

## In This Issue...

Sanctions for Deposition Misconduct .....	1
Comments from the Editor .....	5
Can For-Profit Corporations Discriminate Based on the Religious Beliefs of Their Owners? BOLI Says "No" .....	6
Ninth Circuit Gives Guidance Regarding Claims for Injunctive Relief and Rules on a Trademark Case of First Impression — Part 1 of 2 .....	8
Trial Presentation Made Easy ..	10
Pro Hac Vice: Procedure and Practice in Oregon.....	11
Recent Significant Oregon Cases.....	13

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## Sanctions for Deposition Misconduct

By David B. Markowitz and Joseph L. Franco  
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Federal courts increasingly are cracking down on deposition misconduct through the imposition of sanctions under Rule 30(d)(2), which authorizes a wide array of sanctions against any person who impedes, delays, or frustrates the fair examination of a deponent. Fed. R. Civ. P. 30(d)(2). Sanctions are being imposed with greater frequency upon clients and their lawyers. As discussed below, sanctions may be imposed whether the disruption to the deposition was deliberate, or merely the product of a misunderstanding of the rules governing deposition conduct. For instance, courts have increasingly sanctioned lawyers under Rule 30(d)(2) for making speaking objections or improperly instructing witnesses not to answer questions. In addition, two courts have recently held that sanctions may be imposed for a lawyer's failure to intervene when a deponent client engages in deposition misconduct, on the theory that the defending lawyer's silence ratified and encouraged the bad conduct.

David Markowitz, along with now Judge Lynn Nakamoto, wrote on the subject of Rule 30(d) sanctions approximately ten years ago. David B. Markowitz and Lynn R. Nakamoto, *Sanctions for Deposition Misconduct Under FRCP 30(d)*, OREGON STATE BAR LIT. J., Vol. 22, No. 2 (August, 2003).<sup>1</sup> The intervening years have seen an increasing use of sanctions to curb deposition misconduct, and a consequent development in the law. This article provides an update regarding sanctions for deposition misconduct in federal court under Rule 30(d), discusses methods by which a lawyer defending a deposition may protect her witness while avoiding sanctions, and briefly comments upon the potential to seek sanctions in Oregon State court, given the absence of an analog to Rule 30(d)(2) in Oregon's procedural rules.

### I. Sanctions Under Federal Rule 30(d)(2).

#### A. The Use of Sanctions for Deposition Misconduct is on the Rise.

The last several years have seen a significant rise in the use of sanctions to curb deposition misconduct in federal courts. Rule 30 was amended in 1993 to include express authorization for the court to sanction a lawyer whose misconduct impeded, delayed or frustrated the fair examination of a deponent.

<sup>1</sup> This article, as well as past articles by Mr. Markowitz and Judge Nakamoto on the subject of depositions, are available at <http://www.mhgm.com/our-resources/articles>.

Fed. R. Civ. P. 30(d)(2). Our research revealed a several hundred percent increase in the number of Rule 30(d)(2) sanctions opinions in the last ten years, over the number of opinions in the initial ten years following the Rule's amendment in 1993. Indeed, we identified more opinions concerning Rule 30(d)(2) sanctions in the last two years than in the ten years after 1993. This increase in the use of sanctions for deposition misconduct, as well as the reasoning and tenor of recent judicial opinions, suggests that courts are granting motions for sanctions with increasing frequency.

Judicial willingness to impose sanctions for deposition misconduct may be based in part upon an understanding of how critically important the deposition has become in modern litigation.

More than 98% of all civil cases filed in the federal courts result in disposition by way of settlement or pretrial adjudication. Very often, these results turn on evidence obtained during depositions. Thus, depositions play an extremely important role in the American system of justice.

See e.g. *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 185 (E.D. Penn. 2008) (internal citations omitted).

Given the increasing use of sanctions to curb deposition misconduct, the practitioner should be familiar with the circumstances under which sanctions may be imposed, the range of available sanctions, and how to avoid sanctionable conduct when defending a deposition.

## ***B. Considerations for Imposing Sanctions for Deposition Misconduct.***

Rule 30 articulates the standard for proper deposition conduct and authorizes the court to impose sanctions for misbehavior. Lawyers must conduct the examination and cross-examination of a deponent in the same manner, and with the same level of decorum, "as they would at trial." Fed. R. Civ. P. 30(c)(1). Objections "must be stated concisely in a nonargumentative and nonsuggestive manner," and a witness may be instructed not to answer "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Fed. R. Civ. P. 30(c)(2) (emphasis added). Rule 30(d)(2) states that the "court may impose an appropriate sanction – including the reasonable expenses and attorney's fees incurred by any party – on a person who impedes, delays or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2). Thus, sanctions may be imposed for "argumentative objections, suggestive objections, and directions to a deponent not to answer...[A]n excessive number of objections may constitute actionable conduct, though the objections be not argumentative or suggestive." *Craig v. St. Anthony's Medical Center*, 384 F. App'x. 531, 533 (8th Cir. 2010) (paraphrasing the Advisory Committee's comments to Rule 30(d)(2)).

The text of Rule 30 suggests that a court employ a two-fold analysis in deciding whether to impose sanctions for deposition misconduct. "First, the movant must identify language or behavior that impeded, delayed or frustrated the fair examination of the deponent . . . . Second, the movant must identify "an appropriate sanction." *Dunn v. Wal-Mart Stores, Inc.*, No.

2:12-cv-01660-GMN-VCF, 2013 WL 5940099, at \*5 (D. Nev. Nov. 1, 2013). Naturally, in conducting this analysis a court will consider both the frequency and severity of the objectionable conduct. *Craig*, 384 F. App'x. at 533.

While courts will sometimes consider whether deposition misconduct was undertaken in bad faith, bad faith is not a requirement for the imposition of sanctions under Rule 30(d)(2). *Hylton v. Anytime Towing*, No. 11CV1039 JLS (WMc), 2012 WL 3562398, at \*2 (S.D. Cal. Aug. 17, 2012); *Layne Christensen Co. v. Bro-Tech Corp.*, No. 09-2381-JWL-GLR, 2011 WL 6934112, at \*2 (D. Kan. Dec. 30, 2011) (holding that Rule 30(d)(2) does not require a finding of bad faith before sanctions may be imposed); see also *GMAC Bank*, 248 F.R.D. at 196.

## ***C. Courts Will Impose Sanctions for a Broad Range of Conduct.***

Courts will sanction lawyers for discourtesy during a deposition, making speaking objections, and excessive interruptions. A recent case from the Seventh Circuit provides a good example of growing judicial intolerance for this sort of conduct. *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007). In *Redwood*, the lawyer taking the deposition asked largely irrelevant, and at times harassing, questions. *Id.* at 468-469. The defending lawyer did not suspend the deposition to seek a protective order under Rule 30(d)(3), but instead engaged in speaking objections and improperly instructed the witness not to answer. *Id.* The deponent, who was himself a lawyer, feigned the inability to remember or understand basic questions. *Id.* The trial court found that counsel for all the parties had behaved badly, and therefore declined to sanction either side. *Id.* at 469-470. The Seventh Circuit reversed, finding that "mutual enmity does not excuse [a] breakdown in decorum" and that the district court should have used its authority to maintain standards of civility and professionalism. *Id.* The Court censured three lawyers, including the deponent, admonished a fourth lawyer, and warned that any "repetition of this performance, in any court within this circuit, will lead to sterner sanctions, including suspension or disbarment." *Id.* at 470.

Other courts have echoed this disdain for unprofessional conduct during depositions. "Both sides have complained about opposing counsel's conduct during depositions . . . . The Court's extensive review of these pages serves as a useful reminder that loaded guns, sharp objects and law degrees should be kept out of the reach of children . . . . Both lawyers made inappropriate speaking objections to deposition questions and improperly instructed witnesses not to answer questions." *AG Equip. Co. v. AIG Life Ins. Co.*, No. 07-CV-556-CVE-PJC, 2008 WL 5205192, at \*3 (Dec. 10, 2008). Although the recent occasions upon which courts have sanctioned this sort of conduct are too numerous to list, some additional examples are: *Deville v. Givnadan Fragrances Corp.*, 419 F. App'x. 201, 207 (3rd Cir. 2011) (upholding sanctions for abusive, unprofessional and obstructive conduct during deposition); *Specht v. Google, Inc.*, 268 F.R.D. 596, 598-599, 603 (N.D. Ill. 2010) (imposing sanctions for speaking objections that obstructed the deposition); *BNSF Ry. Co. v. San Joaquin Valley RR Co.*, 2009 WL 3872043, \*3 (E.D. Cal. Nov. 17, 2009) (imposing sanctions for inappropriate and burdensome objections). In addition, earlier this year in a case that is still pending in the District of

Oregon, the Court imposed a \$5,000 sanction for deposition misconduct by counsel. *Accident Care Specialists of Portland, Inc. v. Allstate Fire and Cas. Ins. Co.*, No. 3:11-cv-01033-MO (D. Or. Jan. 6, 2014) (CM/ECF LIVE, Docket Entry No. 197).

