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The Honorable Mark D. Clarke Receives 2014 Owen M. Panner Professionalism Award

By Tracy M. McGovern, Frohnmayer, Deatherage, Jamieson,
Moore, Armosino & McGovern, PC



Judge Clarke receiving Professionalism Award from the Honorable Owen M. Panner.

Judge Mark D. Clarke, United States Magistrate, Medford, was presented with the Owen M. Panner Professionalism Award at the annual banquet of the Litigation Institute and Retreat at the Skamania Lodge on March 7, 2014. Judge Clarke is the first recipient of the Owen M. Panner Professionalism Award from Southern Oregon. Judge Clarke was joined for the evening by his wife Marianne, his daughter Stephanie and his son John, who is a 2L at the University of Oregon School of Law.

Judge Panner presented Judge Clarke with the professionalism award. Judge Panner and Judge Clarke have worked closely together at the U.S. District Court in Medford

for the past seven years. As Judge Clarke pointed out in his acceptance speech, it was a great honor to receive the award from his mentor, who has guided him since joining the bench in 2007.

United States District Court Judge Anna Brown began the presentation by describing Judge Clarke's early years. Judge Brown recalled how she recruited Judge Clarke out of law school and convinced him to join Bullivant, Houser. Judge Brown and Judge Clarke worked together at Bullivant until 1990, when Judge Clarke was lured back down to Southern Oregon, where he had gone to college. Judge Brown shared her "respect" for Judge Clarke. She described him as right-minded, ethical, smart, polite, effective, coherent and thorough.

Tracy M. McGovern, Judge Clarke's former law partner at Frohnmayer, Deatherage, Jamieson, Moore, Armosino & McGovern, PC, described Judge Clarke as the "reasonable man"; a standard to which every lawyer aspires. During his years at Frohnmayer, Deatherage, Judge Clarke earned the respect of the entire Southern Oregon Bar and beyond. Even his adversaries described him as a lawyer who will "always do the right thing, even when no one is watching." When Judge Clarke left the firm to become a United States Magistrate in Medford, he not only left Frohnmayer, Deatherage a better place because of his contribution to the firm, but also set a standard among the

members of the bar for effective advocacy and professionalism.

Judge Clarke's first clerk, Karen Clevering, from the Oregon Department of Justice, was also on hand to share her experience working with Judge Clarke. She expressed her gratitude for Judge Clarke's mentorship. Ms. Clevering also described Judge Clarke's even-keeled judicial temperament and respect for the system.

Judge Clarke accepted the award with immense gratitude to Judge Panner and a reminder to us all that our attitude is always something we can control. We should never lose our humanity or our sense of humor.

Integrated Advocacy

By William A. Barton, The Barton Law Firm, P.C.



William A. Barton

May I offer a kinder and gentler approach to jury trial advocacy, one that emphasizes courtesy and professionalism rather than aggression? Why should you consider my offer? Because your persuasiveness is driven more by citizenship and decency than cleverness and experience.

I call this approach Integrated Advocacy (IA) because, when you walk into court using IA, you don't put on a lawyer's mask or suit of armor; instead, you emphasize the very best of who you are as a person. Good and decent people often become less so in the process of trying to become better trial lawyers.

Jury trials are about credibility. Effective lawyers generate, consolidate, and, finally, utilize all the credibility they accumulate with the jury during closing argument. As a lawyer, you testify four times during jury trials as an "unsworn" witness: jury selection, opening statement, cross-exam, and closing. Strive to be the most trustworthy witness the jury sees and hears.

IA will increase your courtroom comfort, citizenship, and effectiveness. Many of IA's kinder and gentler tenets are inter-related and focus on cross-exam and closing, the two times when explicit aggression is most likely to surface. Here are some suggestions:

1. Maximize the benefits of constructive cross. Extract concessions from the opposition, meaning admissions a witness must concede. If you choose to attack a witness, do it in the proper order. Begin with constructive, then move to destructive. This is common sense; any witness is likely to give you more when you treat them in a friendly manner, plus it allows you to start each witness respectfully. Concessions from an opponent also come with a level of assurance your own experts can't provide.
2. An unappreciated purpose of cross is to accredit you, the questioning attorney, as an information source. This can be done quietly, almost modestly. Jim McElhaney's *Trial Notebook*¹ contains excellent examples.

