range Plywood*, 294 Or 926, 931 (1983) (that an expert witness did not have a specialized degree in the subject-matter went to the weight accorded to testimony, not admissibility); *see also, Baughman v. Pina*, 200 Or App 15, 20 (2005) (expert's failure to explain basis of opinion went to weight of testimony but not basis for directed verdict). The effect is the same in federal court. *See generally*, Wright & Gold, Federal Practice and Procedure § 6264 at 224 ("courts usually conclude that defects in the underlying logic or basis of expert testimony are jury questions that go to weight, not admissibility").

38 Oregon UCJI No 10.06.

39 Oregon UCJI No 1034. The civil jury instruction is similar. Oregon UCJI No 10.06 provides that "An expert witness may give an opinion on any matter in which that witness has special knowledge, skill, experience, training, or education. You should consider the qualifications and credibility of the expert witness and the reasons given for the opinion. You are not bound by the opinion. Give it the weight, if any, to which you consider it is entitled."

The Ninth Circuit Criminal jury instruction, and its virtually identical civil counterpart, provides: "You have heard testimony from persons who, because of education or experience, were permitted to state opinions and the reasons for their opinions. Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case."

40 *State v. Lyons*, 324 Or 256, 278-79 (1996) (quoting *Bales v. SAIF*, 294 Or 224, 235 n 4 (1982)).

41 During a Rule 104 hearing, counsel is not constrained by the other rules of evidence. Rule 104 provides "Preliminary questions concerning the qualification of a person to be a witness * * * be determined by the court. * * * In making its determination the court is not bound by the rules of evidence except those with respect to privileges."

consider relevant information or facts, and opinions that have been soundly criticized in the scientific literature. Whether to introduce the underlying facts or data that informs the expert's opinion is a strategic choice. Conversely, it is beneficial for counsel to introduce the evidence that forms the basis of his own expert's opinion because through the expert, counsel can often introduce favorable evidence that is otherwise inadmissible.

For example, defense counsel used cross-examination to great effect in *Blake v. Cell Tech International, Inc.*,[42] by drawing out the fact that the expert had used a new and untested method to determine whether there were toxins in the decedent's liver, and had also conducted three different rounds of that testing that contained false positives. Both the trial court and the Court of Appeals concluded that the opinion was not reliable, and therefore it was inadmissible.[43]

B. Expert Testimony Is Inadmissible When it Intrudes on the Jury's Function to Determine the Credibility of Witnesses

"A fundamental premise of our criminal trial system is that 'the jury is the lie detector.'"
—United States v. Scheffer[44]

Advocates also should be mindful that on the basis of Rule 403, courts have determined that there is some expert testimony that so thoroughly supplants the role of the jury that it is inadmissible. Even if the science behind the opinion is determined to be reliable, and the expert's opinion is sensible, as a matter of judicial doctrine, that evidence cannot come in. For example, in *State v. Southard*, the Oregon Supreme Court decided whether a diagnosis of sexual abuse was admissible.[45] In so deciding, the court followed the framework set forth in *Brown/O'Key*. First, it determined the evidence was relevant to the issue of whether the victim had been sexually abused. Significantly, it next decided that the evidence was scientifically valid and reliable under Rule 702. The court then looked at the methodology that the psychologist used in formulating the diagnosis of child sex abuse. Noting that the psychologist used standard, conventional, and accepted protocols, the court determined the proffered evidence has sufficient indicia of scientific validity. However, the court ultimately determined that, because the diagnosis did not tell the jury anything that it could not determine on its own—like whether the alleged sexual abuse occurred—it was of limited probative value, while, at the same time, it was very prejudicial. Therefore, the evidence was inadmissible.

