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The Vanishing Trial, Revisited

By Julianne Davis
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In 2002, as a member of the Ninth Circuit Senior Advisory Council, I was asked to participate in a multi-discipline research project on the phenomenon of the "vanishing trial." The project was funded by the Civil Justice Initiative of the Litigation Section of the American Bar Association, and chaired by Professors JoAnne Epps of Temple University, Steve Landsman of DePaul University, and Bob Sayler of the University of Virginia. The study involved numerous other law professors, trial and appellate judges, and civil and criminal practitioners. The work was both exhilarating and disheartening. To be sure, it was an honor and a joy to work with such a wide variety of disciplines, points of view and thought-provoking minds, and it was exhilarating to be part of a select group that studied, assessed and commented on the steady and alarmingly steep decline in the number of cases decided by trial. At the same time, it was a sobering experience as it was concluded that "[t]he vanishing trial may be the most important issue facing our civil justice

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system today." Patricia Renfro, *The Vanishing Trial*, 30 Litigation (Winter 2004).

The first step in the project was to gather as much data as possible about what was happening with trials, especially in the federal courts. Professor Marc Galanter of the University of Wisconsin School of Law was engaged to collect as much information as possible on the subject. That data collection formed the predicate for papers by 15 of the most respected academics in the country on a variety of topics relating to the vanishing trial, its causes and consequences. In December 2003, the academics were brought together with state and federal judges and leading practitioners for a two-day symposium to discuss the data, present the papers and begin to consider the myriad of issues raised.

The results of the study touched a nerve. The Vanishing Trial project ignited a great deal of attention and discussion in both the legal and mass media, and continued to be the subject of numerous conferences hosted by bar groups, as well as follow-on critiques and discussion by various members of the legal profession eliciting cries of "the sky is falling," to "much ado about nothing," and everything in between the two extremes. [1]

My assessment of the findings when first presented in a public format in 2004 was that there was much about which to be concerned, and much to be lost if the trend continued. While there were definite positive aspects about the dispensation of justice that were brought to light during the course of the work, the decline in trials, in my eye, signaled a new kind of justice that, if left unchecked, would result in a less just system. So, a decade after the work was undertaken, I decided to revisit the question, examine the numbers and trends anew, review the academic dissertations on the subject and deliver those facts, conclusions, opinions, warnings and the like to you. My hope is that the discussion is kept alive, and as trial lawyers we ensure that this vital aspect of justice and democracy not be allowed to wither and die by neglect or, worse yet, through inertia. Rather, we, as professionals most invested in the process, act to ensure that justice through trial be taken off life support, and resuscitated through reasoned and thoughtful discourse, action and advocacy. We have too much to lose if we fail to act.

By the Numbers

Marc Galanter, along with Angela Frozena, recently updated the numbers from the initial 2002 report. As the numbers indicate, the institution of the American trial continues its downward spiral. The fear here is, of course, that we may reach a point where we actually lose the ability to retain this important element of our public culture, even if we want to. Likewise, the numbers make it clear that the word "death" is not too strong a word. With regard to civil trials in the federal courts, Galanter concludes that there is "no news" and "big news." The "no news" is that the half-century-old downward trend lines continue. The "big news" is that the civil trial in the federal courts is approaching extinction. The following is a summary of some of the statistics gathered and reported in both his 2004 report and the update including figures through 2009. Marc Galanter and Angela Frozena, "*A Grin Without a Cat," Civil Trials in the Federal Courts,* published paper available at: http://roscoepound.org/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf.

In 1938, about 20% of federal civil cases went to trial. By 1962, the percentage was down to 12%, and in 2009, the number had sunk to 1.7%. The percentage of jury trials in federal civil cases was down to just under 1%, and the percentage of bench trials was even lower. *Id.* So between 1938 and 2009, there was a decline in the percentage of civil cases going to trial of over 90%. Importantly, the pace of the decline has accelerated toward the end of that period, until very recently, when there is almost no further decline possible. Even civil rights cases, where the perceived injury creates a somewhat higher likelihood of trial, showed a decline from 20% in 1970 to 4% in 2002. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. Emp. Legal Studies 459, 468 (2004).

The percentage of federal criminal cases going to trial fell from 15% in 1962 to 5% in 2002. Another study of a federal district court found that in 1975 twice as many civil cases were resolved after trial than by summary judgment; by 2000, in the same district three times as many cases were resolved by summary judgment as by trial. So in that district the rate of cases "disposed

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of" by summary judgment rose by 350%. State statistics are harder to come by, but they showed a similar pattern. In the ten years between 1992 and 2002, the number of trials in the seventy-five most populous counties fell by about 50%, even though the number of filed cases was actually increasing. *Id.* at 480. In the criminal context, from 1976 to 2002, the percentage of cases tried by judge or jury fell over 60%. Robert P. Burns, *What Will We Lose if the Trial Vanishes,* Northwestern University School of Law; electronic copy available at http://ssrn.com/abstract=1851776.

As noted by Robert Burns, "[t]he trial seems to be the only part of the legal system that is shrinking. There were more statutes, more regulations, more case law, more cases, more lawyers, more judges and a higher percentage of GDP going to legal matters. And so it is shocking that even the absolute numbers of federal civil trials is decreasing, from about twelve thousand in 1985 to about 3200 in 2009. The ratio of trials to filings is about 8% of what it was in 1962." *Id.* at 11. Burns further notes that the numbers of trials are actually skewed as they include cases where trial begins, but are not tried to judgment, and evidentiary hearings, such as preliminary injunctions.

Professor Galanter's ground-breaking research also showed that the types of civil cases being tried have also changed, reflecting, at least in part, the changing nature of the federal civil docket. Trials of tort cases in federal courts have plummeted. In 1962, one in six tort cases went to trial; by 2002, only one in 46 was tried. The percentage of civil trials that involve contract disputes also declined slightly. Meanwhile, trials in civil rights actions went from less than 1 percent of civil trials in 1962 to more than one-third of civil trials in 2002.

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Similar trends appear in the cases handled by federal magistrate judges. Magistrate judges tried 570 cases in our justice system in 1979 (the first year for which data is available), 1,919 in 1996, and only 959 in 2002. As with trials before Article III judges, the number of trials went down while the number of magistrate judges increased significantly. In 1982, one-third of magistrate dispositions were by trial; in 2002, the percentage had dropped to only 7.5 percent. Of course, the data on federal courts tells only a small part of the story of trials in the United States. The vast majority of trials—an estimated 88,000 in 1999—are in state courts. For a variety of reasons, the data on state court case filings, dispositions, and trials is sketchier. Brian Ostrom and his colleagues at the National Center for State Courts reported on trial trends in state courts from 1976 through 2002. In the 22 states for which data is available, civil jury trials are down by 28 percent and, in 2002, represented 0.6 percent of the total civil dispositions. The rate of bench trials in civil cases has also dropped.

Why Are Trials Disappearing?

When one looks at these dramatic changes, one stark question emerges: what has caused this phenomenon? While there is no single accepted answer, there is no shortage of theories and opinions on the cause of the demise of the trial as we now know it. That being said, on the criminal side, there appears to be near unanimity that the federal sentencing guidelines are responsible for the decline in the federal criminal trial. No one disputes that the guidelines impose a significant penalty on defendants that choose to exercise their constitutional right to a trial. Depending on one's point of view, the guidelines were designed to encourage or coerce defendants to accept plea bargains, and to that end the guidelines appear to be working admirably. It is safe to say that fewer defendants today will take the risk that is associated with a trial. Thus, the disappearance of criminal

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trials in federal court may be as straightforward as the unwillingness of defendants and their lawyers to risk additional harshness of the mandated penalty should they be unsuccessful at trial.

On the civil side, the causes are more nuanced and thus more difficult to identify and separate. The explosion in new case filings is most certainly a contributing factor in the vanishing trial phenomenon. As case filings continue to climb, judges have to cope with ever-increasing dockets. The sheer time it takes to manage large caseloads creates pressure on ever curtailing court resources, whether at the federal or state level. There simply is not enough money, personnel and time to try as many cases as in the past. Or, put differently, judges and their staffs are placed under enormous pressure to dispose of as many cases as possible. Indeed, in many jurisdictions, judges are evaluated based on their case disposition rates, an evaluation system that is uniquely hostile to trial dispositions because, by definition, they take longer.

For whatever reason, some judges are simply anti-trial. Judith Resnick of Yale documented judges who view trials as "failures" that occur only when lawyers have not done their job and obtained a negotiated resolution. These judges view themselves as case-resolvers—the faster the better. They have their ways of exacting a toll on those who want to hold out for a jury trial. Judith Resnick, *Whither and Whether Adjudication,* 86 B.U. L. Rev. 1122, 1126 (2006).

As unpopular as this sentiment might be, I believe that trial lawyers bear some responsibility for the disappearing trial by making the process of getting to trial too expensive and too long.

As unpopular as this sentiment might be, I believe that trial lawyers bear some responsibility for the disappearing trial by making the process of getting to trial too expensive and too long. Discovery is too broad, takes too much time, causes the parties too much distraction from their day to day work responsibilities, and costs too much money. Rather than tailoring discovery to only those issues and data that is needed to support our client's case, or debunk the opposition's theory, much too often we seek to leave "no rock overturned," which makes the process significantly more expensive, and emotionally and intellectually draining for the parties. As trial lawyers, we need to be more circumspect, and more confident in turning over only the stones that need be. From my perspective, I have never participated in a trial in which the amount of information obtained during discovery was fully utilized in the courtroom. On the contrary, only a small percentage of the information was actually needed to fully, accurately and successfully prepare the case for trial. We need to do better.

Another cause of the declining trial is the rise in summary judgment. *Litigation*, Winter 2004 Volume 30 Number 4, available online at http://www.abanet.org/litigation/home.html. Stephen Burbank of the University of Pennsylvania concluded that the rate of case termination by summary judgment rose from approximately 2.8 percent in 1960 to approximately 7.7 percent in 2000. At the same time, however, he cautioned that the rate of summary disposition varies both among different federal courts and among case types.