Use of cross to impeach in a way that shows who knows the facts better (the lawyer or the witness)²:

Q: Pardon me, Ms. Smith, the car you saw circling the block was green, true?

A: No, it was blue.

Q: Sure it wasn't green?

A: No, it was blue.

Q: You told Officer Black it was green, didn't you?

A: No. It was a blue car.

Q: Take a look at the statement you wrote out for Officer Black. That says green, doesn't it?

McElhaney's advice is gold.³ His walk-away points are worth repeating:

- a. When you try to make too much of a point, you lose that volley. The jury can't trust your view of the facts.
 - b. Quibbles are costly. The quibble is the lowest common denominator. It says this is the best you can do.
 - c. If the jury sees you check a fact when you ask a question, you win at least part of that volley. It sends the message that you are careful.
 - d. If the witness forgets something and you remind him, you win that volley.
 - e. If the witness forgets something in a document and you show her where it is, you win that volley.
 - f. If the witness says, "If you say so," you win that volley. Like the dog that rolls over on its back in doggy surrender, the witness is saying "I give up." You can still show the jury you're right. You say, "Not if I say so, that's what it says in your letter. True?"
 - g. By the time you finish cross-examination you want the jury to think you are careful, fair, honest, and you know the facts better than the real witness does. It makes you the guide worth following.
3. Never call anyone a liar. If it's obvious, then you don't need to say so; if it's not obvious, then it's too risky. Of course you can and should discuss bias, interest, and motive, but do it in a circumspect manner that acknowledges we're all human with our own preferences.
 4. Jim McComas in his book *Dynamic Cross-Examination*,⁴ offers this advice:
We'll attack or disrespect a witness only after he deserves it or asks for it, by the witness's own behavior in front of the jury or when the witness must be disbelieved.
 - Even then, we're firm and relentless, not out of control.
 - We always consider whether staying above the witness's level may hurt his credibility even more than duking it out.
 - Show no joy in destroying a witness in front of the jury. It's snake-killing; it's a dirty job that just needs to be done.

5. Being hostile to witnesses on cross suggests they're lying and therefore deserve such treatment. You're actually setting yourself up to fail. Why? Because no matter what you may believe, it's almost guaranteed you're not going to be able to prove the witness is testifying falsely. Biased? Sure. But perjury? No. Your hostility not only sets the bar way too high, but it also marks you as inconsiderate and a jerk. Leave that to the other lawyers; you can do better. An opponent who doesn't have to overcome the burden of proof might be able to get away with this, but you don't have the luxury.
6. Monotone speech is like reading a book without sentences, paragraphs, or chapters. Modulate your voice; whispers can be deafening. This also allows you the ability to naturally reduce the distance between you and a witness, or the jury, thereby engendering a powerful sense of intimacy.
7. File pretrial *motions in limine* to delineate what's going to be admissible. If you must object during trial, cite your authority without argument, and if the court rules against you, request a continuing objection.
8. Don't marginalize yourself by being too patriotic. Why? Because the jurors will think you aren't objective, and thus not credible. Your client may love it, and it might feel right to you, but it can quickly be too much of a good thing.
9. Be "ABC": accurate, brief and clear.
10. Less experienced lawyers complain when a witness refuses to answer their questions. If your question isn't ABC, then it's your fault. Long questions invite long answers, short questions invite short answers. Witnesses self-impeach when they decline to answer an ABC question. Why? Because their obvious partisanship motivates them not to answer your short question with the short answer it demands.
Ask your ABC question again, let the witness meander, then pause to look at your watch, then ask your ABC question a third time, again the witness runs on. The jury gets it. At this point you may choose to ask the judge to strike the witness' answer(s) as nonresponsive and direct the witness to answer your question. This decision must be made in the moment by reading the judge and jury. Any choice you make must be professionally delivered, and at most firm. No sarcasm.
11. Beginning lawyers are frustrated when opponents constantly object. They shouldn't be; it's a gift. Why? Because jurors don't like it.⁵ This is particularly true when jurors want to know the answer to your question. Trustworthy lawyers don't have anything to hide.
12. Study psychodrama and learn the tools of a compassionate cross.⁶ It's a soft cross that says to the witness "I understand why you're testifying as you are, and so will the jury." In my Advocacy Boot Camp I regularly bring in psychodrama teachers.