For similar reasons, courts also disapprove of evidence that improperly comments on a witness's credibility. That is why no witness, expert or otherwise, may give an opinion that another witness is or is not telling the truth in his or her trial testimony.[46] In *Milbradt*, a psychologist called by the state testified that because of the victim's severe mental retardation, she lacked the capacity to fabricate a lie. The Oregon Supreme Court unequivocally held that "*no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state.* The assessment of credibility is for the trier of fact and not for psychotherapists."[47]

Likewise, as discussed above, the court concluded that polygraph evidence is inadmissible for any purpose, even when parties stipulate to its admissibility.[48] Even though the court earlier had recognized that "under proper conditions polygraph evidence may possess some probative value and may, in some cases, be helpful to the trier of fact," any probative value was outweighed by the prejudicial effect.[49] Polygraph evidence, even if properly done, has a "potential for misuse and over-valuation * * * by the jury" that is, in fact, exacerbated by the parties' stipulation to its introduction and reliability—Oregon courts "will not permit this gamble."[50]

However, evidence that relates to the capacity of a witness to testify is generally relevant.[51] The cases cited above present different theories, and illustrate how important it is for counsel to hone the theory of relevance. In my case, where expert testimony regarding the witness's diagnosis of being a pathological liar was admitted, the witness had been diagnosed before the FBI chose to rely on him as an informant. The expert's testimony allowed me to challenge the government's reliance on a pathological liar to build its case and to interpret the facts. It was also admissible because it pertained to a mental illness that went directly to the witness's ability to perceive, recall, or recount. The psychologist rendered no opinion regarding the informant's truthfulness in court.

C. Experts Are Necessary to Prove Certain Facts

"Who's to say who's an expert?"
—Paul Newman

It is critical to know when an expert opinion is required and how to articulate the specific theory of admissibility. It is equally important to know how to mount challenges based on an adversary's failure to use

42 228 Or App 388 (2009).
43 *Id*. at 401-02.
44 523 US 303, 313 (1998).
45 347 Or 127 (2009).
46 *State v. Middleton*, 294 Or 427, 438 (1983); *Milbradt*, 305 Or at 629-30.
47 305 Or at 629-30 (emphasis in original).
48 *State v. Lyon*, 304 Or 221, 233-34 (1987).
49 *Id.* at 230-31 (quoting *Brown*, 297 Or at 438).
50 *Id.* at 232-33.
51 *See State v. Longoria*, 17 Or App 1, 20-21 (1974) ("In a proper case, where there is an indication that a witness suffers mental impairment affecting his testimonial capacity, it may be proper to allow psychiatric or psychological evidence to assist the jury in assessing the ability of that witness to perceive, remember and relate."); *see also United States v. Palmer*, 536 F2d 1278 (9th Cir 1976) (citing 3A Wigmore, Evidence § 944 at 778 (Chadburn Rev 1970)) (range of evidence to discredit a witness on capacity to remember, observe, and recount is broad).

an expert when one is required. Thus, it is important for both the proponent and the opponent of an expert witness to understand how that witness will be put to use, in case you are able to challenge your opponent's failure to use an expert when one is necessary. Rule 702 is silent about when a party is required to put forth expert testimony; however, case law has held that expert testimony is required to prove certain facts. For example, expert testimony is often required to prove causation. "When the element of causation involves a complex medical question, as a matter of law, no rational juror can find that a plaintiff has established causation unless the plaintiff has presented expert testimony that there is a reasonable medical probability that the alleged negligence caused the plaintiff's injuries."[52]

In professional malpractice cases, expert testimony is often required to establish whether the professional breached the profession's duty of care. In one medical malpractice case, the plaintiff did not call an expert and argued that the doctor should be held liable on a *res ipsa loquitur* theory. The court rejected that argument, stating that this was "precisely the type of case that the Supreme Court has said requires expert testimony."[53] Because there was no evidence presented that the doctor failed to perform according to the reasonable standards of the community without expert testimony, there was no way to establish that the doctor had been negligent.

In addition to the opinions required by law and "big picture" conclusions—such as causation—that are the purview of expert witnesses, the rules of evidence require expert testimony to prove certain facts because lay witnesses are not competent to testify to matters requiring specialized knowledge. Lay opinion testimony is limited by Rule 701, which is essentially identical in both Oregon and federal courts. That rule provides:

> If the witness is not testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> (1) rationally based on the perception of the witness; and
>
> (2) helpful to a clear understanding of testimony of the witness or the determination of a fact in issue.