Alternative dispute resolution, in all of its permutations, also contributes to the declining trial rates. Thomas Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution,* Journal of Empirical Legal Studies, Volume 1, Issue 3, 843-912 (November 2004). The trend toward privatization of dispute resolution is well known, but hard statistics are not readily available for any meaningful conclusions. It seems that today virtually every consumer contract contains a clause that the consumers waive rights to adjudicate any dispute in court, and courts have routinely enforced such clauses. While some see this development as a positive in that it allows disputes to be resolved

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more quickly and inexpensively, it also has a distinct negative impact as well. Corporate litigants seem to favor arbitrations over trials because of the perceived uncertainty and unpredictability of a trial. Much of this demonization of trials, and jury trials in particular, stems from tort actions and what the media and others have depicted as excessive verdicts in relation to the actual harm. Who, amongst our ranks, can forget the infamous "coffee in the lap" verdict assessed against McDonald's? The certainty of a known result drives litigants to compromise and settle rather than risk the unknown of a trial. On the negative side is that ADR is largely unregulated and, by its very nature, private. So, in the quest for a cheaper and perhaps more predictable outcome, we give up one of the most important aspects of justice in a democracy—that it be done in public, with the facts, arguments and conclusions of judges, lawyers and juries open to public scrutiny.

What Are We at Risk of Losing?

When we consider the statistics, the analysis and the conclusions of a variety of commentators, we need to keep in mind that we should not be nostalgic for something that never was. With that in mind, we need to acknowledge that trials have never been the principal method of dispute resolution in our judicial system. For decades before I started practicing law in 1984, most cases did not proceed to trial for resolution. Rather, historically most cases have been resolved through settlement, or some method other than trial. Nevertheless, the trial has always been the endgame in American jurisprudence. It has served as the pinnacle of resolving disputes in the eyes of lawyers and laypersons alike, and the examination of its worth should acknowledge the importance of this public perception. Our adversarial system and the culmination of disputes in a trial of our peers is, without doubt, one of the most compelling examples of democracy and self-governance in action. Beyond the passive act of voting, jury service may be the only opportunity most citizens have to participate in any aspect of government. It has been my personal experience that most jurors take their job seriously, and strive to do it honestly, fairly and within the confines of the law. In addition, studies I've seen show that, on average, most jurors work very hard to do the right thing, and leave their jury service feeling good about their experience and about the justice system. In a democratic society, that matters. And the cost of losing that citizen participation in government is impossible to calculate.

In order to attempt to calculate what might be lost if the trial goes the way of the dinosaur, one needs to appreciate the powerful message that is delivered when trial practices, along with the unique nuances in the communication of the facts and explanations, impact our perception of the "truth" as revealed during a trial. In other words, a public discourse, utilizing the rules of a trial which regulate what is material, can, and often does, result in a fair and just resolution to what should be done about a dispute.

Many of the legal restraints or formalities regulating the presentation of evidence serve an important public purpose. The notion of materiality keeps the presentation of evidence connected to the substantive law and serves to protect the democratic legitimacy of the rule of law. The requirement of foundation as to personal knowledge and that testimony, to the extent feasible, be based on one's knowledge, rather than supposition or rumor, is crucial. A trial allows the trier of fact to understand the basis of any witness's assertion by actually hearing that assertion, rather than having it presented in a sterile document or pleading.

The trial also reveals and respects the detailed factual truth, our common sense, social mores, and "the rule of law as a law of rules." It is the trial's adversarial approach of examination, cross-examination, opening and closing statements that creates the atmosphere that encourages, challenges and requires the finder of fact to seek the truth, even if that truth is merely more likely than not. This process allows us to reflect on and apply real life controversies in reaching a fair and just resolution to disputes. This process alone is worth fighting to preserve.

The privatization of dispute resolution has a host of consequences. The pleadings, testimony, documents—and the result—are shielded from public view. Indeed, that is one of the reasons litigants turn to private dispute resolution in the first place. Neither the public nor the press has a seat in the private arbitration courtroom. Arbitration decisions contribute

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nothing to the development of the common law. There is anecdotal evidence that, at least in some areas, private arbitration is affecting the bench because judges, underpaid almost everywhere, can earn so much more by hanging out their shingle as a "neutral." Moreover, the private judge has none of the protections of an independent judiciary.

There is also the issue of training new trial lawyers and ensuring that they get "on the job" experience. I am absolutely convinced that not only must a trial lawyer be mentored, but they must also be ultimately responsible for taking cases through trial. Anyone who has tried cases will likely agree that the way to becoming a better, more efficient *litigator* is to try cases. It is entirely possible that some "litigators" sometimes settle a case because they don't know how to try a case. And if there are fewer trials to go around, then surely over time, fewer lawyers will have meaningful experience in trying a case. At the current rate of resolution of disputes by methods other than trial, where and how will young lawyers become seasoned, experienced and trusted trial lawyers? Today, many large firms routinely elect new litigation partners who have never even second-chaired a trial.

As we watch trials diminish, we lose some important and intangible social benefits that flow from the public trial. Trials can be about closure and healing when an aggrieved litigant finally has "their day in court." This public benefit should not be taken lightly. We, as trial lawyers, advocate for our clients, but at the end of the day it is *the client's* problem, and a trial may be what is needed to bring a dispute to an end, win or lose. Trials can also educate and enlighten. Trials can be a catalyst for change. Trials can bring the light of public scrutiny into areas of public concern. In sum, to most of the public trials are about right and wrong, good and bad, innocence and guilt. In my mind's eye, that is simply too much to lose. I agree with the sentiments of the findings of the 2004 study, that the vanishing trial may be the most important issue facing our civil justice system today. It is our obligation to continue to study and discuss this situation. It would be a shame if this quintessence of American jurisprudence expires through inertia.

End Note:

[1]On February 29, 2012, United States District Court Judge William G. Young of Massachusetts released his latest rankings of the most productive federal courts. Interestingly, Judge Young does not base his evaluation on the number of cases closed or processed; rather, his measure of productivity is based upon the time federal judges spend on the bench in civil and criminal trials each year. Judge Young concludes that too many disputes are being resolved administratively as opposed to being tried in a court of law. Judge Young laments the decline in trials, and urges judges to think in terms of "how am I going to try this case," instead of "how am I going to get rid of this case." A discussion of the study can be found at http://www.law360.com/ip/articles/314736?nl_pk=635db9e4-0719-4d87-b888-3cae7ef12a3e&utm_source=newsletter&utm_medium=email&utm_campaign=ip. ❐

Revisiting the First Principles of Cross-Examination

By Janet Lee Hoffman
Janet Hoffman & Associates LLC

As many lawyers know, one of the most nerve-racking activities is to stand up in front of a group of colleagues or peers and speak on a subject as an "expert." Such demonstrations are often more intimidating than appearing before any judge or jury. For this reason, when I agreed to demonstrate a model Cross-Examination as part of this year's OSB Trial Advocacy College, I was dismayed to learn that not only would my techniques be held up as the "right way" to do things, I would be cross-examining the plaintiff in a type of case in which I had virtually no experience: a personal injury case arising out of a motor vehicle accident. My work preparing that demonstration cross, however, not only reminded me how much fun cross-examination can be, it also confirmed that the tried-and-true techniques for preparing and conducting a cross-examination of a hostile witness will work even with an unfamiliar subject matter. After over thirty years as a trial lawyer, I can almost recite in my sleep the basic concepts behind cross-examination, but this exercise underscored how far certain key concepts can take a lawyer who finds herself in a new or challenging situation.

Janet Lee Hoffman

"I'll tell you a story."
— F. Scott Fitzgerald

Dickens famously said, "Now, what I want is, Facts." The story the lawyer weaves from the facts ultimately carries the day. Trial practice has much in common with the theater and storytelling. An effective cross-examination will showcase your narrative more than any other part of the trial. With a critical witness such as the plaintiff in a personal injury case, the jury will expect something compelling, or at least somewhat interesting. Developing a captivating narrative requires putting yourself in the shoes of the juror and asking: What would a juror want to know about this case? What is my case theory and how can the witness contribute toward establishing my themes?

Although I knew little about the typical issues that arise in a car accident case, I knew that if I wanted to make an impression on the jury (or, in this case, interest and entertain my fellow lawyers), I had to do something more with my cross of the plaintiff than just elicit basic factual testimony that an accident reconstruction expert could later use to show inconsistencies between the plaintiff's story and the physical evidence.

In this case, the participants in the training program were given a set of prepared materials involving a motor vehicle accident that had taken place at an intersection in Southwest Portland. The written materials revealed some inconsistencies among the plaintiff's statements made to police, to doctors, and during depositions, but the statements mostly concerned matters collateral to the cause of the accident itself. The records, of course, provided evidence that the plaintiff had a motive to exaggerate—namely, a desire for a financial recovery—and had perhaps overstated the extent of his injuries. I needed to go beyond those issues

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if I wanted the jury to conclude that the plaintiff's statements that he was driving carefully and well within the speed limit when the collision occurred were not trustworthy.

It is common knowledge that people enjoy solving puzzles. Neuroscientists have found that not only does the brain enjoy puzzle-solving, once a person reaches a conclusion, it becomes a fixed belief. The ancient rhetorical device of creating a syllogism—where an audience is presented with two propositions from which it is meant to reach a desired conclusion—has long been used to sway public opinion. In the context of cross-examination, this means that jurors who are allowed to come to their own conclusions will believe the outcome is a matter of common sense and will not be easily swayed from their conclusion once it has been reached.

In this case the plaintiff testified he was driving the posted speed limit from the time he left work to the time of the accident. Because the defendant pulled out unexpectedly into the plaintiff's lane of traffic, the plaintiff was unable to slow down to avoid the collision. I knew I needed to set up the following syllogism: The plaintiff drove at a speed in excess of the posted speed limit after he left work. Therefore, the plaintiff's statement that he was driving the posted speed limit before the collision cannot be trusted. Once the inaccuracy was exposed the jury would have to conclude a person who lies about consistently driving the posted speed limit must be lying when he testified that he was driving carefully immediately before the accident. Therefore, the plaintiff's careless driving caused the accident.