In *Win Your Case*, Gerry Spence details the difference between a destructive cross and a compassionate cross

against a "snitch" who says he saw the defendant commit the crime. The compassionate cross of the snitch goes something like this:

A: Mr. Smith, you must find yourself in a very difficult position. I mean, you're facing 20 years in the penitentiary yourself.

W: Maybe.

A: I don't mean to embarrass you, but you've been in the pen before haven't you?

W: Yes.

A: It's not a very pleasant place to be, is it?

W: It could be worse.

A: What's it like to be in the penitentiary?

W: What do you mean?

A: Well, Mr. Smith, you're facing 20 years in the pen. Could you help the jury understand what a day in the pen is like?

W: I don't know.

A: You've spent many days in the pen, haven't you?

W: Yeah.

A: What's a day like there?

W: Like any other day.

A: (Leads the witness through a day in the pen from the morning to the night) A day in the pen is hell isn't it?

W: You get used to it.

A: And you're looking at seventy-three hundred of those days unless you can do something to shorten the time, isn't that true?

W: They gave me 20 years.

A: You're married?

W: Yeah.

A: How long has it been since you've seen your wife?

W: She comes once in a while.

A: How long has it been since you just held her hand?

W: I don't know.

A: It's been over a year, hasn't it?

W: I suppose. Never kept track of it.

A: You love your wife?

W: Sure.

A: She love you?

W: Yeah, I guess.

A: She was good to you?

W: Yeah.

A: There's no one in the pen who cares about you, isn't that true?

W: I got friends.

A: Tender loving people like your wife?

W: (no response)

A: And you have children?

W: Yeah.

A: You're proud of them?

W: Yeah, sure.

A: How long has it been since you've seen your children?

W: I don't know.

A: Do they come to see you?

W: No.

A: You miss them?

W: Yeah.

A: And you know they're growing up without a father.

W: Yeah.

A: It must be a very frightening and lonely life you live in the pen.

W: (says nothing, looks down at his hands)

Through this cross Spence establishes the hell of living in prison so that when he asks the final question, "I guess you'd do or say anything to get out of this hell?" and the witness says, "No," the jury understands that, indeed, the snitch would do anything to get out of prison.⁷

13. How can you strategically gain from an opponent's lapses in behavior when you're before a jury? If jury trials are partial referendums on the lawyers' and parties' character, then your smartest response to an opponent's boorish behavior is to professionally contrast it with yours. You don't win if you look bad making someone else look worse.

Conclusion

IA improves your odds of winning by reducing the chances you'll lose because of a failure of citizenship. Stated another way, if you lose, it will be for the right reason, such as your case wasn't good enough, and that shouldn't offend anyone.

IA isn't about being a push-over or anything less than a vigorous advocate. It's about maximizing your effectiveness through the strategic use of professionalism. It's good medicine for all of us and it's good for the system we all share. Thank you . . .

Endnotes:

- 1 McElhane, James W., *McElhane's Trial Notebook*, 4th Edition, American Bar Association, 2006. P.438-439. I highly encourage you to read Chapters 50-55 and Chapter 60 for excellent advice on cross-examination.
- 2 *Id.* at p. 446.
- 3 *Id.* at p. 447.
- 4 McComas, James H., *Dynamic Cross-Examination*, Trial Guides, 2011, p.342.
- 5 The Oregon Bar Bulletin has published two instructive articles on objec-

tions. See, "To Object or Not to Object: The Use and Misuse of Objections in Civil Jury Trials," by Eric E. Meyer in *The Oregon State Bar Bulletin*, August/September 2008 and "No Second Chance: Get Your Objections Right," by Jason Vail in *The Oregon State Bar Bulletin*, November 2000.

- 6 An excellent book about psychodrama is *Trial in Action* by Joane Garcia-Colson, Fredilyn Sison, and Mary Peckham.
- 7 Spence, Gerry, *Win Your Case*, St. Martins Griffin, New York, 2005, p.204-209.

Direct Examination: Old Dogs and New Tricks

By Dennis P. Rawlinson, Miller Nash LLP



Dennis Rawlinson

Although many established trial techniques or tactics have thus far been largely unchallenged, commentators and practitioners are beginning to reevaluate the wisdom of some of these techniques, including those for direct examination. This article will examine some of the traditional rules of direct examination by comparing these rules or techniques to those used on cross-examination. It will

then discuss alternatives to traditionally accepted direct-examination techniques.