Courts increasingly seem to be willing to sanction lawyers for instructing witnesses not to answer questions, even if the lawyer believes in good faith that the questions are far afield or even harassing. Rule 30(c)(2) provides three narrow grounds upon which a lawyer may instruct a deponent not to answer: (1) to preserve a privilege; (2) to enforce a limitation ordered by the court; and (3) to present a motion to terminate or limit the deposition under Rule 30(d)(3). That is it. If a lawyer instructs a witness not to answer under any other circumstances, sanctions may be imposed. See *Layne Christensen Co.*, 2011 WL 6934112 at \*2, 4 (holding that counsel should be sanctioned for improperly instructing a witness not to answer; however, agreeing not to characterize the payment of fees for continued deposition as a “sanction” if the lawyer and party voluntarily pay such costs). In addition to sanctions under Rule 30(d)(2) for impeding the fair examination of the witness, attorney fees under Rule 37(a)(5)(A) may be imposed following a successful motion to compel. Fed. R. Civ. P. 37(a)(5)(A).

Finally, in an interesting development, two courts have recently held that sanctions may be imposed for a lawyer’s failure to intervene when a deponent client engages in deposition misconduct. *GMAC Bank v. HTFC Corp.* stands out as perhaps the most egregious example of deposition misconduct by a witness that we have seen in our review of the case law. 248 F.R.D. 182 (E.D. Penn. 2008). The deponent repeatedly refused to answer legitimate questions, used a familiar four-letter word no fewer than 73 times on the record, and verbally accosted the lawyer taking the deposition. *Id.* at 187-190. The court fined the deponent’s lawyer personally under Rule 30(d)(2) and Rule 37(a)(5)(A) because his failure to intervene under the circumstances amounted to “endorsement and ratification” of his client’s conduct. *Id.* at 197-198. A district court within the Ninth Circuit has adopted the reasoning of *GMAC Bank*, finding that the “failure of an attorney to curb client misconduct during a deposition can have the effect, as it did here, of empowering continued misconduct.” *Luangisa v. Interface Operations*, No. 2:11-cv-00951-RCJ-CWH, 2011 WL 6029880, at \*11 (D. Nev. Dec. 5, 2011). “It is not enough for an attorney to refrain from instructing a client not to answer. In fulfilling his or her duties as an officer of the court an attorney must take some affirmative step to ensure the deponent complies with the deposition rules.” *Id.*

#### **D. Courts Have Wide Discretion to Tailor Sanctions to Each Specific Case.**

Our review of the case law revealed that monetary sanctions are by far the most common form of sanction for deposition misconduct. Often, the party who was obstructed from fairly taking the deposition will move to compel further testimony under Rule 37(a). Commonly the moving party will seek to recover the cost of having to depose the witness twice, and will seek to recover the attorney fees required to bring the motion to compel. See e.g. *Luangisa*, 2011 WL 6029880 at \*14; *BNSF Railway Co.*, 2009 WL 3872043 at \*3.

Despite the inclination toward monetary sanctions, courts are free under Rule 30(d)(2) to fashion “an appropriate sanction.” This may include the requirement that the deposition be continued at the courthouse in the presence of a judicial officer. *GMAC Bank*, 248 F.R.D. at 193. It could include censure or disbarment. *Redwood*, 476 F.3d at 470.

Sanctions can even include dismissal of a claim or cause of action. *Glick v. Molloy*, CV 11-168-M-DWM-JCL, 2013 WL 140100, at \*3 (D. Mt. Jan. 10, 2013) (sanctioning a deponent for deposition misconduct and cautioning that the deponent’s “failure to appear at another deposition...or his refusal, without legal justification, to answer questions at his deposition, may result in the dismissal of this action as an appropriate sanction...”). In order to impose case-ending sanctions, a court must consider five criteria: 1) the public interest in prompt conclusion of litigation; 2) the need to manage the court’s docket; 3) the risk of prejudice to the party asking for the sanction; 4) the policy favoring disposition of disputes on their merits; and 5) the suitability of less drastic sanctions. *Feuerstein v. Home Depot, U.S.A., Inc.*, 2:12-cv-1062 JWS, 2013 WL 4507612, at \*4 (D. Ariz. Aug. 23, 2013) citing *Con. Gen Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). Although less drastic sanctions will ordinarily be suitable, sometimes case-ending sanctions are appropriate. See *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776 (7th Cir. 1991) (upholding case-ending sanctions for repeated deposition misconduct).

## **II. Approaches for Protecting Your Witness While Avoiding Sanctionable Conduct.**

Generally, “in the face of irrelevant questions, the proper procedure is to answer the questions, noting them for resolution at pretrial or trial, unless the questions are so pervasive that a motion under Rule 30(d)(3) is appropriate.” *Luangisa*, 2011 WL 6029880, at \*10. Rule 30(d)(3) provides a mechanism by which an attorney may move to terminate or limit a deposition “on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses a deponent or a party.” Fed. R. Civ. P. 30(d)(3). For such a motion to be successful, however, the misconduct usually must be either pervasive or somewhat egregious. See *Luangisa*, 2011 WL 6029880, at \*10, 12 (finding, however, that it was permissible for a deposing lawyer to suspend a deposition under Rule 30(d)(3) following the fifth relevance objection and fifth refusal to answer in the first few minutes of a deposition). In addition, a motion to terminate or limit a deposition must be filed without delay when a deposition is suspended. *FCC v. Mizuho Medy Co. Ltd.*, 257 F.R.D. 679, 683 (S.D. Cal. 2009) (holding that a Rule 30(d)(3) motion must be filed immediately after a deposition is suspended or terminated).

In some instances it is obvious that a line has been crossed and it is appropriate to suspend a deposition and move under Rule 30(d)(3). Usually, it is less clear when poor questioning has crossed the line to bad faith or harassment. Courts recognize this state of limbo. “[T]here are many occasions in which a party taking a deposition may ask a question a deponent or

counsel consider improper, but will be unable to show is asked in bad faith, or to annoy, embarrass or harass the witness.” *Brincko v. Rio Properties*, 278 F.R.D. 576, 584 (D. Nev. 2011). In *Brincko*, the court held that a lawyer may not instruct a witness not to answer questions the lawyer deems repetitious, argumentative or harassing, but must instead suspend the deposition and move for protection under Rule 30(d)(3). *Id.* at 581. But the court also suggested the remedy of an emergency dispute resolution conference with the court – a remedy we encourage you to consider if you are unsure whether improper questioning has crossed the line to bad faith or harassment. *Id.* at 584.

Local Rule 30-6, Motions Relating to Depositions, is the local rule analog of Rule 30(d)(3). In it the Court makes itself available to immediately intervene if “the parties have a dispute which may be resolved with the assistance of the Court, or if unreasonable or bad faith deposition techniques are being used...” LR 30-6. An immediate conference or hearing is available not only if unreasonable or bad faith deposition techniques are being used, but for any matter of dispute during a deposition. *Id.* This flexibility is emphasized by the Local Rule’s additional reference to the availability of a telephone conference under Local Rule 16-2(c), which in turn states that any party may ask for a conference under Rule 16 at any time. *Id.*, LR 16-2(c).

In *Brincko*, the court encouraged the parties to take advantage of the availability of emergency conferences and noted that neither party had availed themselves of this opportunity. *Id.* at 584. Availing yourselves of the opportunity presented by Local Rule 30-6 will at a minimum show the court you are trying to exhaust the remedies available in order to continue with the deposition, and it may result in an immediate order limiting the conduct of the opposing lawyer without the expense and delay of a suspension and motion under Rule 30(d)(3).

### III. Sanctions Are Available for Deposition Misconduct in Oregon State Court Despite the Absence of A Rule Analogous to Federal Rule 30(d)(2).

The absence of a provision in the Oregon Rules of Civil Procedure that is analogous to Federal Rule 30(d)(2) may explain the dearth of reported Oregon cases dealing with sanctions for deposition misconduct. That said, the Oregon Rules contain provisions that would permit the imposition of sanctions for certain types of deposition misconduct, and also contain many provisions similar to those in the Federal Rules that constrain deposition conduct.