If you hope to use a witness's own words to demonstrate his untrustworthiness or some other negative trait, it is imperative that you know as much as you possibly can about the subject matter at hand.

To determine whether your syllogism works, it is crucial to enlist trusted colleagues, if possible. Talk to those around you about your case theory; ask them if your talking points are persuasive; show them your exhibits to determine whether they make your point. If you can't accomplish these things in a succinct, appealing way ahead of time with an honest audience, it probably won't work with twelve strangers on a jury.

"Preparation is the be-all of good trial work." — Louis Nizer

We have all been told countless times about the importance of preparation in trial practice, and doubtless many of us have learned that lesson the hard way. But it bears repeating that thorough and exacting preparation is nowhere more important than in cross-examination. As stated above, a truly effective cross-examination results in the jurors drawing their own conclusion that the witness cannot be trusted. Your goal is to lead the jurors to conclude that the opponent's version of events is implausible and defies common sense.

If you hope to use a witness's own words to demonstrate his untrustworthiness or some other negative trait, it is imperative that you know as much as you possibly can about the subject matter at hand. For example, once I determined that the events at the scene of the accident would be the most compelling part of this cross-examination, reviewing and analyzing the written case file was merely the first step. The only way to explore fully the issue was to visit the scene and attempt to understand in a concrete way the context and identify any factors that might undercut the witness's statements. In any trial there is no substitute for getting out into the field.

In my case, I enlisted a few interested colleagues to travel to the scene with me to take photographs, to assess and document the features of roadway, and to explore what both the plaintiff and defendant would have seen before the accident occurred. We also mapped out and traveled the plaintiff's route on the day in question. We drove from his place of work to the scene of the accident. I was hoping

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that the time it took him to reach the point of the accident was shorter than the legal speed limit, proving he was speeding. Unfortunately, this theory did not pan out. Our investigation revealed that even in heavy traffic the plaintiff could have reached the location in the time he testified it took him while traveling well within the speed limit. From past experience I have learned not to waste time and squander credibility by cross-examining a witness on topics that don't further your goal of casting doubt on the opponent's case. No matter how good the questioning technique, if the facts don't support your point, the witness's answers will have the ring of truth.

What the investigation of the accident scene revealed, however, was that the posted speed limit for certain parts of the route was lower by half than what the plaintiff had testified to in his deposition since there were multiple warning and hazard signs, including school crossings and curves. When taken together, there was persuasive evidence to suggest that if the plaintiff had been driving at 40 mph as he had testified under oath in his deposition, he had been driving substantially faster than the posted speed limit. The jury could therefore conclude that he must have been speeding when he approached the relevant intersection. In other words, his testimony that he had been driving carefully and had slowed down just before the accident could not be trusted. The investigation revealed the key to the syllogism and showed me how I could lead the jurors to conclude that the plaintiff, not the defendant, caused the accident.

"Order is Heaven's first law."
— Alexander Pope

Once you determine the goals of your cross, formulate a step-by-step plan to achieve those goals. A well-organized cross-examination has several elements. The topics should flow logically; the organization should make sense to the listener and should be easy to follow. Oftentimes, the outcome of a case depends on which lawyer jurors trust more. Jurors are more likely to respect and trust lawyers who have a well-structured cross-examination and appear to know ahead of time what they are trying to accomplish. A well thought-out cross demonstrates to jurors that the lawyer knows her case and is confident in the positions she is taking.

While the Oregon Evidence Code grants the court the discretion to "exercise reasonable control over the mode and order of interrogating witnesses,"[1] the court generally will not interfere with the order of your questioning, if it makes logical sense and does not mislead the jury. Focus on one point at a time, and clue jurors in on the topic you are covering by using introductory statements, such as "Now I'd like to discuss the statements you made to the police officer at the scene."

It is also critical to consider the appropriate time to raise the different topics in your examination and depending on how those topics will impact the witness. Even hostile witnesses will frequently be able to provide testimony favorable to your case. In some instances, this function of cross-examination can be as important as damaging the credibility of the witness. If the witness can provide you with helpful affirmative testimony, elicit that testimony before you begin to impeach him or otherwise attempt to harm his credibility. There's truth to the old adage "don't insult the alligators until you have finished crossing the stream."

In all likelihood, opposing counsel will already have attempted to build up the witness's credibility during the direct examination and you can take advantage of her efforts by lending credibility to the testimony concerning your own case. When you want information from a hostile witness that will help your case, be nice to him, flatter him, build him up as an authority on the issue and make him feel smart. A witness who feels comfortable and competent will let down his guard and may want to appear to be an expert on the subject and to both continue to remain in your good graces and shine before the jury. He is more likely to answer your questions in a pleasant, affirmative way. Only after you have received the helpful testimony you want from the witness should you revert to "attack mode." In short, organize your cross examination to frontload the questions that will elicit information helpful to your case and backload the questions that will have the effect of impeaching or criticizing the witness.

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"No rule so good as rule of thumb, if it hit."
— Scottish Proverb

The classic rules of cross-examination work and bear repeating. Anything you read on cross-examination will tell you to use simple, leading questions to control the witness. As it is also commonly said, you should do the testifying, and the witness should simply be asked to agree with whatever you say. When you lead a witness by asking questions that themselves strongly imply the desired answer, you are in effect "priming a pump." Witnesses typically go into a cross-examination anxious and ready for battle, and if you can get the witness answering "yes" over and over, it will lull him into a rhythm. He is then less likely to reject the premise of your question, and more likely to provide the answer you seek.

Using simple questions is also critical because it requires the witness to do less thinking and supports the tendency to answer "yes" to every question you ask. Simple, short questions also hold the jury's attention and provide a coherent story free of confusion.

Some attorneys, like me, have the tendency to ask compound questions. These questions are not only subject to objection, they can be confusing to both the witness and the jury. If you ask a compound or poorly-worded question, don't be afraid to acknowledge it and to use humor when doing so. Levity and self-effacement can humanize you to the jury and build credibility. Lawyers who recognize their mistakes and appear personable are more likable and generally more trustworthy to the jurors than lawyers who convey a sense that they are always right.

One of the most oft-quoted rules for cross-examination is to only ask questions to which you know the answer. This remains a good rule of thumb, but like all rules of thumb, there are exceptions. There are some situations where any possible answer the witness gives will help you and no possible answer can hurt you. These are few and far between, but can be effective opportunities when recognized. Again, don't be afraid to use your trusted colleagues to help you determine whether a question you plan to ask can hurt you. If you can identify those questions, they can sometimes provide some of the most effective and compelling testimony in your case.

For example, in this case, the plaintiff had testified during his deposition that his car had "almost bottomed out" on a speed bump just before the accident occurred. The cross-examination question, "What did it feel like when your car almost bottomed out?" probably will not hurt you, even if you don't know what the witness will say in response. Everyone has had the experience of going over a speed bump a little too fast, so if the witness tries to minimize his earlier statement it will not undercut his prior statement. But, if the witness uses language that unintentionally conveys that he was going very fast over the speed bump, his own words can be used against him much more effectively than any characterization you could give. In my demonstration, the witness unexpectedly responded to that question by describing the feeling of traversing the speed bump as similar to being "on a roller-coaster"—very helpful testimony because using his own words, you could characterize his drive as his "roller-coaster ride."

"We are not won by arguments that we can analyze, but by tone and temper; by the manner, which is the man himself."
— Louis Brandeis

One of the most common ways that lawyers attempt to undercut an adverse witness's credibility is through impeachment, especially impeachment with prior inconsistent statements.[2] It is essential to make your impeachment count. All too often, however, the inconsistency appears much bigger and more significant in the mind of the lawyer than it appears to the jury. Jurors may empathize with the witness who is being put on the spot by a crafty lawyer, or they see the distinction the lawyer is making as trivial. Jurors may also fail to understand the meaning of the impeachment or fail to appreciate its importance, if they do not understand the issues. Because we all know our case much better than any juror could hope to, we should remember that during cross-examination the jurors must be led through the impeachment step-by-step. Through a methodical inquiry, they have an opportunity to appreciate fully its significance.

One common and effective way for jurors to appreciate the impact of your

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impeachment with a prior inconsistent statement is to highlight the original statement and build up the importance of the circumstances under which it was made. You should take the witness through the steps of his first statement: He should affirm how seriously he took that statement, and he should acknowledge that he understood the importance of being truthful. In doing so, you are demonstrating to the jury that the witness had every incentive to be accurate. The jury must come to believe as a matter of common sense and life experience that a witness is unlikely to make these inconsistent statements by accident. Rather, he must have been intentionally untruthful. If the first statement is highlighted sufficiently, the inconsistencies in the second statement will have much more impact. This can be done very easily with a series of short questions that build on each other.

If you are attempting to highlight the improbability of a witness's statement based on other evidence, you can lead the jurors to recognize the improbability by using small visual bites that paint a picture of the scene that is favorable to your case. Short, clear questions are always more effective in helping jurors recognize the inherent illogic of the witness's testimony.

"Patience and tenacity are worth more than twice their weight of cleverness."
— Thomas Huxley

A close corollary of this lesson is that it is essential to take your time with a witness when making an important point. While you don't want to bore the jurors or waste their time with irrelevant lines of questioning that are going nowhere, when you have something to show that will advance your case theory, you should not waste its potential impact by rushing through it. When you are cross-examining a witness, the courtroom belongs to you and no one should rush you or pressure you to finish your examination before you are ready.

Using short questions with small bites of information can have the effect of freeze-framing the action being described and will help the jurors focus on the details that you want to highlight.

Don't be afraid to draw out a particular subject if it is important to your case theory. This can be an effective means of building suspense and can help to grab the jurors' attention. Using short questions with small bites of information can have the effect of freeze-framing the action being described and will help the jurors focus on the details that you want to highlight. Think of it as peeling an onion one layer at a time. If you are describing an event, think about including questions that focus on the senses to paint a picture. Take your time and use baby steps. Lead the jurors to reach their own inevitable conclusions about your witness by leaving them with no other plausible choice.