Comparison of Traditional Rules of Direct and Cross-Examination

The comparison of the general rules for conducting direct examinations and cross-examinations exposes a common theme. Whatever the rule that applies to direct examination, the directly opposite rule usually applies to cross-examination.

This contrast is not surprising. After all, direct examinations generally consist of eliciting helpful information from cooperative witnesses whose credibility we are attempting to bolster. On the other hand, on cross-examination we are generally attempting to elicit helpful information from an uncooperative witness whose credibility we are attempting to impeach.

A review of six general rules of cross-examination and comparing these rules with those for direct examination will demonstrate the contrast.

A. End Strongly; Start Slowly.

A good direct examination, redirect examination, or re-cross-examination should start and end strongly (taking advantage of the persuasive techniques of primacy and recency). Similarly, cross-examination should finish strongly, ending with the traditional "zinger," a point that is a guaranteed winner in that it is absolutely admissible, is central to your theory, evokes your theme, is undeniable, and can be stated with conviction. In direct examination, the same kind of impact can be made with a zinger in the opening line of questions.

In contrast, however, a cross-examination should not usu-

ally begin with a zinger. Why? Because employing an initial zinger will alienate the cross-examination witness and make it impossible to draw from that witness helpful points to generally bolster your case (before turning to hostile questions and ending with a zinger).

Starting slowly on cross-examination will allow you to take full advantage of information available from the cross-examination witness before you allow your relationship with him or her to deteriorate into alienation.

First, you can elicit friendly background information that is not threatening, but that may support your theory and theme, such as the achievements and extraordinary training of a defendant who you are attempting to show knew full well what he or she was doing at the time of the complained-of conduct.

Second, after exhausting the friendly information, you can ask questions to build the value of your case by providing affirmative information that will fill in gaps and will be more persuasive coming from an adverse rather than a friendly witness.

Finally, uncontroverted information that is well documented or well settled can be solicited before resorting to your first challenging information questions and finally your hostile questions to the cross-examination witness.

B. Indirection.

During the direct examination, in the interest of assisting your witness and drawing a clear, easy-to-follow picture for the fact-finder, the examiner works hard to make it clear where he or she is going. In contrast, on cross-examination, making it clear to the witness where you are going will only encourage the witness to become evasive, hostile, and argumentative.

For instance, if you are trying to make the point that the witness should have understood the contract or letter that the witness read, and you ask the question directly, you will probably not get the answer you want. On the other hand, you can achieve your goal by indirection. Before concentrating on the simple language of the agreement or letter that the witness has admitted receiving and reading, you can establish the witness's extensive experience, achievements, and laudable business practices through a series of questions with which the witness will have to agree and that will lead to only one conclusion concerning the witness's understanding of the agreement or letter.

Questions that could be asked to set up the indirection:

1. You have more than 30 years of experience negotiating contracts, don't you?
2. You've been highly successful in negotiating successful contracts over your career?
3. You regularly hire lawyers to assist you in reviewing important documents?
4. To the extent that you don't review important documents, you have someone on whom you can rely review them?
5. You insist that important and crucial points that are discovered in documents be brought to your attention?

Litigation Journal Editorial

Summer 2014

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

Articles are welcome from any Oregon attorney. If you or your law firm has produced materials that would be of interest to the approximately 1,200 members of the Litigation Section, please consider publishing in the Oregon *Litigation Journal*. We welcome both new articles and articles that have been prepared for or published in a firm newsletter or other publication. We are looking for timely, practical, and informational articles.

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6. It is this kind of detailed, cautious, and deliberate procedure that has led to your success?

Establishing the witness's general practice of careful reading of documents, while at the same time flattering his or her achievements and work habits, will allow you by indirection either to obtain the admission or to frame a question concerning understanding of the agreement or letter that will make apparent the answer you should have gotten. If you had flagged in advance where you were going and why you were asking the background questions, the result might have been quite different.

C. Details First.

Often in direct examination the most effective procedure is to cover details only after the witness has described his or her recollections of the action. Put differently, it is generally prudent not to interrupt the action of the witness's story on direct examination with detailed questions about distances, thought processes, and emotional reactions until the action has been told and completed in a series of frames where each point adds an additional action step and captures the fact-finder's attention.