As with the Federal Rules, objections in state court depositions must be made in a nonargumentative and nonsuggestive manner. ORCP 39 D(3). Similarly, a defending lawyer may not instruct a witness not to answer except to present a motion for court assistance, to enforce a limitation ordered by the court, or to preserve a privilege or constitutional right. *Id.* Further, the Multnomah County Circuit Court Civil Motion Panel Statement of Consensus states: “Speaking Objections - Attorneys should not state anything more than the legal grounds for the objections to preserve the record, and objec-

tion should be made without comment.” Civil Motion Panel Statement of Consensus (February 1, 2013). Accordingly, the contours of proper conduct and misconduct during depositions are not materially different whether in federal or state court.

Under the Oregon Rules, either party may suspend a deposition to immediately move for court assistance if a deposition is being conducted or hindered in bad faith, in a manner not consistent with the Oregon Rules, or in such a manner as to unreasonably annoy, embarrass or oppress the deponent or any party. ORCP 39 E(1). A party may also compel additional discovery if a deponent refuses to answer questions at a deposition, or if the answer is evasive. ORCP 46 A(2), (3). The prevailing party on a motion under ORCP 39 E(1) or 46 A(2) or (3) may be entitled to attorney fees incurred in bringing or defending the motion. ORCP 39 E(2); 46 A(4). While such fees may not properly be considered a “sanction,” they could nevertheless result in the imposition of a substantial monetary penalty on the party whose deposition misconduct necessitated the motion. In addition, the rules explicitly allow sanctions for violation of a discovery order, as well as imposition of attorney fees against the party who caused, or the counsel who advised, the violation. ORCP 46 B. Accordingly, if a party obtains an order prohibiting or enjoining certain deposition conduct, sanctions are explicitly available for violation of that order.

## COMMENTS FROM THE EDITOR

### “A Recipe for Opening Statements and Closing Arguments”

By Dennis P. Rawlinson, Miller Nash LLP



Dennis Rawlinson

A lot has been written on opening statements and closing arguments. Over the course of a career, most of us read “volumes” of material dealing with opening statements and closing arguments and attend countless seminars covering these trial practice topics.

Ultimately, however, I find that unless I’ve reduced these materials and seminars to short checklists or abbreviated points (a recipe, of sorts), I run the risk of forgetting what I have learned. I suspect that most of us find that before trial (when we are overworked and sleep-deprived) is not the ideal time to be rereading and restudying to perfect our trial skills. On the other hand, if we can pick up a quick checklist and review it as we’re preparing an opening statement or a closing argument, points garnered over the years from experience, reading, and seminars will be less likely to be overlooked.

Set forth below are a couple of checklists for your consideration. I believe that ultimately the most beneficial checklist is the one that each of us develops individually and reviews and revises over a lifetime of practice rather than one that we find in a treatise or receive at a seminar. Thus the checklist set forth below is really more an example of a methodology for your consideration rather than a specific checklist to adopt. Each of us should, over time, prepare and revise a checklist of points that is suited to our own individual style.

## A. Example of Opening Statement Checklist

1. Theme, theme, theme. (Select your theme and return to it often.)
2. Simplify, simplify, simplify. (Provide a view of the forest, not a description of each of the trees.)
3. Capture attention early. (The media correctly recognizes that this needs to be done in 30 seconds or less.)
4. Tell a story with a viewpoint. (Think about whether the viewpoint should be from an omniscient narrator, the position of your client, or the position of your adversary.)
5. “Pull the teeth” of your weaknesses. (If you haven’t done so in jury selection, disclose your weaknesses before your opponent does it and hurts your credibility.)
6. The facts, the facts, the facts. (The “facts,” not “argument,” win cases. Marshal the facts that support your theme and story.)
7. Use visuals. (Use charts, a white board, and exhibits to enhance your opening.)
8. “Talk,” don’t give a speech. (Don’t have your opening memorized or write it word for word; simply “talk” or “visit” with the jury or the judge.)
9. Tell the fact-finder what you want. (Make it clear (particularly if you’re a plaintiff) what it is that you’re asking the fact-finder to do.)
10. Start strong and end strong.

Similarly, each of us should make an effort to reduce the points we have learned over time from both practical experience and continuing legal education to a checklist of points that can be reviewed as we prepare closing argument.

## B. Example of Closing Argument Checklist

1. Thank the jury, but “don’t overdo it.”
2. Avoid notes.
3. Use exhibits and testimony transcripts.
4. Invite the jury or the court to examine exhibits and transcripts.
5. Select and review key jury instructions.
6. Argue credibility. (Discuss why your witnesses are more credible than your opponent’s, but don’t accuse anyone of lying.)
7. Establish why your case is important. (Argue

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that more is at stake than simply deciding the outcome of a dispute.)

8. Fulfilled and unfulfilled promises. (Return to opening statements and demonstrate your fulfillment of and your opponent’s failure to fulfill promises concerning what the evidence will show.)

9. Suggest, don’t demand. (Empower the judge or the jury and suggest why your approach is more just or fair.)

10. Argue inferences. (Argue the reasonable and logical conclusions that should be drawn from the evidence.)

I encourage each of you (if you haven't already done so) to develop your own personalized checklist and then to review and modify it regularly, based on your study and experience. Then each time you prepare an opening statement or closing argument, your recipe (checklist) can be easily used to ensure that the points you have learned over time are not overlooked.

## Can For-Profit Corporations Discriminate Based On the Religious Beliefs of Their Owners? BOLI Says "No"

By Paul J.C. Southwick, Davis Wright Tremaine LLP



Paul J.C. Southwick

For-profit companies whose owners operate them pursuant to their religious beliefs are seeking exemptions to state antidiscrimination statutes, particularly in the area of sexual orientation discrimination. However, in a recent case, the Oregon Bureau of Labor and Industries ("BOLI") rejected a local company's attempt to secure an exemption to Oregon's antidiscrimination statute. On January 17, 2014, BOLI issued a press release stating that Sweet Cakes

by Melissa, a for-profit bakery in Gresham, "violated the civil rights of a same-sex couple when it denied service based on sexual orientation[.]"

The same-sex couple had filed a complaint against the bakery pursuant to the Oregon Equality Act of 2007 when the bakery refused to sell them a wedding cake. According to Oregon's Equality Act, "all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age[.]" O.R.S. 659A.403(1).

The bakery's owners argued, however, that being required to serve a same-sex couple would violate their religious freedom, as they opposed same-sex weddings on religious grounds. Oregon's Equality Act contains some exceptions for "a bona fide church or other religious institution...based on a bona fide religious belief about sexual orientation as long as the housing or the use of facilities is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution." O.R.S. 659A.006(3).

To date, the exemption has not been discussed in any reported Oregon decision. However, consistent with the plain language of the exemption, BOLI determined that Sweet Cakes by Melissa "is not a religious institution under law and that the business' policy of refusing to make same-sex wedding cakes represents unlawful discrimination based on sexual orientation."

Oregon is one of many states evaluating the application of its anti-discrimination statutes to for-profit corporations owned by individuals who operate them according to their religious beliefs. The New Mexico Supreme Court recently held that Elane Photography, a for profit limited liability company that refused to photograph a same-sex wedding because of the religious beliefs of its owners, violated the New Mexico Human Rights Act ("NMHRA"), which forbids discrimination by businesses open to the public. *Elane Photography v. Willock*, 309 P.3d 53 (N.M. Sup. Ct. 2013).

The case against Elane Photography originated as a discrimination complaint filed with the state's human rights commission, similar to the BOLI complaint against Sweet Cakes by Melissa. On appeal, the New Mexico Supreme Court determined that "Businesses that choose to be public accommodations must comply with the NMHRA, although such businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws." *Id.* at 59.

New Jersey recently went further than Oregon and New Mexico and determined that its nondiscrimination statute applies to a non-profit, religious organization. In *Bernstein v. Ocean Grove Camp Meeting Ass'n*, Num. CRT 6145-09 (Off. Of Admin Law decision issued January 12, 2012), an administrative law judge upheld the determination of the state's human rights commission that a non-profit organization, even one that is "fundamentally a religious organization," may qualify as a public accommodation under the state's anti-discrimination statute.

In *Ocean Grove Camp Meeting*, the commission and administrative law judge considered access to a wedding pavilion operated by a non-profit organization closely associated with the United Methodist Church. In upholding the commission's determination that the wedding pavilion constituted a public accommodation that could not exclude people on the basis of sexual orientation, the judge noted that the non-profit "was renting space at the Pavilion for weddings, an activity largely detached from associational expression or speech" and that it "did not inquire into religious beliefs or practice because it did not sponsor, or otherwise control, these weddings." *Id.* at 6.