For example, at the beginning of my career, I tried a kidnap-rape case and wanted to establish through cross-examination that the act was consensual. I wanted to prove that the complainant's statement that she did not call for help because no one was around to hear was improbable by establishing that when the alleged rape occurred, it was evening in downtown Portland, every restaurant and bar was open, and there were many people out and about. But instead of taking the witness through these details one by one, I simply asked, "There were lots of people around at the time, weren't there?" She replied, "Well, none that I could see." My argument was ineffective because owing to my inexperience, I had rushed through the issue and thereby lost a potentially fruitful line of impeachment. If I had instead used a series of concise questions to establish the scene, including the number of bars that were open, bus stops, street lights and movie theaters on her path, the jury may have concluded that her testimony that she did not call for help because no one was around was implausible. The jury might have then concluded that she had left with my client voluntarily.

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Revisiting the First Principles of Cross-Examination

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"It is the province of knowledge to speak, and it is the privilege of wisdom to listen."
— Oliver Wendell Holmes, Sr.

Another critical principle of cross-examination is the art of listening. Many times lawyers become so focused on their examination outline and the points they hope to make that they fail to hear and absorb important statements the witness made on direct or during the cross. Failure to listen accurately can also harm your credibility with the jurors because they may feel that you are taking advantage of the witness by twisting his words. The jurors might perceive you as manipulative and can have the added effect of creating sympathy for the witness. Poor listening might also cause you to miss an opportunity to remedy an unhelpful response, or you might miss a helpful answer that you could have used to your advantage during the examination.

During my cross of the plaintiff in this exercise, I asked the plaintiff to confirm (as stated in the police report) that the accident occurred at approximately 4:00 pm, with the goal of subsequently getting his agreement that the accident occurred while the 20-miles-per-hour school zone speed limit was in force. Perhaps sensing that the 4:00 pm time frame could hurt him, the witness was reluctant to agree and stated, "I'm a little shaky on the details." Had I been so focused on making my point about the 20-mile-per-hour speed limit, I might have missed that the witness had just admitted he was uncertain about his testimony regarding the fundamental details of the accident.

Had I been so focused on making my point about the 20-mile-per-hour speed limit, I might have missed that the witness had just admitted he was uncertain about his testimony regarding the fundamental details of the accident.

One effective technique to show you are listening to the answers the witness is providing is to use the "mirroring" technique: Use the witness's own words when posing your questions. A similar technique is "looping," or integrating the witness's last answer into your next question. A witness will tend to agree with questions in which his own words are accurately restated.

If you are a careful listener, you will appear to be—and in fact will be—more engaged in the testimony that is being elicited. You will be a much more effective questioner than if you're simply following your outline. Failure to listen will likely result in missed opportunities.

"Tell me and I'll forget; show me and I may remember; involve me and I'll understand."
— Chinese Proverb

The logic of your position and your ability to establish your syllogism in the jurors' mind is greatly enhanced by the use of visual aids. Visual aids emphasize key areas of testimony and help them remember what they are hearing. Brain science has shown that people learn best and retain more new information when more of their senses are engaged. The brain is most active when it is stimulated in various ways. For example, a study by scientists at University of California at Santa Barbara examined some of the most brain-friendly instructional strategies to enhance learning and established that people learn best when presented with narration and are simultaneously exposed to a visual representation.[3]

In practical terms this means that to augment the impact of a point, the attorney should speak while showing some type of graphic, such as a photograph, demonstrative exhibit, or video clip. The brain is able to absorb both types of information by processing them through separate channels. It will process what it hears through its verbal channel and what it sees through its visual channel. The verbal information will enhance the visually-conveyed message and vice versa, causing more information to be retained.

Notably, contrary to popular wisdom, PowerPoint presentations are not effective visual aids. If the jurors are shown slides filled with words during an oral presentation, they are

Revisiting the First Principles of Cross-Examination

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unable to absorb the written message and spoken information simultaneously because both modes of communication engage the same verbal channel part of the brain. The listener experiences an overload of verbal inputs and the brain is forced to ignore a certain portion of the information.

If, however, images are used as visual aids (e.g., videos, photographs or schematics), it can have the effect of demonstrating your point in a uniquely impactful way that cements the information in the jurors' brains. In this case, for example, an important part of the model cross-examination of the plaintiff included a series of photographs taken of the road along plaintiff's route in the mile or so before the intersection where the accident occurred. Luckily, this road had an unusual number of road signs, including several speed limit signs showing posted limits lower than the 40 miles per hour that plaintiff had claimed, as well as signs requiring a reduction in speed for a park, a school zone and a school crossing, as well as a speed bump warning. By using short questions to elicit small bits of information, while at the same time displaying the numerous road signs to the jury, it cemented the impression that this was a road that should have been traveled slowly and cautiously, and that plaintiff's admitted speed of 40 miles per hour was at times 20 mph over the posted speed and unreasonably fast.

In a real trial setting, of course, visual exhibits—photographs, films, videos, and the like—must be authenticated and shown to be admissible under the Oregon Evidence Code, particularly OEC 401 (relevance) and OEC 403 (balancing of probative value against risk of unfair prejudice), to be admitted into evidence. Any exhibit must be a "fair and accurate" representation of what existed at the time of the event or when it was prepared. While a visual need not be identical to the original, it must be similar in the aspects that are relevant to an issue in the case. The degree of variance may be taken into account in terms of what weight must be assigned to a piece of evidence rather than in terms of its admissibility.

In your next case, think carefully about the visual exhibits, graphics, and demonstratives that will most effectively get your point across to the jury. Prepare mock-up exhibits and show them to your colleagues to ensure you are choosing images with the greatest possible impact. With thoughtful preparation, the strategic use of visual aids will allow jurors to absorb more information and they may be more receptive to your message.

Any successful cross requires intense preparation. It requires that you identify the areas where your examination can lead the jury to conclude, as a matter of common sense, that your view of the case is the only logical one.

"Success is a science; if you have the conditions, you get the result."
— Oscar Wilde

Regardless of the subject matter or area of law, an effective cross-examination draws on the same tools and skills. Any successful cross requires intense preparation. It requires that you identify the areas where your examination can lead the jury to conclude, as a matter of common sense, that your view of the case is the only logical one. But once you identify those areas, don't squander your hard work. Get the most out of your cross by using some of these venerable tools to make the jury take notice and increase your chances of success.

End Notes:

[1] *See* OEC Rule 611.

[2] *See* Oregon Evidence Code Rules 607, 608, 609 and 609-1 for the key rules of evidence regarding the impeachment of witnesses.

[3] *See* Roxana Moreno & Richard E. Mayer, *Cognitive Principles of Multimedia Learning: The Role of Modality and Contiguity,* 91, No. 2, JOURNAL OF EDUCATIONAL PSYCHOLOGY 358 (1999). ❐

From the Managing Editor

Repetition and Skating . . . But Not on Ice

By
Dennis P. Rawlinson
Miller Nash LLP

By the time we graduate from law school, we realize that the most powerful techniques for trial practice are primacy (we remember best what we hear first), recency (remember what we heard last), and repetition. Repetition to a degree is the stepsister of the other two techniques. Perhaps because it is overused or misunderstood.

Make no mistake about it, however—if used correctly, it is powerful.

Dennis P. Rawlinson

1. Misuse of Repetition.

When the videotape portraying the police beating of Rodney King was played for the 35th time at trial in the original case before the jury in Simi Valley, California, the jury was so calloused from hearing and seeing it over and over again that the initial reactions of revulsion and horror had drained away. Repetition of the same powerful evidence over and over again can dilute its impact and even result in its having an opposite impact.

As a result of this phenomenon, we should be careful to use strong visceral evidence sparingly. The first time tears come to the plaintiff's eyes, the jury is moved by them. By the eighth or ninth time, the tears may well have the opposite effect.

Save, savor, and carefully dole out your powerful visceral evidence. This is not where the trial technique of repetition is effective.

2. Repetition of Theme.

In contrast, however, when you have finally boiled down all your evidence, the facts, and your theories into a simple one-sentence theme, don't be afraid to repeat that theme throughout the trial.

For instance, if the theme of your case is that the defendant will not pay for the new plant that your client built for it because demand has fallen off for its product and it doesn't need the plant, don't be afraid to ask half a dozen witnesses about the undisputed loss of demand.

Here repetition can be helpful and reinforce your message to the fact finder.

3. Skating.

Skating is the trial technique that enables you to dwell on, repeat, and savor great testimony that helps your case. Some refer to this technique as "looping" . . . but I call it "skating."

For instance, in a negligence case against a defendant who has caused an automobile collision, you may discover on cross-examination that the defendant had three beers just before the accident.

This is evidence worth dwelling on, repeating, and savoring. Don't run the risk of hiding this piece of evidence in a long-winded narrative answer by one witness or limit this evidence to one short question and answer.

The first technique is to repeat the inflammatory answer in your next question. "After you had the three beers . . ."

Oregon State Bar

Announcement Concerning Future Issues of the Litigation Journal

Future issues of the litigation journal will be sent to you electronically rather than by mail. All Litigation Section members will receive a notice from the Oregon State Bar explaining how special requests may be made for hard copy delivery. We anticipate no interruption in providing you the latest in litigation practice developments.

From the Managing Editor

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Skating, however, goes further; you can dwell on that answer by asking a series of questions that forces the same answer to be repeated over and over again until you are sure the fact finder (and even sleepy juror number 6) has heard it and will remember it. Here's a short example based on the answer that the defendant had three beers before the accident:

"**Q:** Were the three beers that you had light beers or dark beers?

"**A:** Light beers.

"**Q:** Were the three beers that you had from the tap or from a bottle?

"**A:** From a bottle.

"**Q:** Were the three beers that you had imported or domestic?

"**A:** Domestic.

"**Q:** The three beers that you had—did you drink them with a glass or without a glass?

"**A:** I drank them out of the bottle.

"**Q:** The three beers that you had—did you drink them slowly or did you drink them fast?

"**A:** I drank the first fast and the last two slowly."