This rule is interpreted broadly in the sense that lay witnesses often express themselves through opinion based on perception as opposed to hard fact, for example when the witness testifies that, "the weather was cold," "he seemed angry," or "he was driving fast."[54]

Many opinions, of course, are outside of the competence of a lay witness. For example, in *State v. Hite*, the defendant tried to testify that his ability to communicate was impaired by the medication he was taking. The court did not permit the testimony because the defendant was not competent to testify about medical causation.[55] In another case, a post-conviction matter, the court held that expert testimony was required to explain the nature of the injuries sustained during an assault so the trier of fact had the information needed to decide whether the injury was significant.[56]

III. Challenging your Opponent's Expert and Protecting your Own

"Make three correct guesses consecutively and you will establish a reputation as an expert."
—Laurence J. Peter

What is the threshold of reliability for the court to allow the evidence to be presented to the jury? There are two major tacks that an advocate can take to mount a challenge to an expert witness. The advocate can challenge the theory of admissibility, or the advocate can challenge the methodology or protocols used in reaching the expert opinion.

Following a challenge to the theory of admissibility, such as a claim that the theory is bogus or junk science, courts must determine whether the expert's opinion is reliable. A theory or technique is not unreliable just because it is novel. For example, in *Kennedy v. Eden Advanced Pest Technologies*,[57] the defendant brought a pretrial challenge to the plaintiff's treating physician, who was also testifying as an expert in chemical sensitivity.[58] The expert had diagnosed the plaintiff as suffering from "multiple chemical sensitivity." The defendant challenged that opinion as junk science and introduced testimony from its own expert that there was no such condition as "multiple chemical sensitivity" and then suggested that the plaintiff's expert's rate of error was 100%. The trial court excluded the plaintiff's expert but the Court of Appeals reversed. At most, the court concluded, there was a good faith disagreement in the scientific community and that both sides should be able to present evidence to the jury. In a case involving silicone breast implants, *Jennings v. Baxter Healthcare Corp.*, the defendant challenged the plaintiff's expert at trial and the trial court excluded the testimony. In his offer of proof, the plaintiff's expert testified regarding a potential syndrome caused by the leaking implants. In arriving at his conclusions, the expert had followed

52 *Baughman*, 200 Or App at 18.

53 *Jeffries v. Murdock*, 74 Or App 38, 43, *rev den* 299 Or 584 (1985).

54 *See State v. Barnes*, 208 Or App 640, 650-51 (2006) (witness permitted to testify to opinion that victim was on methamphetamine).

55 *State v. Hite*, 131 Or App 59, 62-63 (1994), *rev den* 320 Or 508 (1995).

56 *Lambert v. Palmateer*, 187 Or App 528, 536, *rev den* 336 Or 125 (2003).

57 222 Or App 431 (2008).

58 Although ordinarily there is no pretrial discovery of experts under the Rules of Civil Procedure, there is an exception in personal injury cases for the reports of physicians and psychologists who have examined the plaintiff. ORCP 44 C; *AG v. Guitron*, 351 Or 465, 467 (2011).

established clinical diagnostic techniques. The Supreme Court determined that the evidence should have been admitted because, even though the theory was novel, the protocols followed were not.[59]

Even though novelty alone is insufficient to exclude scientific evidence, where there is a lack of traditional corroboration for reliability the court will exclude the evidence. For example, in *Blake v. Cell Tech Int'l Inc.*,[60] the plaintiff's expert testified in a pretrial hearing that the decedent died from a build-up of microcystin toxins in his liver.[61] To reach that conclusion, the expert had employed a novel technique that had never before been used to test a human liver. After accepting the premise that novelty alone is not sufficient to exclude scientific testimony, the court concluded that the technique was not reliable for a number of reasons. First, the technique that the expert used was not accepted in the field to test for microcystins in a human liver. There was no known error rate nor was there any peer-reviewed publication regarding the accuracy of such procedures. Moreover, the tests conducted by the expert could not be easily duplicated or subjected to confirmatory tests through more established procedures. Finally, the probative significance was central to the plaintiff's claim because it would establish causation, and therefore, if admitted, the expert's testimony would be highly persuasive.[62] The court concluded that the trial court had properly exercised its gatekeeper function.