In contrast, on cross-examination the details must be elicited initially so that you can use them to herd and corral the witness to provide you with the admissions you need. Until the adverse witness lays factual background that limits the routes of escape and explanation, cross-examination is often ineffective.

D. Scatter Circumstantial Evidence.

In argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive. If that contention is that someone was late for an appointment and therefore negligent in his or her driving, assembling circumstantial evidence about the importance of the appointment, the time of the appointment, the time of the accident, the speed of the car at the time of the accident, and the conduct after the accident, including an immediate phone call to the location of the appointment, supports the persuasiveness of the contention.

In contrast, on cross-examination assembling circumstantial evidence to support a contention will make the contention obvious to the adverse witness and result in encouraging that witness to be evasive, hostile, and argumentative. Thus, the circumstantial-evidence points should be separated and scattered so that they are obtained either from different witnesses or at different points in the examination so that your ultimate objective and contention are not obvious.

E. Short Questions and Short Answers.

During direct examination, the examiner strives for short questions and long narrative answers by the witness. This allows the attention of the fact-finder to focus on the witness, not the examiner. Open questions are used. The witness is left unfettered to improve his or her credibility.

In contrast, allowing the adverse witness to launch into long answers and explanations will doom the cross-

examination. The questions should be not only short, but also closed-ended to control and limit the adverse witness's response. By inching along and adding only one fact at a time, the examiner can control the adverse witness and give him or her little room for argument and evasion.

F. Attention on the Cross-Examiner.

As referred to above, during classic direct examination, the examiner attempts to place the attention of the fact-finder on the witness. The examiner simply shepherds the witness in telling his or her story in a natural, credible, and easy-to-follow manner. In contrast, on cross-examination, the attention should be on the cross-examiner. Cross-examination is often the opportunity for the cross-examiner to argue his or her themes or theories by asking questions the answers to which are often irrelevant. By raising impeaching, contrasting, and contradictory points, the examiner brings attention to himself or herself and thereby exposes the weakness of the recently conducted direct examination.

Alternative Approaches to Direct Examination

Traditionally, as discussed above, the techniques employed in direct examination and cross-examination are directly opposite.

For instance, in direct examination, the examiner attempts to place the attention of the fact-finder on the witness. The witness is given free rein and encouraged to tell his or her story in a narrative manner with limited guidance from the examiner.

In contrast, on cross-examination the attention should be on the cross-examiner. The cross-examiner argues his or her themes or theories by asking questions the answers to which are often irrelevant. The cross-examiner is really arguing his or her case through the window of the adverse witness. The emphasis is on controlling the witness and, by raising impeaching, contrasting, and contradictory points, exposing weaknesses in the recently conducted direct examination. A number of respected trial practitioners and trial-technique teachers are challenging this traditional approach and are suggesting alternatives. A discussion of two possible alternatives to the traditional approach to direct examination appears below.

A. Alternative No. 1: Treat Direct Examination Like Cross-Examination.

Some commentators contend that the direct examination should be tightly controlled by the examiner, that the direct-examination witness should be given little or no leeway, and that the attention of the fact-finder during examination should be on the examiner, not the witness. They believe that like cross-examination, direct examination is an opportunity for the examiner to argue his or her case through the window of a witness.

Under this alternative approach, the witness on direct examination is never allowed to answer any more than a sentence. This allows the examiner to do the work and control the examination. It limits the amount of each bite of information that is given to the fact-finder, improving the possibility

of understanding. Moreover, it allows the examiner to take advantage of the additional benefits discussed below.

1. Advantages of using direct examination to argue your case through the window of a witness.
 - a. Removes pressure from the witness.

Under traditional direct-examination techniques, the witness is placed under a tremendous amount of pressure. He is told that he will be asked, "What happened?" The witness is then expected to tell his story in the way that is most persuasive, articulate, and memorable. The witness is told to "be sure to cover this, be sure to cover that, and don't forget to say this . . . and by the way, you cannot use any notes."

Is it really fair to lay all this burden on the witness? Is this really the most effective approach to direct examination? Shouldn't a lawyer be doing the work?