Some courts have drawn a line, however, in extending the application of their antidiscrimination statutes to religious organizations. In *Doe v. Cal. Lutheran High Sch. Ass'n*, 170 Cal. App. 4th 828 (2009), the California Court of Appeal held that a private, non-profit, religious high school, run by a religious organization, was not a "business establishment" subject to the state's antidiscrimination statute for purposes of admitting lesbian students. *Id.* at 838. Nonetheless, the Court recognized that the school could be a "business establishment" for purposes of its commercial transactions with the public. *Id.* at 839.

### Do for-profit corporations have First Amendment free exercise rights?

In *Elane Photography*, the New Mexico Supreme Court noted that "It is an open question whether Elane Photography, which is a limited liability company rather than a natural per-

son, has First Amendment free exercise rights. Several federal courts have recently addressed this question with differing outcomes. Compare, e.g., *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013) ('[W]e conclude that for-profit, secular corporations cannot engage in religious exercise....'), with *Grote v. Sebelius*, 708 F.3d 850, 854 (7th Cir. 2013) ('[T]he [plaintiffs'] use of the corporate form is not dispositive of the [free exercise] claim.'). 309 P.3d at 72-73.

On November 26, 2013, the United States Supreme Court granted certiorari in both *Conestoga Wood Specialties* and *Sebelius*. In those cases, the Court will determine whether for-profit corporations, owned by religious individuals operating them according to their religious principles, have First Amendment free exercise rights such that they should be exempt from the Affordable Care Act's requirement that companies with more than 50 employees offer health plans covering contraception. In addition to determining the application of the Affordable Care Act to these entities, the Court's ruling will undoubtedly impact state court and state human rights commission decisions concerning the application of state antidiscrimination statutes to for-profit, religiously operated businesses.

**The Take-Away:** What is an Oregon lawyer to do when advising a for-profit client who operates their business according to religious principles that clash with the Oregon Equality Act? First, the lawyer can advise the client about the contexts in which such clashes are likely to occur. One of the most likely is the employment context, where an employer wishes to fire an employee for engaging in activities disapproved by the employer on religious grounds, such as marrying a same-sex partner or exercising reproductive rights to contraception or abortion. Another likely arena is the public accommodations and housing context, as with *Sweet Cakes by Melissa*, where a for-profit but religiously-owned bakery, bed and breakfast or conference facility wishes to refuse service to same-sex couples celebrating weddings.

Clashes in both the employment and public accommodations contexts are likely to become more frequent if Oregon legalizes same-sex weddings later this year. In Washington, for example, which legalized same-sex weddings in 2012, there are currently two lawsuits, including one brought by the state Attorney General, against a florist who refused to sell flowers for a same-sex wedding. Additionally, widespread news attention recently arose when a Catholic high school outside of Seattle allegedly fired one of its vice presidents after he married his same-sex partner.

In light of the potential for litigation, Oregon lawyers can advise for-profit, religiously operated businesses that offer services to the public in the following ways: (1) such businesses are probably subject to the non-discrimination requirements of Oregon's Equality Act; (2) however, they retain their First Amendment free speech rights (e.g. they can post signs at their workplaces opposing same-sex marriage); and (3) the United States Supreme Court will likely weigh in later this year on whether such businesses have First Amendment free exercise rights that could potentially excuse them from compliance with Oregon's Equality Act. Additionally, businesses

seeking to avoid litigation can contact BOLI's technical assistance for employers program at (971) 673-0824.

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## Ninth Circuit Gives Guidance Regarding Claims for Injunctive Relief and Rules on a Trademark Case of First Impression, Part 1 of 2

Bryan D. Beel, Ph.D., J.D., Perkins Coie LLP



Bryan D. Beel

In just the last couple of months, the Court of Appeals for the Ninth Circuit addressed two significant issues regarding motions for injunctive relief in the context of copyright and trademark infringement claims. The Ninth Circuit's rulings may be valuable both to intellectual property owners seeking injunctive relief and to alleged infringers trying to fend off an injunction. The following article, which is the first in a short series of two, discusses injunctive relief in the copyright infringement context. In the case summarized, the Ninth Circuit signaled that it will give a district court wide latitude in granting or denying injunctive relief if the lower court applies the law in a reasonable manner to the available facts, especially if the lower court's ruling suggests the availability of a complete legal defense to a claim.

### Preliminary injunctive relief after a claim of copyright infringement

In the first case, the Ninth Circuit affirmed a district court ruling that a television broadcaster could not demonstrate a likelihood of success on the merits of its copyright infringement claim, and thus was not entitled to a preliminary injunction, where the defendant television provider was not a direct infringer and had a meritorious fair use defense to secondary infringement. *Fox Broad. Co. v. Dish Network L.L.C.*, 723 F.3d 1067 (9th Cir. 2013).

Fox Broadcasting Company and its related companies ("Fox") own the copyrights in television shows that air on the Fox television network, including prime-time shows such as *Glee*, *Bones*, *The Simpsons*, and *Family Guy*. *Fox Broad. Co.*, 723 F.3d at 1070. Fox contracts with cable and satellite television providers, such as DISH Network L.L.C. ("Dish"), to retransmit Fox's broadcast signal for the use of the provider's customers. Such providers are known as multichannel video programming distributors, and they may offer video on demand services. Under a 2002 agreement, amended in 2010, Dish was allowed to distribute Fox programs, so long as it did not do so on an "interactive, time-delayed, video-on-demand or similar basis," and so long as it "disable[d] fast forward func-

tionality during all advertisements.” Dish also agreed not to “record, copy, duplicate and/or authorize the recording, copying, duplication (other than by consumers for private home use) or retransmission” of any part of Fox’s signal.

In 2012, Dish offered the Hopper, “a set-top box with digital video recorder (DVR) and video on demand capabilities,” to its customers; the Hopper allowed Dish’s customers to utilize a software feature called PrimeTime Anytime, through which the customers could “set a single timer to record any and all primetime programming on the four major broadcast networks (including Fox) every night of the week.” *Id.* at 1071. A feature of PrimeTime Anytime, called AutoHop, “allows users to automatically skip commercials” for many PrimeTime Anytime shows. *Id.* at 1072. To enable AutoHop, Dish technicians watch each night’s prime-time broadcasts and manually insert the parameters for commercial skipping for each show; each night, Dish tests the accuracy of the technicians’ parameters on stored copies of the prime-time shows.

Fox sued Dish for copyright infringement and breach of contract and sought a preliminary injunction against Dish’s PrimeTime Anytime and AutoHop features, which the U.S. District Court for the Central District of California denied. *Id.* (citing *Fox Broad. Co. v. Dish Network, L.L.C.*, 905 F. Supp. 2d 1088 (C.D. Cal. 2012)). The district court held that Fox failed to demonstrate a likelihood of success on nearly all of its claims, except for the breach of contract claim resting on Dish’s use of broadcast copies to test the technicians’ commercial-skipping parameters. The district court held, however, that Dish’s use of the broadcast copies was not an “irreparable harm” sufficient to support an injunction. *Id.* (As an aside, Dish has been successful in fending off injunctive relief in other courts, as well, even if it may still face liability on the ultimate merits of the copyright infringement claims asserted against it. See, e.g., *In re AutoHop Litig.* No. 12-cv-4155(LTS)(KNF), 2013 WL 5477495 (S.D.N.Y. Oct. 1, 2013) (holding that American Broadcasting Co. is not entitled to a preliminary injunction preventing DISH from offering its PrimeTime Anytime and AutoHop services to DISH subscribers).)

The Ninth Circuit reviewed the district court’s rulings under a very deferential abuse of discretion standard and applied a preliminary injunction test that asked whether Fox was likely to succeed on the merits and likely to suffer irreparable harm in the absence of relief. *Id.* at 1073 (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th Cir. 2007); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Ninth Circuit held, at each turn, that the district court appropriately exercised its discretion in denying Fox a preliminary injunction.

First, the court found that Fox’s direct copyright infringement claim failed because a user’s enabling PrimeTime Anytime to store copies of Fox’s programs did not make Dish a direct infringer of Fox’s copyright; the court found, instead, that Dish merely “operat[es] a system used to make copies at the user’s command.” *Id.* at 1073 (citing *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)). Next, the court held that Fox’s secondary copyright infringement claim failed because even though Dish’s services enabled direct copyright infringement by Dish users, Dish was “likely to succeed on

its affirmative defense that its customers’ copying was a “fair use” under *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which analyzed many of the same types of uses of copied programs in the context of Sony’s Betamax VCRs. *Fox Broad. Co.*, 723 F.3d at 1074-76. Finally, the court held that even assuming that Fox could establish Dish’s breach of contract based on Dish’s use of copies of Fox’s programs for internal quality control purposes, Fox failed to show that Dish’s copying would be an irreparable harm sufficient to support a preliminary injunction. *Id.* at 1076-78. The court held, instead, that any harm done to Fox could easily and appropriately be compensated for with a financial payment. *Id.* at 1079.