The appellate and trial courts are more inclined to admit experts and let the jury consider the weight of their testimony rather than exclude experts where the theory, although novel, is still supported by solid scientific techniques and accepted procedures. This preference is clear from looking at the *Brown/O'Key* and *Daubert* factors. In those cases, the courts were clear that the focus of the multifactor inquiry was "solely on principles and methodology, not on the conclusions that they generate."[63] Although, in *Marcum*, the Oregon Supreme Court expanded the application of the *Brown/O'Key* test to reach the reliability of an expert's ultimate conclusions,[64] the fact remains that most of the factors pertain to the reliability of methods used to reach the conclusion.

For example, courts must focus on the techniques used and their acceptance in the field, the rate of error, and the extent to which the technique relies on subjective interpretation. Further, the existence of standards governing the use of the technique or safeguards in employing it is relevant and persuasive and weighs towards admissibility provided those standards and safeguards were applied in that particular case. If protocols and techniques are not followed, then the conclusion is not reliable and the expert's opinion should be excluded.[65]

A series of cases involving the drug recognition expert (DRE) protocol, which is designed to determine whether a person was under the influence of a controlled substance, demonstrates how a scientifically-valid theory can be undermined by insufficient adherence to proper methods and protocols. The Court of Appeals recognized the scientific validity of the 12-step DRE protocol in *State v. Sampson* following the test set forth in *Brown/O'Key*.[66] Thus, following *Sampson*, DRE protocol results are admissible in future cases. But, in subsequent cases, the courts have excluded DRE protocol results when the opponent of the evidence established that the results were unreliable because the protocol was improperly administered.[67] In *State v. Aman*, a qualified officer administered 11 of the 12 steps in the DRE protocol, but failed to complete the confirmatory urinalysis test. The court determined that because the confirmatory urinalysis "vitiate[d] the problem of the DRE protocol's subjectivity" it was essential to the 12-step protocol's scientific validity under *Brown/O'Key*.[68] Similarly, the court found that in cases where the DRE protocol administrator was unqualified, like in *State v. McFarland*,[69] the opinion is unreliable and inadmissible.

IV. Conclusion

"An investment in knowledge pays the best interest."
—Benjamin Franklin

Understanding the validity of the scientific evidence of your opponent is not merely an academic exercise. As discussed above, challenges to experts may change the entire landscape of a case. Take the example I mentioned earlier, where the government, quite unexpectedly, dismissed an environmental case I was defending during the *Daubert* hearing process in federal district court.

When I litigated the *Daubert* hearing in my environmental case, our expert testified that the tests the government witness performed and the conclusions he drew were outdated. Further, our expert explained that other tests and equipment were available, and these modern tests showed that the nature of the substance in dispute was very different than what the government experts claimed. In short, our expert explained that the government's tests were no longer scientifically valid and were, in fact, unreliable. Before the court had an opportunity to decide whether the government's evidence would be admitted with the general instructions regarding the jury's duty to "weigh the evidence," the government dismissed the case because flaws in its expert's opinion made it very difficult to prove other issues in the case.

59 331 Or 285, 305 (2000).
60 228 Or App 388 (2009).
61 The opinion does not indicate how the defendants procured a pretrial hearing on this subject.
62 *Id.* at 401-02.
63 *O'Key*, 321 Or at 305 (quoting *Daubert*, 509 US at 595).
64 345 Or at 245-46 (expanding *Brown/O'Key* to reliability of opinion of medical causation).
65 *See Jayne*, 173 Or App at 544 (urinalysis techniques were error-prone and thus unreliable).
66 *Sampson*, 167 Or App 489.
67 *See e.g., State v. Aman*, 194 Or App 463 (2004), *rev allowed* 339 Or 488 (2005), *dismissed as improvidently allowed*, 339 Or 281 (2005).
68 *Id.* at 473 (quoting *Sampson*, 167 Or App at 510).
69 221 Or App 567 (2008).