You know, the witness knows, and the jurors know that you don't particularly care whether the three beers were light beers, domestic beers, beers in a bottle, beers served with a glass, or beers drunk fast or slowly. In fact, you have known all this information for some time as a result of discovery. But what you do care about is "skating" over that great evidence, time and time again, until you are certain that repetition will make it memorable.

You are skating . . . but not on ice. ❐

Oregon State Bar

Spring Calendar

CLE Seminars

March 23
Taming the Medicare Gorilla in Your Injury Cases
9 a.m. to 4 p.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd, Tigard, Oregon
6.25 General CLE credits
6 CE credits for insurance professionals

April 13
Conducting Effective Employment Investigations
With Emphasis on Harassment Investigations
9 a.m. to 4:15 p.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd, Tigard, Oregon
6.25 General CLE credits

April 27- April 28
25th Annual Northwest Bankruptcy Institute
9 a.m. to 4 p.m.
Grand Hyatt Seattle
721 Pine St., Seattle, Washington
Cosponsored by the Washington State Bar Association Creditor Debtor Rights Section and the Oregon State Bar Debtor-Creditor Section.
Oregon: 9.75 General CLE credits (including .5 General CLE credit for lunch presentation) and 1 Ethics credit
Washington: 8.75 General CLE credits and 1 Ethics credit (pending)

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

Organizational Depositions: Do They Allow A Second *BITE* At The APPLE?

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

BACKGROUND

The general practice in Oregon is that each witness may be deposed only once. This rule, that a party may have only "one bite at the apple," is not codified within Oregon's procedural rules—but it is well accepted among practitioners and courts alike. The limited Oregon case law discussing the re-opening or continuation of depositions is consistent with the rule that one deposition per person is allowed. *Burson v. Cupp,* 70 Or App 246, 248, 688 P2d 1382 (1984) (holding that trial court's refusal to allow a second deposition of a witness was not an abuse of discretion). Under federal law, the one-bite rule is expressly recognized by Fed. R. Civ. P. 30(a)(2)(ii), which provides that a witness may not be deposed more than once absent a stipulation or leave of court.

Joseph L. Franco

The concept that a witness may be deposed only once is at times in tension with the rules providing for organizational depositions, because they leave open the possibility that a witness may be deposed both as the designated representative of an organization, and also in that witness's individual capacity. ORCP 39 C(6) provides that a party may notice the deposition of an organization and describe with particularity the matters on which examination is requested. Both the Oregon rule and its federal counterpart place on the organization the affirmative duty to prepare the designated witness or witnesses on all matters "known or reasonably available to the organization." ORCP 39 C(6); Fed. R. Civ. P. 30(b)(6). Under both rules, taking an organizational deposition does not preclude "a deposition by any other procedure." *Id.*

Some practitioners employ these rules to get what appear to be two bites at the same apple. A common example is when a corporate officer, such as a CEO or CFO, is deposed and then later, in the same litigation, the organization's deposition is noticed on topics that were already exhaustively covered in the officer's deposition. Often the overlapping subject matter would have made it obvious to the noticing attorney that the previously deposed officer would be the corporate designee at the organizational deposition. Under these circumstances, the same witness could be deposed twice on the same subject matter—even asked substantially the same questions.

David B. Markowitz

It is not surprising that many practitioners object to this tactic. One side seeks a protective order, and both sides brief and argue the issue—often at substantial expense. While reported Oregon cases have yet to address the issue, it has increasingly been raised in federal litigation under Rule 30(b)(6). Although upon first glance the federal courts seem split on the issue, closer inspection reveals they share common themes.

A number of courts have been highly reluctant to proscribe a party's ability to take an organizational deposition, even when it necessitated a second deposition of the same witness. Other courts have limited or even eliminated a party's ability to take an organizational deposition when the individual who will be the organization's designee has already been deposed, if the second

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deposition will be duplicative, harassing or burdensome. These courts have permitted a responding party to designate a fact witness's previous deposition testimony as the testimony of the organization and thereby satisfy the need to designate a Rule 30(b)(6) witness. This approach limits duplication and encourages the questioner to ask all important questions during the first deposition.

Using the federal court treatment of this subject as a guide, this article proposes a standard for Oregon. In particular, this article discusses when it may be inappropriate to allow a party a second bite at the apple under ORCP 39 C(6), when it may be appropriate, and then recommends that these issues be addressed between counsel at an early stage of every case to streamline discovery and avoid costly disputes.

FEDERAL DECISIONS UNDER ANALOGOUS RULE 30(b)(6)

The federal courts that have allowed multiple depositions of the same individual, in different capacities, have done so because of a concern that the purpose behind the rules permitting organizational depositions would have otherwise been thwarted. In articulating the unique purpose of organizational depositions, these courts often focus on two distinctions between the deposition of a fact witness and an organizational deposition: the affirmative obligation to prepare the witness to testify as to matters known or reasonably known to the corporation; and the binding nature of the deposition.

In the case of *In re Motor Fuel Temperature Sales Practices Litigation,* No. 07-MD-1840-KHV, 2009 WL 5064441, *2-3 (D. Kan. Dec. 16, 2009) the court rejected the entry of a protective order, even though the witnesses within the organization who would be designated had already been deposed on the same subject, *and* even though the organization offered to designate the previous testimony as 30(b)(6) testimony. The court based its decision on two distinctions between ordinary depositions and organizational depositions. First, in the context of an organizational deposition, there is the need to provide a witness who is prepared to testify regarding the institutional knowledge of the organization. *Id.* at *2. Second, the organizational deposition binds the company as its official position, where the deposition of an individual employee will often not bind the company to a particular position in the same way. *Id.* at *2. "Based upon this reasoning, courts have consistently held that the fact that a company's employee was deposed under Rule 30(b)(1) does not insulate the company from producing the same—or another—individual as a corporate representative to give a Rule 30(b)(6) deposition." *Id.*

For similar reasons, other courts have rejected the concept that an organization's offer to designate a fact witness's prior testimony as the testimony of the organization satisfied the obligation to designate a witness pursuant to Rule 30(b)(6). *See DHL Express (USA), Inc. v. Express Save Indus. Inc.,* No. 09-60276-CIV, 2009 WL 3418148 (S.D. Fla. Oct. 19, 2009) (declining to allow designation of prior deposition testimony of the president of a closely held corporation as Rule 30(b)(6) testimony, and compelling an organizational deposition); *Alloc, Inc. v. Unilin Décor N.V.,* Nos. 02-C-1266, 03-C-342, 04-C-121, 2006 WL 2527656 (E.D. Wis. Aug. 29, 2006) (requiring an organizational deposition of a previously deposed witness on the same subject matter notwithstanding the defendant's willingness to designate the former testimony as organizational testimony pursuant to Rule 30(b)(6)).

Other courts have seemingly been less reflexive and more pragmatic about whether a party can have two bites at the apple under the organizational deposition rules. These courts will allow a corporate party to designate the prior testimony of a witness as the testimony of the organization, if doing so will avoid the undue burden and expense of a duplicative deposition, while still honoring the basic objectives of an organizational deposition.

In one early case, the court held that when an organization's most knowledgeable employee on the subject in question had already been deposed extensively on that subject, the organization had satisfied its obligations pursuant to Rule 30(b)(6) by offering to be bound by the previous testimony. *Novartis Pharm. Corp. v. Abbott Labs.,* 203 F.R.D. 159, 162-63 (D. Del. 2001). *Novartis* was followed shortly by *Sabre v. First Dominion Capital, LLC,* No. 01CIV2145BSJHBP, 2001 WL 1590544, at *2 (S.D.N.Y. Dec. 12, 2001) in which the court reasoned in *dicta* that: "In the case of many closely held corporations, the knowledge of an individual concerning a particular subject also constitutes the total knowledge of the entity. In such a situation, the witness could simply adopt the testimony that he or she provided in a former capacity,

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A Second Bite at the Apple?

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thereby obviating the need for a second deposition." *See also, Nicholas v. Wyndham Int'l, Inc.,* 373 F3d 537, 543 (4th Cir. 2004) (upholding trial court's order denying an organizational deposition when two principals of a closely held corporation had already been deposed, would have been the 30(b)(6) designees, and possessed all of the corporation's knowledge of the subject matter at issue).

Several courts have cited *Novartis* for the proposition that, under the right circumstances, an organization can satisfy its burden to designate a representative pursuant to Rule 30(b)(6) by offering to be bound by prior testimony. *See e.g., Requa v. C.B. Fleet Holding Co., Inc.,* No. 06-cv-01981-PSF-MEH, 2007 WL 2221146, at *2 (D. Colo. July 31, 2007) ("While prior testimony can be designated by the corporation to satisfy a Rule 30(b)(6) deposition, this is most appropriate when the prior witness is the most knowledgeable on the subject and has been previously deposed by opposing counsel with regard to that topic."); *EEOC v. Boeing Co.,* No. CV 05-03034-PHX-FJM, 2007 WL 1146446, at *2 (D. Ariz. Apr. 18, 2007) ("A corporation may also satisfy its Rule 30(b)(6) obligation by offering to be bound by prior deposition testimony regarding a noticed Rule 30(b)(6) topic.").

Similarly, in *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.,* 254 F.R.D. 227, 232-33 (E.D. Penn. 2008) the court rejected the defendants' attempt to depose a witness in his individual capacity after that witness had already been deposed as his organization's Rule 30(b)(6) designee because defendants already had sufficient opportunity to discover the information sought.

APPLICATION TO OREGON

The two seemingly disparate lines of federal case law on this subject are easily reconciled. Taken as a whole, the federal authorities suggest that two conditions must be present for a party to be able to avoid an organizational deposition when the designated witness has already testified in an individual capacity. First, a party will need to demonstrate that the overall objectives of the rule allowing organizational depositions will not be thwarted by the denial of a second deposition. Generally speaking, these objectives will have been met if the previously deposed witness possessed and testified to all information reasonably available to the company, and if the company agrees that it will be bound by the previous testimony. Second, a party will also need to show that the proposed subject matter of the organizational deposition is the same as or highly similar to the subject matter upon which the witness was previously deposed such that a second deposition would be duplicative, harassing or burdensome. Accordingly, if an organization's most knowledgeable witness on a particular subject has already been fully deposed, and the organization is willing to be bound by that testimony, there is no reason that same witness should have to endure another deposition on the same subject matter. Under those circumstances, the organization should be allowed to discharge its obligation to produce an organizational designee by adopting the previous testimony.