**Lesson Learned:** First, this case reminds us that when reviewing a judgment under the appropriate standard, an appellate court will give significant latitude to a district court’s exercise of its discretion in granting or denying a motion for preliminary injunction, and where, as here, the district court’s conclusions are reasonable in view of the facts, the appellate court will not substitute its judgment for the lower court’s. In addition, this case shows that appropriate guidance from older case law can still provide the framework for analyzing copyright claims in the face of advanced technology: both the lower court and the court of appeals followed the Supreme Court’s nearly 30-year-old holding from the *Sony Betamax* case in ruling on the legality of Dish’s program time-shifting and commercial-skipping software.

To come in the next issue: the Ninth Circuit addresses an issue of first impression regarding injunctive relief after a claim of trademark infringement.

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## Trial Presentation Made Easy

Steve Larson and Angel Falconer, Stoll Berne



Steve Larson



Angel Falconer

Jurors, trial judges, and arbitrators have grown to expect technology in the courtroom to assist with the visual communication. As a result, in addition to developing the visual story, the lawyer also has to work out the logistics for presenting the trial exhibits, demonstrative aids and other visuals that will be used at trial.

With all of the new apps available for the iPad and other tablets, a lawyer can do much more visual advocacy on his or her own. However, for cases with a large number of trial exhibits, or cases with fact patterns that involve hard to grasp issues that are going to need a little more sophisticated demonstrative aids to explain the complex concepts, or cases with videotaped testimony, an assistant that can rapidly find and show trial exhibits on the fact-finder’s monitors, connect a piece of testimony to a demonstrative exhibit and present it to the fact-finder, and pull up videotaped deposi-

tion testimony to impeach a witness will be very valuable.

There are many very capable independent third parties offering their services to assist trial lawyers with trial presentation. However, we have found that having an in-house paralegal who is savvy with the current trial presentation computer software can provide a number of advantages over using an outside third-party trial presentation consultant.

First, an internal paralegal may be as familiar with the documents in the case as the lawyer, if not more so. Familiarity with the documents makes the process of directing a paralegal to a specific section of a document to call out or highlight for the fact-finder much less cumbersome than working with someone who doesn't have any knowledge about the case. That also makes it easier to communicate on the fly about what you are trying to do when you suddenly decide there is something the fact-finder is not getting that you need to emphasize.

Second, the internal paralegal will have had a more hands on role in getting the case ready for trial, so he or she will be familiar with the witnesses, themes of the case, and the points demonstrative aids are intended to emphasize. We frequently have paralegals suggest that we consider using a certain trial exhibit as we are doing cross-examinations. After your paralegal gets more experienced, he or she may also be able to provide you with feedback from a lay person's perspective. An outside independent contractor may be reluctant to tell the trial lawyer that an argument is missing the boat, where an internal employee, who may have had a longer relationship with the lawyer, may feel more comfortable offering advice.

Third, it is much easier to practice opening statements and closing arguments when you are working with someone in-house. Since our paralegals are in the office with us every day, we can practice different approaches days or even weeks before the trial. It is also easier to make last-minute changes to demonstrative aids and the order that visuals will be presented during opening statements and closing arguments if you are working with someone in-house. This repeated exposure to working together should make your presentation smoother than it might be with an outside third party. Jurors, judges, and arbitrators notice how well you work with your paralegal. A number of jurors have told us after trials that they were impressed how our attorney and paralegal team worked together, and how they appreciated the fact that the paralegal could display evidence on the monitors promptly. We have even had arbitrators (who were also practicing trial lawyers), opposing counsel, and third-party consultants approach our paralegals to ask about using the computers and software for the visual presentations.

Having a paralegal learn to use the computers and software for visual presentations may seem like a big project, but a few simple steps can make a computer savvy paralegal ready to be a top-notch trial presentation assistant.

The two trial presentation programs we have used are TrialDirector and Sanction. Both offer customized training solutions, including on-site training for lawyers and staff and thorough written materials. But practice is the real key to success. Starting as early as possible with building the trial database and practicing with case evidence in the database will

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give the paralegal the opportunity to see what's working well, what's not working at all (including technical problems), make corrections and adjustments, or seek out more training well in advance of trial.

We have found that a good way for both the lawyer and the paralegal to practice is to run through opening statement several times before trial. Going through it together multiple times will help the lawyer and paralegal learn the best ways to communicate with each other and the jury will appreciate a well rehearsed and seamless presentation. A paralegal who is familiar with the case may also be able to offer suggestions to help the lawyer refine the message. We often invite others to sit in on a practice run as well.

Courtroom logistics are also a very important part of the trial presentation that should not be overlooked. Coordinating with courtroom personnel in advance to make sure that equipment and additional furniture can be accommodated is critical (there might not be room at counsel's table for your paralegal). Go as early as possible to visit the courtroom to get a feel for the layout, including where to access electrical outlets, where to set up a projector or monitors, the best location for any demonstrative aids, and even map out where the attorney can best engage the jury while still communicating well with the paralegal. In federal court, the courtrooms have much more technology available for the parties to use, but in state courts you will often need to make arrangements with opposing counsel to share some of the technology – like monitors. If possible, set up and test all equipment the day before trial to prevent disasters from happening in the first place.

Of course, there is no replacement for experience, but the more you practice together and the sooner you both get in the courtroom, the more confident both of you will be in each other's abilities. A little extra planning can help settle a lot of nerves.

In summary, given the potential for better performance, increased satisfaction from the fact-finder, more peace of mind for the trial lawyer, and lower costs for the client, using an in-house paralegal for trial presentation is an alternative that should be considered.

*Steve Larson is a Shareholder at Stoll Berne who specializes in complex litigation. Angel Falconer is the Litigation Support Manager at Stoll Berne.*

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## Pro Hac Vice: Procedure and Practice in Oregon

By Mark J. Fucile, Fucile & Reising LLP

With many kinds of litigation becoming increasingly “national” in scope, Oregon plaintiffs and defense lawyers alike are being asked more frequently to serve as “local” counsel for out-of-state “lead” counsel who are admitted *pro hac vice*. This article looks at two primary aspects of serving as local counsel. First, it surveys the process to obtain *pro hac vice* admission for

out-of-state lawyers in Oregon state and federal court.<sup>1</sup> Second, it examines the role of local counsel in Oregon practice. With both, the focus is on trial courts—although similar procedures and considerations apply with equal measure to appellate courts.<sup>2</sup>

### Procedures

*Pro hac vice* procedures in Oregon's state and federal courts share many common aspects but also have some marked differences. After surveying the process for admission, revocation of *pro hac vice* admission is also noted briefly.

*State Court.* *Pro hac vice* admission in Oregon state court is governed by ORS 9.241 and UTCR 3.170. The former confirms the Supreme Court's authority to regulate the temporary practice of law by out-of-state lawyers in both courts and administrative proceedings. The latter outlines the specific requirements for *pro hac vice* admission. ORS 9.241 and UTCR 3.170 create a two-tier approval process.

First, the out-of-state lawyer, typically through local counsel, must obtain a “certificate of compliance” from the Oregon State Bar. The required form is available on the Bar's web site.<sup>3</sup> Tracking the language of UTCR 3.170, the out-of-state lawyer must certify that the lawyer: is a member in good standing in the lawyer's “home” state bar; has no regulatory discipline pending (or, if there is, explain it); will associate with Oregon counsel; and, if the lawyer will engage in private practice, has professional liability insurance “substantially equivalent” to the Professional Liability Fund plan. The out-of-state lawyer's application must be accompanied by a certificate of good standing from the lawyer's “home” jurisdiction and a certificate reflecting the lawyer's malpractice coverage. When the required information and the accompanying fee are provided, the Bar then countersigns the certificate with an “acknowledgement of receipt” and notes any possible deficiencies for the consideration of the court in which the out-of-state lawyer wishes to appear. There are no “firm” admissions. Rather, each out-of-state lawyer must be admitted individually for the particular case concerned. The out-of-state lawyer's certificate must be renewed (again, through a form on the Bar's web site and accompanied by a renewal fee) every twelve months. The certification process requires the out-of-state lawyer to submit to both the regulatory jurisdiction of the Oregon Supreme Court and personal jurisdiction in Oregon for any legal malpractice claims arising out of the case involved.