There are several lessons learned from this and other experiences. First, even though they come with a host of issues for advocates, expert witnesses are a critical part of modern litigation. Litigants rely on experts to educate jurors on complex topics and to explain complicated information. Increasingly, sophisticated jurors will expect counsel to use modern science and technology to prove their points. Further, new science is constantly replacing older ideas. Savvy jurors will expect DNA evidence, where once blood analysis was sufficiently convincing. It is important to remember that at one point DNA evidence was frequently challenged but now is accepted without debate.[70] But at the same time, new technology is often unproven and subject to challenge by opponents. For example, litigators are now presenting powerful demonstrative evidence through computer-generated reenactments. But as the use of this technology becomes more common, so too will be the challenges to computer-generated demonstrations.[71]

There are countless examples of new science becoming standard practice, but likewise, there are examples of once valid protocols that are supplanted by more accurate testing methods. Thus, the methods, protocols, accuracy, and underlying assumptions of an expert's testimony will always present opportunities for challenges where even basic expert evidence is improperly relied upon.

Recent Significant Oregon Cases

Stephen K. Bushong,
Multnomah County Circuit Court Judge

Honorable Steven K. Bushong

Claims and Defenses

Mead v. Legacy Health System, 352 Or 267 (2012)

The plaintiff in *Mead* went to the hospital emergency room suffering from back pain. The resident on staff called defendant, an on-call neurosurgeon, for advice. The resident told defendant that the patient's MRI showed a disk bulge. Defendant advised the resident to admit the patient for pain management but that she did not need neurosurgery at that time. Plaintiff's condition worsened. Four days later, defendant examined plaintiff and reviewed the MRI. He concluded that plaintiff had a herniated disk, not a disk bulge as the resident had reported, and that "pulp from the center of the herniated disk had escaped and was pressing on a sheath of nerves[.]" 352 Or at 271. Defendant operated immediately to remove the pressure, but "the delay between the onset of the pressure and its removal resulted in substantial damage to the nerves governing plaintiff's ability to control her legs and her bladder and bowel functions." *Id.*

Plaintiff sued defendant for malpractice. The jury returned a verdict in defendant's favor, finding that defendant was not acting as plaintiff's doctor when he responded to the resident's request for advice and, as a result, he owed plaintiff no duty. The Court of Appeals reversed, holding that the trial court should have directed a verdict in plaintiff's favor on that issue. The Supreme Court reversed the Court of Appeals and upheld the trial court's denial of plaintiff's motion for directed verdict, concluding that "the jury could find that defendant was not acting as plaintiff's doctor." 352 Or at 269. The court explained that "advising a colleague about the possible causes of a patient's illness or the proper course of treatment for a patient does not necessarily give rise to an implied physician-patient relationship." *Id.* at 280. The court noted that its conclusion was consistent with results reached in other states. "No court has held that an on-call physician's status coupled with advice about a patient's condition or treatment establishes, as a matter of law, that an implied physician-patient relationship existed. Rather, the courts have held that the combination of those facts either creates a question of fact for the jury or leads to a ruling, as a matter of law, in favor of the on-call physician." *Id.* at 283.

However, the court reversed and remanded for a new trial because it concluded that the trial court erred in instructing the jury on the creation of a physician-patient relationship. The trial court's instruction "required the jury to infer from defendant's acts an intent to participate in the diagnosis, care or treatment of the patient." 352 Or at 286. The court explained that "it is sufficient if defendant either knew or reasonably should have known that he was diagnosing plaintiff's condition or providing treatment to plaintiff. In that event, a physician-patient relationship arose and defendant owed a duty of reasonable care to plaintiff." *Id.*

Mannex Corp. v. Bruns, 250 Or App 50 (2012)

The plaintiff in *Mannex* sold custom metal fabrication and other services to PCC Structurals, Inc. (PCC). PCC terminated its relationship with plaintiff after defendant (a PCC purchasing manager) told a new employee "that plaintiff was a crook, that he should never want to do business with plaintiff, and that he should remember that name." 250 Or App at 52. Plaintiff sued defendant for intentional interference with economic relations (IIER) and defamation. The Court of Appeals concluded that

70 *See State v. Lyons*, 324 Or 256 (1996) (determining that DNA evidence is scientifically valid).