A. When should a second bite at the apple be denied?

Using the federal authorities as a guide, the circumstances under which an Oregon court may deny a second bite at the apple pursuant to the organizational rules come into focus. Like federal courts, Oregon courts have discretion to limit discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." ORCP 36 C. It seems likely that an Oregon court would not hesitate to prohibit a party from taking two depositions of the same individual if the overarching objectives of ORCP 39 C(6) had been met, and if the second deposition would merely be duplicative of the first. A court would likely find that such a deposition would be oppressive, and constitute an undue burden and expense.

This situation may arise under two common factual scenarios. The first scenario exists when the most knowledgeable person in an organization on a particular subject has already been thoroughly deposed on that subject. Often the opposing party will think of additional questions later, or will simply be unsatisfied with the answers it received. The

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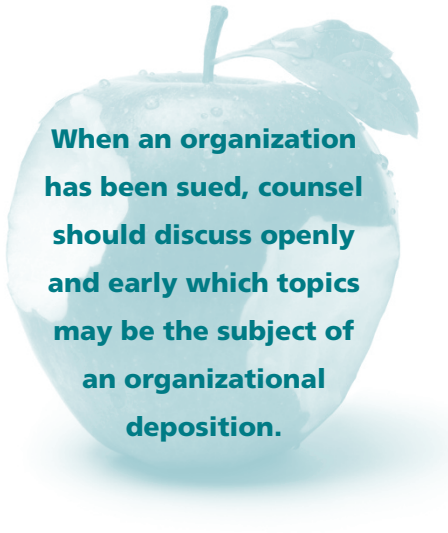
opposing party will then notice an "organizational" deposition pursuant to ORCP 39 C(6) in order to obtain a second shot at the same witness. Under these circumstances, if the organization resists the second deposition and offers to be bound by the previous testimony on the particular subject, a court may well enter a protective order or, alternatively, deny a motion to compel ORCP 39 C(6) testimony.

Another common scenario exists when a previously deposed officer of a closely held company essentially possesses all of the knowledge of the organization. If that officer has already been deposed, it may be difficult to justify allowing the opposing party another bite at the apple simply because the second deposition is of the "organization," which on the facts and circumstances of the case is essentially indistinguishable from the individual.

B. Under what circumstances might a second bite at the apple be appropriate under ORCP 39 C(6)?

Given the obligation of an organization to designate a witness who must "testify as to matters known or reasonably available to the organization," the easiest way to obtain a second deposition is to show that the witness was not properly prepared. If it is apparent that a fact witness did not have knowledge of all of the information reasonably available to the organization on a particular topic at the time of the witness's deposition, then it will be unlikely that the organization could avoid a second deposition by offering to be bound by that testimony. In that circumstance, an Oregon court may hold that the opposing party is entitled to the organization's full knowledge on a particular topic and compel an organizational deposition—whether it be of the previously deposed witness or another witness. This holds true even if a witness's first deposition is in a representative capacity under ORCP 39 C(6). If the witness does not have all of the information reasonably available to the organization during that deposition, then a court would be likely to order a continuation of the deposition so that the witness can provide full testimony after adequate preparation.



Another related circumstance occurs when the previously deposed witness was not asked about the subject matter articulated in the subsequent ORCP 39 C(6) notice of deposition. For instance, if through the course of discovery a party discovers a new subject that must be explored, and upon which a previously deposed witness was not and reasonably could not have been questioned, then an ORCP 39 C(6) deposition may be appropriate even if the organization's choice of designee means that a witness will be deposed twice.

C. Using these principles as a guide, counsel should proactively address potential disputes.

Although the principles discussed above may provide some guidance for Oregon practitioners, their application will depend on the unique facts and circumstances of every case and are therefore fertile ground for disputes. That said, most of these disputes can be avoided by proactive discussions between counsel at the early stages of a case.

When an organization has been sued, counsel should discuss openly and early which topics may be the subject of an organizational deposition. Before any officer of the organization is deposed, or any company employee with specialized knowledge which is the subject of the lawsuit is deposed, counsel should determine whether the testimony should properly be considered the testimony of the organization. Counsel also may know, for instance, that a particular witness, such as a CEO or President, is very busy and will not take kindly to a second deposition. In that circumstance, counsel for the organization should make clear that the organization will resist a second deposition of the same witness even if it is noticed as an "organizational" deposition.

Under some circumstances, counsel may wish to stipulate in advance to two or more deposition sessions with the same witness if that will facilitate an orderly transition through the discovery process. There are innumerable ways these issues can be handled in advance, and without court intervention, if the parties spot these issues early and proactively address them. ❐

Does ORCP 82 Really Require Security *For Every Preliminary Injunction?*

By Steven M. Wilker
of Tonkon Torp LLP


Steven M. Wilker

In 1985, the Oregon Supreme Court held that a preliminary injunction issued without requiring security is void. And, because the court held that the preliminary injunction order was void, the order could be disobeyed without consequence. The Supreme Court made an error, however, because neither the parties nor the court apparently considered the rest of ORCP 82A.

Background

ORCP 82A(1)(a) provides:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

In re Tamblyn, 298 Or. 620 (1985), came to the Supreme Court on review of a decision of the Oregon State Bar Disciplinary Review Board recommending a public reprimand of attorney Tamblyn for advising his client in open court to disregard a trial court's order for a preliminary injunction. Tamblyn petitioned for Supreme Court review, arguing that the preliminary injunction order was void because the trial judge did not require security and that he could not be disciplined for advising his client to disregard a void order.

The Supreme Court divided the analysis "into two steps: (1) Is an order for a preliminary injunction which does not provide for security as required by ORCP 82A(1)(a) void?" and "(2) Is an instruction by a lawyer to a client to disregard or disobey a void order allowing a preliminary injunction a violation of [former] DR 7–106(A) and/or ORS 9.527(3)?" *Id.* at 622. The Court then answered the first question "yes" and the second one "no" and dismissed the Bar's complaint.

The Supreme Court made a fundamental error in its analysis in *Tamblyn*. The court erroneously concluded that ORCP 82 requires security for the issuance of a preliminary injunction and that a court that had jurisdiction over the parties and the cause did not have jurisdiction to issue a preliminary injunction without security. The court relied on inapposite authority and failed to address ORCP 82A(6), which expressly permits trial courts to waive, reduce or limit any requirement for security.

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Why *In re Tamblyn* Was Wrongly Decided

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The Court's Reliance on *La Follette*

The *Tamblyn* court relied on *State ex rel. Salem King's Products Co. v. La Follette*, 100 Or. 1, 10 (1921), where the court had held that a temporary injunction issued without security was void and, therefore, that a violation of the order could not be punished as contempt.

> The giving of an undertaking is indispensable. The court could not dispense with that which the legislature has declared to be indispensable. * * * Although the court acquired jurisdiction over the suit, it did not acquire jurisdiction to allow a preliminary injunction in the ancillary proceeding attempted to be prosecuted by the plaintiff. The failure to give the undertaking rendered the order for the injunction absolutely void; and therefore, La Follette cannot be punished as for a contempt.

Id. at 10 (as quoted in *Tamblyn*, 298 Or. at 625).

The *Tamblyn* court then compared the statutory language at issue in *La Follette* regarding security with the language of ORCP 82A(1)(a). The applicable statute in *La Follette*, Or. Laws § 417, provided: "Before allowing the same, the court or judge shall require of the plaintiff an undertaking, * * *." (Emphasis added by the *Tamblyn* court.) ORCP 82A(1)(a) said (and says): "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, * * *." (Emphasis added by the *Tamblyn* court.) Concluding that "[t]he language of both is mandatory," the court then held that the *La Follette* court's interpretation of Or. Laws § 417 "applies with equal force to our present rule, ORCP 82A(1)(a)." *Tamblyn*, 298 Or. at 626.

The Oregon Supreme Court then held that because the order was void for all purposes, attorney Tamblyn could not be disciplined for advising his client to disregard the order, rejecting the Bar's attempt to distinguish the disciplinary proceeding at issue from the contempt proceeding at issue in *La Follette*. *Tamblyn*, 298 Or. at 627:

> An order granting a preliminary injunction without security is void for all purposes including a collateral contempt proceeding and a collateral bar disciplinary proceeding. It only seemed to be an order and was "in truth no order at all." When Tamblyn advised his clients to disobey the order granting the preliminary injunction, there was "no order" to disobey.

So where did the *Tamblyn* court go wrong? It failed to read the whole rule, which was promulgated by the Council on Court Procedures in 1980. ORCP 82A(1)(a) indeed requires the giving of security. But the then relatively new rule was not as absolute as the rule at issue in *La Follette*. ORCP 82A(6), as it was promulgated in 1980 and as it remains today, gives the court the power to "waive, reduce, or limit any security or bond provided by these rules," a power that the trial court did not have under the statute at issue in *La Follette*.[1] If the court has the power to waive any security or bond provided by the rules, then how could the giving of security be a jurisdictional requirement for the issuance of a valid preliminary injunction?

The only answer is that it cannot be a jurisdictional prerequisite for a valid order. "Jurisdiction cannot be conferred by the parties by consent, nor can the want of jurisdiction be remedied by waiver, or by estoppel." *Wink v. Marshall*, 237 Or. 589, 592 (1964). "It is well-established law in * * * Oregon that subject matter jurisdiction cannot be conferred on courts by consent, waiver, or estoppel. * * * That principle operates to deny to parties and courts the ability to expand court jurisdiction beyond the jurisdiction that the constitutions and legislatures have given to courts." *In re Marriage of Daly,* 228 Or. App. 134, 144 (2009). Where a court has the statutory power to waive a particular requirement, that requirement cannot be said to go to the court's jurisdiction, *i.e.*, its power and authority to act.