Second, the local counsel files a motion for admission with the court concerned attaching the certificate with the acknowledgement from the Bar. The court then makes its own determination about whether the lawyer has met the criteria of UTCR 3.170 and should be admitted. Although many such motions are granted routinely, courts can and do hold hearings on the adequacy of applications—especially when the Bar has highlighted apparent deficiencies. Other parties must be served with the motion and have standing to object. In particular, out-of-state lawyers are often surprised when the Bar notes that their insurance does not conform to the PLF because Oregon's basic coverage, in contrast to most commercial policies, does not have a deductible. Usually, this will not put the application at risk. But, *pro hac vice* motions have been denied on several

occasions in Multnomah County Circuit Court when the lawyers involved did not have malpractice insurance at all because UTCR 3.170 specifically requires “insurance” and the notes to UTCR 3.170 state unequivocally that its requirements “may be modified only by order of . . . [the Supreme] Court.”<sup>4</sup>

*Federal Court.* LR 83-3 governs *pro hac vice* admission in civil matters in the District of Oregon and, generally, is more straightforward than its state counterpart because it only requires approval of the court. The required form is available on the court’s web site<sup>5</sup> and simply requires the out-of-state lawyer to list the other jurisdictions where the lawyer is admitted (both state and federal) and to certify that the lawyer is not subject to disciplinary proceedings (or must provide an explanation if they are) and that the lawyer will maintain malpractice insurance covering the case for the duration of the proceedings. The application is filed with the court through local counsel in the particular proceeding in which the out-of-state lawyer wishes to appear and is served on the other parties through the court’s ECF system. Like the corresponding state rule, the federal local rule admits individual lawyers, not firms, and, therefore, each out-of-state lawyer who wishes to appear *pro hac vice* must submit a separate application.

**Revocation.** Both state (*see, e.g., Tahvili v. Washington Mut. Bank*, 224 Or App 96, 197 P3d 541 (2008)) and federal (*see, e.g., Cole v. U.S. District Court*, 366 F3d 813 (9th Cir 2004)) law recognize that a *pro hac vice* admission can be revoked. In *Tahvili*, for example, an out-of-state lawyer repeatedly disobeyed the court’s rulings and the trial judge revoked the out-of-state lawyer’s *pro hac vice* admission as, in effect, a sanction similar to disqualification. The Court of Appeals found that the trial judge had the requisite “good cause” under UTCR 3.170(3), which provides: “At any time and upon good cause shown, the court or administrative body may revoke the out-of-state attorney’s permission to appear in the matter.” Revocation can be initiated by the court *sua sponte*<sup>6</sup> as in *Tahvili*, or by motion from an opposing party.<sup>7</sup>

## Practice

The practical aspects of serving as local counsel can vary significantly based on the case involved and the relationship between local and out-of-state counsel. Three in particular are recurring: the role of local counsel; lessening malpractice risk; and documenting fee arrangements.

**Role.** Both UTCR 3.170(1)(c) and LR 83-3(a)(1) require that local counsel “meaningfully participate” in the case involved. In practice, what is “meaningful” varies by both case and courtroom. The *Tahvili* case noted earlier, however, provides a stark reminder that local counsel may be required to “meaningfully participate”—whether they anticipated it or not. *Tahvili* initially unfolded like many cases, with local counsel having limited involvement other than the purely local aspects of the litigation such as advising out-of-state lawyers on Oregon practice, procedure and personalities. Almost immediately as trial began, however, the out-of-state lawyer in *Tahvili* got cross-wise with the judge when he disobeyed a number of rulings. This quickly led to a dramatic exchange:

“[Out-of-State Lawyer] . . . then argued that the disputed evidence could be admitted because it was not offered for the truth of the matter asserted. The trial court disagreed, and added:

‘Stop it already. You have rulings you don’t like, abide by them. Whether you like them or not doesn’t matter. But I will emphasize again, if you do this again, actually, the easiest thing will be . . . [Local Counsel] . . . is going to try the case.

. . .

“The court then asked where . . . [Local Counsel] . . . was, and . . . [Out-of-State Lawyer] . . . replied that he presumed that . . . [Local Counsel] . . . was back at his office. When the court asked why, . . . [Out-of-State Lawyer] . . . responded ‘He’s not needed at this point in the trial.’ The court replied that . . . [Local Counsel] . . . was needed ‘since he is your sponsoring counsel who is supposed to be meaningfully participating. He cannot meaningfully participate in absentia.’ Consequently, the trial court then ordered that . . . [Local Counsel] . . . return and ‘be here for the balance of the trial to be meaningfully participating,’ because it appeared to the court that it ‘may well be likely that he will be trying this case.’” 224 Or App at 102.

When the court then revoked the out-of-state lawyer’s *pro hac vice* admission, the local counsel was put in the unenviable position of having to step in to try a case when the expectation throughout was that he would just be assisting with the truly local aspects of the litigation. The local counsel requested that the trial be rescheduled, but because that would have amounted to a mistrial, the judge denied a reset. When the local counsel then informed the court that he was unable to proceed, the defendants moved for a directed verdict—which the court granted. The Court of Appeals affirmed. Although the result in *Tahvili* is rare, it underscores that having sponsored an out-of-state lawyer’s admission on the promise to “meaningfully participate,” local counsel can be put in an uncomfortable position if the court orders just that.

**Lessening Risk.** One of the risks of being “local” counsel is that “lead” counsel may not involve local counsel in overall strategy or contacts with the client. If lead counsel makes a mistake well out of local counsel’s area of responsibility, the question for local counsel is whether their firm must share space with lead counsel on the defendants’ side of the case caption in the resulting malpractice lawsuit. The “meaningful participation” requirement makes it difficult for local counsel to insulate themselves completely. Case law is sparse on this point, but one notable decision, *Macawber Engineering, Inc. v. Robson & Miller*, 47 F3d 253 (8th Cir 1995), focused on the scope of local counsel’s retention in affirming summary judgment for a local counsel firm where the error was unambiguously the fault of lead counsel, and, indeed, local counsel had not even been informed of the particular issue involved. *Macawber* suggests that local counsel avail themselves of RPC 1.2(b), which allows a lawyer to limit the scope of a representation, by outlining in

its own engagement agreement with the client the particular activities for which the local firm will be primarily responsible. This is not a perfect solution in light of the “meaningful participation” requirement, but offers local counsel an avenue to protect themselves to the extent they can.

**Fee Arrangements.** Fee arrangements when serving as local counsel vary. Many are hourly—with the local firm either billing the client directly or having its bill being treated as an expense on lead counsel’s bill to the client.<sup>8</sup> Sharing in a contingent fee, by contrast, generally requires careful analysis of choice-of-law issues and documenting with the client any agreed fee-split. *Bechler v. Macaluso*, 2010 WL 2034635 (D Or May 14, 2010) (unpublished), presents an example of the former. In *Bechler*, the court refused to enforce a fee agreement between a California lawyer and his Oregon clients in a wrongful death case because the California lawyer had failed to comply with ORS 20.340, which mandates specific disclosures in personal injury contingent fee agreements. *Frost v. Lotspeich*, 175 Or App 163, 30 P3d 1185 (2001), in turn, illustrates the latter. In *Frost*, two lawyers agreed to split a contingent fee but failed to secure the client’s approval under the predecessor to current RPC 1.5(d)(1), which requires that “the client gives informed consent to the fact that there will be a division of fees[.]” Absent client consent, the lawyers were left to litigate their respective shares of the contingent fee. The Court of Appeals determined that California law applied and, relying on the corresponding California professional rule that is very similar to the current version of the Oregon rule, found that the fee-split was unenforceable between the two lawyers if there was no evidence on remand that the client had approved the split.

## Endnotes

- 1 Oregon RPC 5.5(c)(2) authorizes the temporary practice in Oregon by out-of-state lawyers for preliminary activities where they “reasonably expect” to be admitted *pro hac vice*.
- 2 *Pro hac vice* admission in Oregon appellate courts is governed by ORAP 8.10(4). Attorney admission to the Ninth Circuit, in turn, is governed by FRAP 46 and Ninth Circuit Rule 46-1.
- 3 <http://www.osbar.org/rulesregs/phvinstruction.html>.
- 4 See, e.g., orders denying *pro hac vice* admissions in: *Godman v. ArvinMeritor*, Multnomah County Circuit Court Case No. 0403-02627; *Steadman v. Allis-Chalmers*, Multnomah County Circuit Court Case No. 0705-06242 (on file with author).
- 5 <http://www.ord.uscourts.gov/index.php/attorneys/attorney-admissions>.
- 6 *Cole* addresses the associated issue of the adequacy of notice when revocation is used as a sanction. In *Tahvili*, the out-of-state lawyer had been forewarned.
- 7 See, e.g., order vacating *pro hac vice* admission, *Steadman v. Allis-Chalmers*, Multnomah County Circuit Court Case No. 0705-06242 (on file with author).
- 8 ABA Formal Ethics Opinion 00-420 addresses the analogous area of treating contract lawyers’ bills as an “expense.”