71 *See generally* Mario Borelli, *The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom*, 71 Ind L J 2 (1996); John Selbak, *Digital Litigation: The Prejudicial Effects of Computer-Generated Animation in the Courtroom*, 9 Berkeley Tech L J 2 (1994).

the trial court properly granted defendant's motion for summary judgment on the IIER claim. The court explained that one of the elements of an IIER claim was interference by a third party, and that "[w]hether an employee is a third party to her employer's contract with another person or entity depends on whether that employee, in performing the alleged interference, was acting within the scope of her employment." *Id.* at 54. Here, summary judgment was properly granted because (1) there was "no dispute that defendant's actions occurred within the time and space limits authorized by her employment and that her actions were of a kind that she was hired to perform" (*Id.* at 56); and (2) "plaintiff did not present any evidence to create a genuine issue of fact about defendant's personal interest in the business relationship between plaintiff and PCC." *Id.* at 57. Summary judgment was properly granted on the defamation claim because (1) defendant's statements "were qualifiedly privileged, either because they were made to protect the interest of defendant's employer or, alternatively, because they were made by defendant to her employer on a matter of mutual interest" (*Id.* at 60); and (2) "there was no evidence that defendant abused her qualified privilege[.]" *Id.* at 61.

Evidence

State v. Rambo, 250 Or App 186 (2012)

The issue in *Rambo* was whether "the trial court erred in admitting as nonscientific expert opinion evidence or, alternatively, as lay opinion evidence, a police officer's testimony that, in his opinion, defendant had driven her vehicle while under the influence of a narcotic analgesic." 250 Or App at 187. Prior case law had established that (1) the procedure and results of the 12-step Drug Recognition Evaluation (DRE) protocol established by the National Highway Traffic Safety Administration (NHTSA) "are admissible as scientific evidence…to show that a defendant was under the influence of a controlled substance" (*Id.* at 191, citing *State v. Sampson,* 167 Or App 489, 512 (2000)); (2) "an incompletely administered DRE protocol is not admissible as scientific evidence" (*Id.,* citing *State v. Aman,* 194 Or App 463, 473 (2004)); and (3) "evidence of individual components of the DRE protocol were not necessarily inadmissible as nonscientific evidence of the impairment." *Id. Rambo* presented "the previously unexamined issue of whether a police officer's opinion that a defendant was under the influence of a controlled substance is admissible where it is based on a foundation that includes certain evidence that is encompassed in a DRE test, but where evidence of the DRE protocol itself is inadmissible because the protocol was not completed." *Id.* at 191-92.

The Court of Appeals concluded that "the trial court properly admitted the challenged testimony as nonscientific expert opinion evidence[.]" 250 Or App at 192. As a result, the court did "not consider whether it qualified for admission as lay opinion evidence." *Id.* The court explained that "[s]pecialized expert opinion evidence based on a witness's training and experience draws its force from that training and experience, but not necessarily from the mantle of science." *Id.* at 195. The testifying officer "did not—apart from his reference to independently admissible scientific tests—rely on the vocabulary of science, nor did he suggest that his conclusions had been reached through the application of a scientific method to collected data." *Id.* The trial court did not err in admitting the challenged evidence because the court "scrupulously sanitized the record of any evidence of a scientifically based protocol, thereby mitigating the risk that [the officer's] testimony would be given unfair weight beyond the credentials that he claimed." *Id.*

Trees v. Ordonez, 250 Or App 229 (2012)