The effect of the adoption of ORCP 82A(6) does not appear to have been raised by the Bar in *Tamblyn*. It is not mentioned in its brief to the Supreme Court and it is not mentioned in the Supreme Court's decision. Yet ORCP 82A(6) would appear to dispose of any argument that *La Follette's* holding on the jurisdictional nature of the security requirement remains good law.

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Tamblyn and *La Follette* Unnecessarily Devalue the Integrity of the Judicial Process

Tamblyn (and *La Follette* before it) also appear to give insufficient value to the integrity of the court process and the appropriate manner in which to challenge an allegedly erroneous court order. In both cases, there was no dispute that the court had jurisdiction over the parties and the subject matter. But, by concluding that the security requirement was *jurisdictional* and, thus, that the orders at issue were void (rather than merely voidable), both decisions effectively empowered the litigants before them (and their lawyers) to make their own judgments about whether to comply with the court's preliminary injunction orders or whether to seek review by appeal or mandamus. As the Oregon Supreme Court explained in *State ex rel. Mix v. Newland,* 277 Or. 191, 200 (1977) (emphasis added):

> If a court has jurisdiction over the parties and the subject matter, and its order or decree is not complied with, that court may hold the noncomplying party in contempt even if it later appears that the original order or decree was either erroneous or in excess of the court's authority. *The integrity of the judicial process demands compliance with court orders until such time as they are altered by orderly appellate review. Litigants are not entitled to sit in judgment on their own cases, and they must follow the appropriate channels for review of decisions they believe to be invalid. Unless and until an invalid order is set aside, it must be obeyed.* Only when there has been no other opportunity to raise the issue can the validity of the underlying order be litigated in a subsequent contempt proceeding.

Thus, unless a party has no other realistic opportunity to challenge the validity of an order, the order must be obeyed unless and until it has been set aside and disobedience can be punished as contempt even if the order is later found to have been erroneous. *Id.; see also State v. Crenshaw,* 307 Or. 160, 167-68 (1988) ("We hold that a challenge to the merits of the underlying order may be made in any appeal from an order of contempt where, for constitutional, statutory or practical reasons, no other remedy, either by appeal or mandamus, was available.").

Because jurisdiction over the parties and the causes was present in both *La Follette* and the underlying proceeding leading to *Tamblyn*, the decisions to treat the security requirement as jurisdictional and the failure to require security as depriving the court of jurisdiction appear to have unnecessarily devalued the integrity of the court process. Had the orders been treated as voidable, the enjoined parties could have sought review by appeal or mandamus or, *if those avenues were unavailable*, they could have risked contempt and then challenged the preliminary injunctions in the collateral proceeding.

For La Follette, he could have sought direct review to enforce the security requirement. Presumably, given the ruling in the case, the Supreme Court would have reversed the issuance of the injunction for lack of security on appeal or mandamus. But, absent a stay of the injunction, La Follette should have been expected to comply with it. If direct review were not available—and there is no discussion of the availability of direct review in the decision—then La Follette's defense to the contempt charge if he chose not to comply would properly include a defense to the enforceability of the injunction for lack of security.

As for Tamblyn, a ruling that the security requirement was not jurisdictional would not have protected him, because, assuming he gave the same advice, he would have been advising his client to disregard a merely voidable order. Moreover, as discussed above, ORCP 82A(6) expressly permitted (and permits) the trial court to waive the security requirement in ORCP 82A(1)(a). Thus, *Tamblyn* was wrongly decided on both counts, because the security requirement could be waived and the fact that it could be waived means that it could not be jurisdictional in any event.

So What Now?

As a practical matter, the rule announced in *Tamblyn* (and *La Follette*) made it clear that a party seeking a

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preliminary injunction had to give some security for the issuance of the order. As *La Follette* had explained, security was required so that a party wrongfully enjoined would have a remedy for any damages suffered as a result of a wrongful injunction. Because the harm from a wrongful injunction was a result of the court's action, without security, there could be no remedy if the claim had been brought in good faith. *La Follette*, 100 Or. at 8. The security or undertaking given served as both the source and the limit on the recovery for a wrongful injunction. See Or. Laws § 417 ("the court or judge shall require of the plaintiff an undertaking, with one or more sureties, to the effect that he will pay all costs and disbursements that may be decreed to the defendant, and such damages, *not exceeding an amount therein specified*, as he may sustain by reason of the injunction if the same be wrongful or without sufficient cause.") (emphasis added); *see also Buddy Systems, Inc. v. Exer-Genie, Inc.,* 545 F.2d 1164, 1167–68 (9th Cir. 1976) (to similar effect). Because the bond or other security serves as both the source and limit of any recovery, posting a bond for a relatively small amount could even be beneficial to a plaintiff seeking a preliminary injunction because it should cap a plaintiff's potential liability (either directly or as an indemnitor of its surety).

Nevertheless, the question remains whether a bond or other security is required if the trial court is willing to waive the bond and/or if the parties have agreed to waive the requirement by contract (as is fairly common in nondisclosure agreements). ORCP 82A(6) certainly appears to permit either type of waiver. Whether a trial court would or could agree to a waiver in light of the *Tamblyn* court's unequivocal (but apparently incorrect) statement of the law and the jurisdictional nature of the holding is a different issue.

It is also questionable whether an attorney should rely on *Tamblyn* as authority to advise a client to disregard a preliminary injunction order given without security in light of the very shaky underpinnings of the decision. Recently, the Oregon Supreme Court, citing *State ex rel. Mix v. Newland,* reaffirmed the principle that a party is not free to disobey an order that the party believes to be invalid or even unconstitutional. *State v. Ryan,* 350 Or. 670, 680 (2011): "This court has previously explained that a party may be punished by contempt for disobeying a court order, even if the order was erroneous or exceeded the court's authority."

Conclusion

In re Tamblyn's unequivocal pronouncement that a preliminary injunction issued without security is void appears to be wrong and to have been wrong when it was made, because ORCP 82A(6) expressly permits the trial court to waive, reduce or limit any security required. Nevertheless, unless a plaintiff has no ability to post a bond or other security of any size for the issuance of a preliminary injunction, it would seem advisable to seek a nominal or relatively small bond or cash undertaking, both to avoid an argument about the validity of the preliminary injunction and to cap the plaintiff's potential liability in the event the court later finds that the injunction was wrongful. Finally, it would seem that advising a client to ignore a preliminary injunction issued without security is a risky proposition for both the attorney and the client.

End Note:

[1] ORCP 82A(6) also permits the court to "authorize a non-corporate surety bond or deposit in lieu of bond, or require other security, upon an ex parte showing of good cause and on such terms as may be just and equitable." This authority is significant, because it expressly permits the court to do something that the *La Follette* court found unacceptable (in the absence of such a statute or rule). In *La Follette*, the trial court had conditioned the temporary injunction requiring the delivery of *La Follette's* crop to the plaintiff on the plaintiff paying *La Follette* the price plaintiff contended it owed and depositing into court the difference between that price and the price at which *La Follette* was willing to sell. The Oregon Supreme Court concluded that the deposit into court was not authorized by the security statute and did not amount to an undertaking to pay damages and costs and disbursements. *La Follette*, 100 Or. at 9–10. ORCP 82A(6) supersedes by rule this holding of *La Follette*, too. ❐

Recent Significant Oregon Cases

Hon. Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

Friends of Yamhill County v. Board of Commissioners, 351 Or 219 (2011)

The issue in *Friends of Yamhill County* was "whether a landowner holding a Measure 37 waiver had a common law vested right to construct a residential subdivision that he had begun but not completed by the effective date of Measure 49." 351 Or at 222. The county concluded that "the costs that the landowner had incurred were sufficient to establish a vested right to complete construction of the subdivision[.]" *Id.* The trial court affirmed; the Court of Appeals reversed and remanded for further proceedings. The Supreme Court affirmed the Court of Appeals decision but for different reasons. The court concluded that, in determining whether a landowner has a common law vested right within the meaning of Measure 49, courts must look to *Clackamas Co. v. Holmes,* 265 Or 193 (1973), "both for guidance in determining what the common law of Oregon requires and also as the controlling precedent on that issue." 351 Or at 237. The Court of Appeals had concluded that "only some of the *Holmes* factors are material" in this context because "a landowner who complies with the terms of Measure 49 will necessarily have satisfied the second, third and fourth *Holmes* factors." *Id.* at 238. The Supreme Court disagreed, holding that the Court of Appeals (1) "erred in holding that compliance with the terms of section 5(3) [of Measure 49] means that a landowner's expenditures necessarily will relate to the proposed use and be made in good faith" (*Id.* at 242); and (2) "erred in discounting some of the *Holmes* factors and finding, as a result, that other factors were 'more material.'" *Id.* The court concluded that consideration of the ratio of expenses incurred to the total cost of the project "provides the necessary starting point in analyzing whether a landowner has incurred substantial costs toward completion of the job, although the other *Holmes* factors will bear on whether the costs incurred are substantial enough to establish a vested right under section 5(3)." *Id.* at 242-43.