In contrast, under the alternative approach, the lawyer takes control. The witness is asked a series of short questions to each of which he gives an answer of only a word or two and in no event any longer than a sentence. The lawyer then leads the witness to the next point. The witness can now relax.

- b. Employs the techniques of persuasion.

If the lawyer does the work and coaches the witness to give short answers, the lawyer has a full array of persuasive techniques available. First, repetition on the most important and damaging points; the direct examiner can repeat a point several times by rephrasing the question to ensure that it is remembered by the fact-finder.

Second, the lawyer can remove from the direct-examination testimony tangential, irrelevant, and side points that clutter up the information that the fact-finder needs to receive. Third, the lawyer can, by controlling the witness, make the arguments to the jury that are available through the direct-examination witness. Similar to cross-examination, the examiner can argue the case through the window of the direct-examination witness.

- c. Allows the examiner, not the witness, to be the salesperson.

In traditional direct examination, it was up to the witness (whether a fact or an expert witness) to be persuasive—to be the salesperson. At least in my experience, most fact-finders are suspicious of fact or expert witnesses who appear to be salespersons.

In contrast, the fact-finder expects the lawyer examiner to be the salesperson. As a result, if the lawyer argues through the direct-examination witness and the witness simply provides short, accurate, and thoughtful answers, the resulting argument is that of the lawyer. The witness's credibility is not undercut or tainted by the witness's active effort to sell the point.

2. A sample examination for your consideration.

Two of the proponents of this alternative approach to direct examination are Judge Herbert Stern and Judge Ralph Adam Fine. One of Judge Fine's examples of the effectiveness of this technique is taken from the novel *Runaway Jury* by John Grisham.

In the novel, a turncoat former employee of a tobacco company is testifying about a memorandum that went to the president of the company, which has since been destroyed by the tobacco company (thereby overcoming the best-evidence-rule problem). The examination follows the traditional method of having the witness do the work.

Q: What was in the memorandum?

A: *I suggested to the president that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine would mean more smokers, which would mean more sales and more profits.*

The question and answer are powerful. But not as powerful as they could be if the lawyer were doing the work. With a single question and answer, there is always the risk that the fact-finder will be distracted for the moment and miss or misunderstand the answer.

Now, here's a sample of the same direct examination in which the examiner does the work, limits the answer of the witness, and argues the important points to the fact-finder through the window of the direct-examination witness.

Q: Did you read the third paragraph of the memorandum?

A: *Yes.*

Q: What was the subject of the third paragraph?

A: *Nicotine.*

Q: What about nicotine was discussed?

A: *The nicotine levels in cigarettes.*

Q: Did the paragraph suggest that the nicotine levels be increased or decreased?

A: *Increased.*

Q: If the nicotine levels were increased, would that have any effect on anything?

A: *Yes.*

Q: What?

A: *The number of smokers.*

Q: Would increasing nicotine mean more smokers or fewer smokers?

A: *More smokers.*

Q: More smokers than if the nicotine levels were not increased?

A: *Yes.*

Q: Would this mean more or fewer sales?

A: *More.*

Q: Would this mean more or less profit for the company?

A: *More.*

Q: Would the increased profits be substantial or insubstantial?

A: *Very substantial.*

Under the second example, with a lawyer doing the work, it would be hard for a fact-finder to miss the answer or miss the point. In fact, after the first couple of questions, the fact-finder knows the answer to the next question before it's even

answered. Why? Because the answer is compelled by common sense.

One of the advantages of arguing the case through a witness not only on cross-examination but on direct examination is that the fact-finder knows the answer before it is given. An answer that the fact-finder arrives at on his or her own regardless of the witness's answer is an answer that will not be subject to impeachment by your adversary.

3. Summary.

We all have plenty to do and think about at trial. Perhaps that is why allowing the witness to do the work on direct examination is so attractive.

But next time you conduct a direct examination at trial, you may want to consider this alternative approach. You may find that the rewards from this technique far outweigh the extra work.

B. Alternative No. 2: The Sponsorship Theory of Direct Examination.

In their book *Sponsorship Strategy*, Robert H. Klonoff and Paul L. Colby¹ advocate the “sponsorship theory” of introducing evidence. The theory’s premise is that by offering any item into evidence, the offering attorney endorses, or sponsors, the significance of that evidence to the case. Thus, contrary to traditional thinking about trial strategy, an attorney applying the sponsorship theory will not bring out the weaknesses in his or her own case. Rather, the attorney will introduce only evidence favorable to his or her case. And when conducting direct examination, the attorney will select among witnesses and subject-matter areas and will elicit only favorable evidence.