The defendant neurosurgeon in *Trees* performed surgery to fuse three vertebrae in plaintiff's neck. Plaintiff sued for medical malpractice when "she later suffered adverse medical consequences that required additional surgeries and left her with permanent disabilities." 250 Or App at 231. Plaintiff alleged that defendant "breached the standard of care by failing to properly place and secure the plate used to stabilize plaintiff's cervical spine, resulting in plaintiff's injuries." *Id.* Plaintiff's evidence at trial "included expert testimony from a biomechanical engineer about the function of the plate, opining that [defendant's] installation of the plate was inconsistent with the manufacturer's explicit instructions." *Id.* The trial court granted defendant's motion for directed verdict, concluding that plaintiff "had failed to provide expert testimony that defendant violated the applicable standard of care." *Id.* The Court of Appeals affirmed. The court explained that the engineer's testimony "did not provide the jury with legally sufficient evidence of the care, skill, and diligence that was required of a reasonably careful practitioner when performing plaintiff's surgery under these circumstances." *Id.* at 237-38. Such testimony was required, the court explained, because without it, "the jury could not determine what the standard of care required in terms of using the plates under the complex medical circumstances presented here[.]" *Id.* at 240.

Procedure

Willemsen v. Invacare Corp., 352 Or 191 (2012)

In *Willemsen,* defendant CTE Tech Corp. (CTE), a Taiwanese corporation, manufactured battery chargers that it sold to an Ohio company (Invacare) that manufactures motorized wheelchairs. Invacare then sold the wheelchairs with the battery chargers in Oregon. Plaintiffs sued CTE after their mother died in a fire allegedly caused by a defect in CTE's battery charger. CTE contended that "the Due Process Clause

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does not permit Oregon to exercise personal jurisdiction over it when it has not purposefully availed itself of the privilege of conducting business in Oregon." 352 Or at 197. The Supreme Court disagreed, concluding that "the pattern of sales of CTE's battery chargers in Oregon establishes a relationship between the defendant, the forum, and the litigation, such that it is fair, in light of the defendant's contacts with this forum, to subject the defendant to suit here." *Id.* at 207 (internal quotes omitted).

***Worthington v. Estate of Milton E. Davis*, 250 Or App 755 (2012)**

The plaintiff in *Worthington* named as a defendant a person who died before the complaint was filed. Plaintiff later amended to name the personal representative of the decedent's estate as the defendant. The Court of Appeals held that the amendment "changes the party against whom the claim is asserted for purposes of ORCP 23 C." 250 Or App at 764. Because the complaint "misidentified the defendant, not merely misnamed the defendant[,]" the "amended complaint will relate back to the date of the original complaint only if the requirements of both sentences of ORCP 23 C are met, including that the personal representative who was brought in by the amendment received adequate notice of the action within the period provided by law for commencing the action against him." *Id.* at 764-65 (internal quotes omitted).

Miscellaneous

***Doe v. Corp. of Presiding Bishop*, 352 Or 77 (2012)**

***Evergreen Pacific, Inc. v. Cedar Brook Way, LLC*, 251 Or App 194 (2012)**

In *Doe*, the Supreme Court held that "Article I, section 10 [of the Oregon Constitution] does not compel the trial court to release to the public trial exhibits that are subject to a protective order or entitle the public to have access to trial exhibits at the close of trial." 352 Or at 86. In *Evergreen Pacific*, the Court of Appeals held that the Supreme Court's decision in *Trullinger v. Kofoed,* 7 Or 228 (1879) "compels the conclusion…that, as a matter of law, by taking the trust deed [as security for payment due under a construction contract], plaintiff forfeited the right to a construction lien." 251 Or App at 206.

***Niday v. GMAC Mortgage, LLC*, 251 Or App 278 (2012)**

In *Niday*, the Court of Appeals held, in a case "of first impression in the Oregon appellate courts" (251 Or App at 280), that "the 'beneficiary' of a trust deed under the Oregon Trust Deed Act is the person designated in that trust deed as the person to whom the underlying loan repayment obligation is owed." *Id.* at 281. The court explained that the import of its holding is: "A beneficiary that uses MERS [Mortgage Electronic Registration Systems, Inc.] to avoid publicly recording assignments of a trust deed cannot avail itself of a nonjudicial foreclosure process that requires that very thing—publicly recorded assignments." *Id.* at 301.