Judge Bushong

Towe v. Sacagawea, Inc., 246 Or App 26 (2011)
Stewart v. Kids Incorporated of Dallas, OR, 245 Or 267 (2011)

The plaintiff in *Towe* "brought an action to recover for injuries he suffered after hitting a cable stretched across a private road . . . while riding his motorcycle." 246 Or App at 28. The trial court granted summary judgment in favor of the two defendants—the owner of the property (Mountain View) and a realtor that posted a sign with an arrow pointing up the private

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access road (Re/Max)—concluding that "plaintiff was 100 percent responsible for his injuries." *Id.* The Court of Appeals affirmed, but on different grounds, concluding that "(1) as a matter of law, plaintiff was a trespasser and Mountain View's conduct met the standard of care applicable to trespassers, and (2) Re/Max cannot be liable for plaintiff's injuries because its conduct was not the cause of those injuries as a matter of law." *Id.* The plaintiff in *Stewart* brought a negligence action seeking damages for injuries she sustained "when she was sexually assaulted while attending a car wash fund-raiser sponsored by Kids Inc. at Dairy Queen's restaurant." 245 Or App at 269. The trial court granted defendants' motion to dismiss, concluding that the complaint "failed to allege facts sufficient to establish that the harm suffered was reasonably foreseeable to either defendant[.]" *Id.* The Court of Appeals affirmed. The court explained that the complaint "makes the generic assumption that defendants should have known about the risk of harm of sexual attack, without alleging any facts to support that assumption." *Id.* at 286. The court concluded that "the fact that sexual predators in the community may commit crimes does not make a particular crime reasonably foreseeable." *Id.*

Cocchiara v. Lithia Motors, Inc., 247 Or App 545 (2011)
Cruze v. Hudler, 246 Or App 649 (2011)

The plaintiff in *Cocchiara* asserted claims for fraudulent misrepresentation and promissory estoppel when his employer allegedly reneged on an offer to give plaintiff a less-stressful "corporate" position after he suffered a heart attack. The trial court granted the employer's motion for summary judgment; the Court of Appeals affirmed. The court explained that the employer could have terminated plaintiff from the corporate position because it was an at-will job, so plaintiff "could not reasonably rely on any promise of employment in the job, and he has no claim for damages associated with not having been hired into it." 247 Or App at 556. The plaintiffs in *Cruze* sued a real estate developer and an attorney, alleging that the defendants "defrauded them by means of an investment scheme." 246 Or at 652. The trial court granted summary judgment in favor of the defendant attorney (Markley) on all claims and refused to allow plaintiffs to amend their complaint to allege a racketeering claim against either defendant. The Court of Appeals reversed, holding that (1) "the trial court erred in failing to give [plaintiffs] the benefit of all available inferences regarding Markley's knowledge of and involvement in the scheme to defraud" plaintiffs (*id.* at 657); and (2) the trial court "erred in denying plaintiffs' motions to amend based on an overly narrow construction of ORICO[.]" *Id.* at 671.

Smith v. Bend Metropolitan Park and Recreation, 247 Or App 187 (2011)
Westfall v. Dept. of Corrections, 247 Or App 384 (2011)

The plaintiff in *Smith* injured her ankle when she slipped and fell into a fountain fixture while running to prevent a child from falling into the water at a city swimming pool. The trial court granted defendant's motion for summary judgment, holding that (1) the design and placement of the fountain "were discretionary decisions for which defendant had immunity" (247 Or App at 189); and (2) plaintiff "did not adduce any evidence of causation connecting plaintiff's injuries to defendant's failure to warn." *Id.* The Court of Appeals affirmed the causation ruling because "[u]ncontradicted evidence supports the court's finding that plaintiff knew of the dangers at the pool, and where an injured party is 'fully aware of the danger presented,' there is no causation." *Id.* (quoting *Garrison v. Deschutes County,* 334 Or 264, 279 (2002)). The court reversed the ruling on discretionary immunity because "there is evidence in the record on summary judgment from which a trier of fact could find that defendant's decisions regarding the design and placement of the fountains did not require the exercise of discretion within the meaning of ORS 30.265(3)." *Id.* The plaintiff in *Westfall* sued the state for negligence and false imprisonment, alleging that the Department of Corrections (DOC) incorrectly calculated his prison-release date. The trial court granted DOC's motion for summary judgment, holding that the state was entitled to discretionary function immunity from tort liability under ORS 30.265(3)(c). The Court of Appeals reversed, holding that "when the DOC employees implemented the sentencing policy, they made routine decisions in the course of their everyday activities—*viz.,* computing an inmate's prison sentence—that were not choices among competing policy objectives" as

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required to qualify for discretionary function immunity. 247 Or App at 393.

***Man-Data, Inc. v. B & A Automotive, Inc.*, 247 Or App 429 (2011)**
***Pewther v. C CORP*, 245 Or App 644 (2011)**
***Russell v. U.S. Bank National Association*, 246 Or App 74 (2011)**

The plaintiff collection agency in *Man-Data* sued to recover legal fees allegedly owed by a corporate client and individual guarantors. The trial court "prevented the individual defendants from attacking the validity of the fees charged [the corporate client] under the fee agreement." 247 Or App at 431. The Court of Appeals reversed, applying the general rule that "the individual defendants, as sureties, may raise defenses available to" the corporate defendant. *Id.* at 437. The court concluded that "the individual defendants' ability to defend . . . is not limited by the assignment of the claim to plaintiff." *Id.* In *Pewther*, the Court of Appeals held that the presumption in favor of joint liability does not apply "where one of the supposedly jointly liable obligors has sold his entire interest in the source of the obligation to the other obligor." 245 Or App at 649. In *Russell*, the Court of Appeals held that a claim for 30 days of statutory penalty wages did not accrue for statute of limitations purposes "until the thirtieth day following the day on which plaintiff's earned wages allegedly were due and unpaid." 246 Or App at 81.

***Baggarley v. Union Pacific Railroad Company*, 246 Or App 624 (2011)**
***Kaseberg v. Davis Wright Tremaine, LLP*, 351 Or 270 (2011)**

The plaintiff in *Baggarley* brought an action under the Federal Employee Liability Act (FELA) to recover for hip injuries he allegedly sustained on the job. The trial court granted summary judgment to defendant, holding that plaintiff's claims were barred by the three-year statute of limitations because plaintiff "became aware of his work-related injuries more than three years before he filed the claims[.]" 246 Or App at 626. The Court of Appeals reversed, holding that, on the record in this case, "it would be possible for a jury to find that, until 2007, plaintiff reasonably thought that his symptoms were just the normal consequence of working long and physically demanding days and that plaintiff reasonably did not equate his hip symptoms with any work-related injury or condition." *Id.* at 631. In *Kaseberg*, the trial court granted summary judgment to defendant on a legal malpractice claim, holding that the claim was barred by the two-year statute of limitations in ORS 12.110(1). The Supreme Court, applying the "discovery rule," reversed, concluding that a genuine issue of material fact precluded resolving the issue on summary judgment. The court explained that it could not conclude as a matter of law that "a reasonable person in plaintiff's circumstances" would have reached the conclusion more than two years before the claim was filed that the attorney was responsible for plaintiff's damages. 351 Or at 284.

Procedure

***A.G. v. Guitron*, 351 Or 465 (2011)**
***Lasley v. Combined Transport, Inc.*, 351 Or 1 (2011)**

In *A.G.*, the Supreme Court held that "ORCP 44 C required plaintiff to deliver to defendants, at defendants' request, a copy of all written reports of examinations related to the psychological injuries for which plaintiff sought recovery, including, specifically, the report of an examination by a psychologist retained by plaintiff's counsel for the purpose of the litigation." 351 Or at 467. In *Lasley*, the Supreme Court held that "in a comparative negligence case, a defendant that seeks to rely on a specification of negligence not alleged by the plaintiff to establish a codefendant's proportional share of fault must affirmatively plead that specification of negligence and do so in its answer as an affirmative defense and not in a cross-claim for contribution." 351 Or at 14.

***Robinson v. Harley-Davidson Motor Co.*, 247 Or App 587 (2012)**
***Williams v. Salem Women's Clinic*, 245 Or App 476 (2011)**

The plaintiff in *Robinson*, an Oregon resident, was injured when the front wheel of her motorcycle malfunctioned while she was riding the motorcycle in Idaho after the defendant dealership performed service and repairs in Idaho. The Court of Appeals held that there were insufficient contacts between the defendant and the State of Oregon

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"to allow the court to exercise its jurisdiction pursuant to ORCP 4 L, Oregon's 'long-arm' statute." 247 Or App at 589. In *Williams*, the Court of Appeals reversed an award for attorney fees under ORS 20.105(1) and enhanced prevailing party fees under ORS 20.190 because the record was not "entirely devoid" of support for defendant's third party claim. 245 Or App at 478.

Miscellaneous

Farmers Ins. Co. v. Mowry, 350 Or 686 (2011)

In *Mowry*, the Supreme Court disavowed the strict "rule of prior interpretation" of statutes adopted in *State v. Elliott*, 204 Or 460, 465 (1955), and applied in *State v. King*, 316 Or 437, 445-46 (1993). Under that rule, when the Supreme Court interprets a statute, "the interpretation becomes a part of the statute, subject only to a revision by the legislature." 350 Or at 695. The court noted that this rule "has long been criticized as wrong in principle and unduly restrictive in practice[.]" *Id.* at 695. The court explained that the rule was "based on the theory of legislative acquiescence" which "posits that a judicial decision interpreting a statute becomes ratified by legislative silence and thus can only be changed by the legislature." *Id.* at 696. The court concluded that this theory "is a legal fiction that assumes, usually without foundation in any particular case, that legislative silence is meant to carry a particular meaning[.]" *Id.* Instead of adhering to a rule that precluded the court from re-examining a prior decision construing a statute, the court concluded that, in "applying *stare decisis* to decisions construing statutes, we will rely upon the same considerations we do in constitutional and common-law cases, although . . . the weight given to particular considerations will not necessarily be the same." *Id.* at 697.

Watson v. Meltzer, 247 Or App 558 (2011)
Klutschkowski v. PeaceHealth, 245 Or App 524 (2011)

In *Watson*, the Court of Appeals held that UCJI 45.02—commonly known as the "case-within-a-case" instruction—applies to legal malpractice cases when the malpractice occurs during the negotiation of a transaction in addition to malpractice occurring during the course of litigation. 247 Or App at 560. In *Klutschkowski*, the jury in a medical malpractice case returned a verdict of $1.375 million in noneconomic damages. Defendant sought to reduce that award to $500,000 in accordance with the statutory cap on noneconomic damages set forth in ORS 31.710. The trial court denied the motion. The Court of Appeals reversed, holding that "neither the remedy clause of Article I, section 10 [of the Oregon Constitution] nor the jury trial provisions of Article I, section 17 and Article VII (Amended), section 3, preclude application of ORS 31.710 under the circumstances of this case." 245 Or App at 548. ❐

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