## Recent Significant Oregon Cases

Stephen K. Bushong  
Multnomah County Circuit Court Judge

### Claims and Defenses

#### *Trees v. Ordonez*, 354 Or 197 (2013)



Honorable  
Stephen K. Bushong

Plaintiff alleged in this medical malpractice case that the defendant neurosurgeon negligently installed a metal plate during cervical fusion surgery. At trial, plaintiff’s expert—a biomechanical engineer familiar with the use and design of the plate—testified that defendant selected the incorrect size plate for the surgery, causing the screw heads to protrude. He further testified that the screw heads had sharp edges, which could cause damage to the tissue if they came into contact with the esophagus.

Because plaintiff did not present any expert testimony from a neurosurgeon establishing that defendant had breached the standard of care, the trial court granted defendant’s motion for a directed verdict. The Court of Appeals affirmed, but the Supreme Court reversed. The court “reject[ed] a rule requiring expert testimony from a medical doctor to survive a motion for a directed verdict on the issue of negligence in a medical malpractice case.” 354 Or at 211. In this case, based on the biomechanical engineer’s testimony, “the evidence that the screw heads . . . were protruding above the plate could allow a jury to find that defendant breached the standard of care[.]” *Id.* at 215. The court further concluded that the trial court did not err in denying defendant’s motion for directed verdict based on causation. The court explained that there was sufficient “evidence from which a reasonable jury could infer that it is more probable than not that defendant’s alleged negligence caused plaintiff’s injuries: sharp screws were protruding in the area where plaintiff’s esophagus was before the surgery, the esophagus is a soft tissue, multiple experts agreed that the esophagus had been perforated, the perforation started to close after the screws were removed, and plaintiff’s condition improved after the screws were removed.” *Id.* at 220.

#### *Hagler v. Coastal Farm Holdings, Inc.*, 354 Or 132 (2013)

Plaintiff was injured when a 15-pound metal post-pounding tool fell off a store shelf onto her foot as she walked down the aisle of defendant’s store. She contended that, although she did not see the tool fall or notice how it was shelved before it fell, defendant was liable for negligence on a *res ipsa loquitur* theory. The trial court granted summary judgment for defendant because plaintiff submitted no evidence that defendant knew or reasonably should have known of any danger in shelving the product. The Court of Appeals and Supreme Court both affirmed. The Supreme Court concluded that *res ipsa loquitur* is inapplicable. The court explained that, to establish negligence

on a *res ipsa loquitur* theory, “plaintiff is required to supply evidence that plaintiff’s injury is the sort that, more likely than not, was caused by negligence on the part of defendant.” 354 Or at 147. In this case, there was no such evidence. The court concluded that, “[a]s the trial court correctly observed, there is no basis for determining that the injury in this case occurred because defendant shelved the post pounders in an unsafe manner or failed to discover that the post pounders had been stacked by someone else in an unsafe manner. The post pounder that fell and injured plaintiff could have fallen because of the action of another customer. On this record, it is not possible to say that the manner in which defendant shelved the post pounders is the more likely explanation for plaintiff’s injury.” *Id.*

***Alcutt v. Adams Family Food Services, Inc.,*  
258 Or App 767 (2013)**

Plaintiff sued his employer to recover for injuries he suffered while working at defendant’s restaurant, alleging claims for negligence, negligence per se, and violation of the Oregon Safe Employment Act (OSEA). The trial court granted defendant’s motion to dismiss, concluding that ORS 656.018, the exclusive remedy provision of the Workers’ Compensation Law, barred plaintiff’s civil action. The Court of Appeals reversed, though it agreed that the exclusive remedy rule applied. The court explained that the exception to the exclusive remedy rule set forth in ORS 656.019—which applies when a worker “fails to establish” that the work accident was the major contributing cause of his disability or need for treatment—did not apply here because the workers’ compensation claim was ultimately denied when the employer succeeded in proving that the otherwise compensable injury was not the major contributing cause of plaintiff’s disability or need for treatment. 258 Or App at 782. However, the court went on to hold that plaintiff was entitled to bring his negligence and negligence per se claims—but not his OSEA claim—because, under *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), plaintiff was constitutionally entitled under Article I, section 10, of the Oregon Constitution to bring his civil negligence claims in circuit court. *Id.* at 785-86.

***Love v. Prime, Inc.,* 259 Or App 1 (2013)**

Plaintiff brought a disability-discrimination claim after defendant refused to hire him as a truck driver. Defendant’s doctor had determined that plaintiff was not medically qualified under federal Department of Transportation (DOT) regulations to operate a commercial motor vehicle because his medical condition placed him at risk of sudden cardiac death. Plaintiff’s doctor disagreed, stating that plaintiff’s medical condition would not affect his ability to drive a truck. The trial court granted summary judgment to defendant on the grounds that plaintiff must first exhaust his administrative remedies before suing an employer based on his DOT qualifications. The Court of Appeals reversed. The court first explained that “the applicable principle is that of primary jurisdiction,” not exhaustion of remedies. 259 Or App at 4. The court agreed that the dispute between the doctors over plaintiff’s DOT qualifications is subject to the primary-jurisdiction doctrine “in a case involving a claim whose resolution depends on whether the driver is qualified to operate a commercial vehicle.” *Id.* at 7. But primary

jurisdiction does not apply “where, as here, the judicial relief sought by the driver does not include injunctive relief to require the carrier to hire the driver as a commercial driver[.]” *Id.*

***Bagley v. Mt. Bachelor, Inc.,* 258 Or App 390  
(2013), review allowed (Jan 7, 2014)**

Plaintiff fell and was seriously injured while snowboarding at Mt. Bachelor. He alleged that the resort negligently designed, constructed, maintained or inspected a “jump” in the “terrain park” where he fell. The trial court granted defendant’s motion for summary judgment based on a release plaintiff signed when he was 17 years old before using a snowboard pass that he continued to use after turning 18, when he was injured. The Court of Appeals affirmed, concluding that (1) there was no genuine issue of material fact that plaintiff had ratified the release agreement after reaching the age of majority; (2) the release agreement was not void as contrary to public policy; and (3) the release agreement was not substantively or procedurally unreasonable.

***Spain v. Jones,* 257 Or App 777, rev den,  
354 Or 656 (2013)**

Plaintiff, a plumber, was injured when he fell on a construction worksite. He sued the property owner and two framing subcontractors, alleging that (1) defendants’ negligence caused his injuries; (2) the landowner was liable under a premises-liability theory; and (3) defendants were liable under the Employer Liability Law (ELL), ORS 654.305 to 654.336. The trial court granted summary judgment in favor of all three defendants, concluding that (1) both common-law claims were barred by the “specialized expertise and knowledge” doctrine adopted in *Yowell v. General Tire & Rubber*, 260 Or 319 (1971); and (2) the ELL claim failed because none of the defendants controlled plaintiff’s work or were engaged in a common enterprise with plaintiff’s employer. The Court of Appeals reversed. The court explained that, under the *Yowell* doctrine, a defendant avoids liability only when (1) a risk is obvious and inextricably intertwined with the plaintiff’s employer’s performance of a specialized task; (2) the defendant lacks expertise regarding and control over the specialized task and the risk; and (3) the defendant hired the plaintiff’s employer because of its expertise in that work. 257 Or at 787-88. In this case, summary judgment was improperly granted under *Yowell* because there was a genuine issue of material fact about whether plaintiff’s risk of falling was inextricably intertwined with the performance of his plumbing duties. *Id.* at 791. Summary judgment was improperly granted on the ELL claim because “a genuine issue of material fact remains on plaintiff’s theory that defendants had actual control over, or the right to control, the risk-producing activity.” *Id.* at 794.

***Atkeson v. T & K Lands, LLC,*  
258 Or App 373 (2013)**

Plaintiff sued for rescission of a land sale contract based on mutual mistake, innocent misrepresentation, and intentional misrepresentation concerning problems with the property. The trial court granted defendants’ motion for summary judgment, and the Court of Appeals affirmed. The court explained

that, to obtain rescission, plaintiff had to prove that he did not know about the problems when he purchased the property. Undisputed evidence in the record showed that plaintiff's attorney knew about the problems, and that knowledge is imputed to plaintiff under *Benson v. State of Oregon*, 196 Or App 211, 217 (2004), and *Restatement (Third) of Agency* § 5.03 (2006). Plaintiff argued that only innocent third parties can rely on the "imputed knowledge" rule, and defendants were alleged to have participated in a fraud. The court disagreed, explaining that its prior holding in *Benson* "cannot fairly be read to mean that—in all circumstances—only 'innocent third parties' can invoke the imputed-knowledge rule." 258 Or App at 384 (emphasis in original). Applying that rule was equitable and appropriate in this case despite the fraud allegations, because the claim involved "an arms-length real estate transaction in which one party, plaintiff, hired a lawyer specifically to perform due diligence as to the condition of the property for sale." *Id.*

## Procedure

### ***Zimmerman v. Allstate Property and Casualty Ins.*, 354 Or 271 (2013)**

#### ***York v. Paakkonen*, 259 Or App 276 (2013)**

In *Zimmerman*, the Supreme Court held that an insured's initial report of injury "did not provide sufficient information to constitute a proof of loss" for an underinsured motorist (UIM) claim. 354 Or at 273. As a result, the insurer's "safe harbor" letter accepting coverage was timely, so the insurer was not liable for the insured's attorney fees under ORS 742.061. In *York*, the Court of Appeals held that the trial court erred in granting defendant's motion for partial satisfaction of judgment pursuant to ORS 31.555 to reflect the amount that defendant's insurance carrier had paid in personal-injury-protection (PIP) benefits. The jury awarded \$45,382.57 in economic damages, the exact amount plaintiff sought for past medical expenses. The court concluded that the jury's award was ambiguous, and the rule of *Dougherty v. Gelco Express Corp.*, 79 Or App 490 (1986)—which places the burden on the plaintiff to show that an ambiguous jury award was not intended to overlap with PIP benefits—did not apply. The court explained that the trial court was not permitted "to speculate about the mental process the jury employed in reaching the damage figure that it did." 259 Or App at 284. The *Dougherty* rule did not apply because the trial court—at defendant's request—did not segregate the types of damages requested on the verdict form beyond distinguishing between economic and noneconomic damages. *Id.* at 285.

### ***Delgado v. Del Monte Fresh Produce, N.A., Inc.*, 260 Or App 480 (2014)**

#### ***McNeff v. Emmert*, 260 Or 239 (2013)**

In *Delgado*, a class action wage and hour case, the Court of Appeals held that (1) the trial court did not abuse its discretion in denying defendant's motion to decertify the class at the close of trial on class-wide issues; and (2) pursuant to ORCP 61 B, the trial court was entitled to enter judgment on the issue of whether defendant was an "employer" liable for statutory pen-

alty wages because defendant waived its right to a jury trial on that issue. 260 Or App at 499. In *McNeff*, the Court of Appeals held that the trial court erred in failing to resubmit a hostile work environment claim to the jury after it returned a verdict finding that (1) plaintiff prevailed on her claim and defendants should be punished by an award of punitive damages; and (2) plaintiff was entitled to recover \$0 in noneconomic damages. The court explained that, by making the first finding, the jury indicated that plaintiff proved all the elements of her claim, including that defendants had caused her damages. Thus, the jury's verdict "was internally inconsistent with regard to whether plaintiff suffered damages." 260 Or App at 253.

### ***LaVoie v. Power Auto, Inc.*, 259 Or App 90 (2013)**

Plaintiff was seriously injured when his car accelerated out of control and crashed. Plaintiff brought negligence and product liability claims against the dealership that sold the car, alleging that the accident resulted from the driver's side floor mat sliding forward and interfering with his ability to operate the accelerator and brake. The trial court granted the dealership's motion for summary judgment, concluding that (1) installation of the after-market floor mats was an "alteration or modification" that precluded liability under ORS 30.915; and (2) the affidavit plaintiff submitted under ORCP 47 E was insufficient to defeat summary judgment on the "alteration or modification" defense. The ORCP 47 E affidavit only stated that plaintiff's expert would testify to facts or opinions creating questions of fact as to the allegations of duty, breach, causation and damages. The Court of Appeals agreed with the trial court that the affidavit was inadequate to defeat summary judgment because the affidavit "did not address defendant's affirmative defense" and the statement regarding duty, without more, did not create a fact issue "with respect to the question of whether the addition of dangerous after-market floor mats was reasonably foreseeable so as to require warnings." 259 Or App at 98. The court nevertheless reversed the trial court because defendant had not established as a matter of law that no warnings were necessary, as required to establish the "alteration or modification" defense. *Id.* at 102-03.

#### ***Young v. Davis*, 259 Or App 497 (2013)**

### ***Rains v. Stayton Builders Mart, Inc.*, 258 Or App 652 (2013)**

In *Young*, the Court of Appeals held that the trial court "applied an incorrect legal standard with respect to plaintiff's burden of proof" under ORS 31.150, Oregon's anti-SLAPP statute. 259 Or App at 497. Specifically, the trial court erred "to the extent that it weighed defendant's evidence against plaintiff's in determining that plaintiff was not 'likely to succeed on the merits' of her claims." *Id.* at 510. Instead, the trial court "should have assessed whether plaintiff met her burden 'by presenting substantial evidence to support a prima facie case.'" *Id.* quoting ORS 31.150(3). In *Rains*, the Court of Appeals held that ORCP 71 B's one-year deadline for moving to vacate a judgment on the grounds of fraud applies even while an appeal in the case is pending. 258 Or App at 662. And the trial court's inherent authority under ORCP 71 C to modify judgments

“does not authorize trial courts to do so while an appeal is pending.” *Id.* at 664.

### ***Kennedy v. Wheeler, 258 Or App 343 (2013)***

A jury’s award of economic and noneconomic damages in a personal injury case arising out of a motor vehicle accident was reversed in *Kennedy* because a jury poll revealed that only the same eight jurors agreed on economic and noneconomic damages. The Court of Appeals declined to decide “whether economic and noneconomic damages are independent or interdependent issues.” 258 Or App at 349. Under *Congden v. Berg, 256 Or App 73 (2013)*, “because the court gave the jury instructions and a verdict form that indicated that at least the same nine jurors were required to agree as to economic and noneconomic damages, that became the law of the case, and the court erred in receiving the jury’s verdict when only the same eight jurors agreed on liability, economic damages, and noneconomic damages.” *Id.* at 344.

## **Miscellaneous**

### ***Klutschkowski v. PeaceHealth, 354 Or 150 (2013)***

The trial court erred in reducing a jury’s award of \$1,375,000 in noneconomic damages to \$500,000 pursuant to the statutory cap in ORS 31.710(1), the Supreme Court held in *Klutschkowski*. The court explained that determining whether application of the cap violated a plaintiff’s right to a remedy under Article I, section 10, or right to a jury trial under Article I, section 17, of the Oregon Constitution required the court—under its prior decisions in *Smothers v. Gresham Transfer, Inc., 332 Or 83 (2001)* and *Hughes v. PeaceHealth, 344 Or 142 (2008)*—to examine “whether the common law recognized a right to recover for [plaintiff’s] injuries when Oregon adopted its constitution in 1857.” 354 Or at 168. The court concluded, without reaching the Article I, section 10, issue, that “Article I, section 17, prohibits the legislature from limiting the jury’s determination of noneconomic damages” because an action for medical malpractice “is one for which the right to jury trial was customary in 1857[.]” *Id.* at 177. Justice Landau concurred to express his reservations about the “sort of imaginative reconstruction of nineteenth-century case law” that is required by the court’s prior precedents. *Id.* at 178 (Landau, J., concurring). Justice Landau invited further advocacy to address those issues in future cases.

### ***Robinson v. Harley-Davidson Motor Co., 354 Or 572 (2013)***

In *Robinson*, the Supreme Court held that the defendant, a Harley-Davidson motorcycle franchisee operating in Idaho and Wyoming, did not have contacts with Oregon sufficient to give the court personal jurisdiction over plaintiff’s personal injury claim. The court expressly disavowed the “substantive relevance” test for determining personal jurisdiction described in *State ex rel Michelin v. Wells, 294 Or 296 (1982)*. Instead, the court explained, “the inquiry as to whether specific jurisdiction exists has three aspects”: (1) the defendant must have purposefully directed its activities at this state; (2) that activity must

be a “but-for” cause of the litigation and provide a basis for an objective determination that the litigation was reasonably foreseeable; and (3) the exercise of jurisdiction must otherwise comport with fair play and substantial justice. 354 Or at 594.

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