1. Do not call every potentially helpful witness.

Because the sponsorship theory dictates using only strong evidence, an advocate should not call even a potentially helpful witness until he or she has anticipated the questions that the witness may be asked on cross-examination. Only by doing this will the advocate be able to determine whether the witness’s favorable testimony outweighs the potential costs of calling the witness. This means that the advocate must assess the degree to which the opponent’s cross-examination may ultimately reduce the value of the witness’s testimony on direct examination. Only if the witness will still be strong after considering the effects of cross-examination should the advocate call that witness.

The advocate applying the sponsorship theory must also consider the relative strength of multiple witnesses who may all testify favorably on a single point. If there are multiple witnesses to testify on the same point but the testimony of one witness is stronger than that of the others, the advocate must carefully consider whether he or she should call the “less than strong” witnesses. Although some commentators suggest calling multiple witnesses to testify on the same point, regardless of the strength of each witness, the sponsorship theory counsels against this tactic. Rather, only the strong witness should be used.

For example, Klonoff and Colby provide an example of a burglary case with two eyewitnesses. Both had witnessed the

burglary from their apartment windows. After apprehending a suspect, the police asked the two witnesses to look at him. Although one witness positively and unequivocally identified the suspect, the other said that the suspect “looked like” the burglar but also identified some differences in clothing and appearance. The prosecutor introduced both witnesses.

During closing argument, defense counsel was then able to focus his attention on the weaker witness. The jury acquitted the defendant. Klonoff and Colby suggest that the error of the prosecutor’s decision to introduce both witnesses was that by doing so, the prosecutor conceded that the strong witness was not sufficient to convict. The sponsorship theory would have counseled introducing only the strong witness and letting the defense introduce the weaker witness if it chose to do so. Then the prosecutor could have attacked the strength of what would have been the defense evidence.

2. Skip the warm-up questions.

Many attorneys begin direct examination by eliciting neutral points. They ask lay witnesses about their educational backgrounds, employment histories, etc., which are rarely relevant to the lay witness’s testimony. The rationale for this tactic is that asking the witness these warm-up questions before asking substantive questions allows the witness to relax and get used to testifying in the courtroom environment.

This technique may actually be hazardous to an otherwise effective direct examination. For example, seemingly innocuous questions may in fact open the door for cross-examination that the direct examiner had not anticipated. Or such questions may provide opposing counsel with information or material to include in closing argument. Thus, rather than asking the witness warm-up questions to help him or her relax, the attorney should consider conducting pretrial practice examinations (preferably in a courtroom setting, if possible) to help the witness get ready for trial. By doing so, the attorney may be assured that the witness will feel relaxed and prepared for direct examination, and the attorney can then focus on eliciting only helpful information on direct examination.

3. Do not elicit testimony on direct examination that is harmful to your case.

Although it is often suggested that an advocate should elicit damaging testimony or disclose weaknesses in his or her own case, rather than letting opposing counsel expose these weaknesses, the sponsorship theory advocates against using this technique. The rationale for exposing weaknesses in the advocate’s own case is that by doing so, the advocate gains credibility with the jury. This rationale is questionable, however, because the jury may consider the advocate’s acknowledgment of the harmful matter or weakness in his or her case as self-serving and not worthy of credit. Further, the advocate who elicits damaging information on direct examination in order to bolster his or her own credibility does so at the expense of the witness’s credibility.

While an advocate should avoid eliciting damaging testimony on direct examination, the responsible and ethical advocate must be sure to direct his or her witnesses to answer all questions truthfully. Thus, if the witness is asked about

damaging matters on cross-examination, he or she must answer directly and honestly.

4. Summary.

The sponsorship theory, which proposes offering only helpful evidence, may be used as an alternative to traditional direct examination. While some attorneys may initially feel uneasy employing this technique after being taught to expose the weaknesses in their own cases, the benefits may very well outweigh any initial discomfort. For example, one experienced defense attorney decided to employ the sponsorship theory and did not bring out the defendant's prior conviction on direct. Rather, he allowed the prosecutor to elicit the prior criminal conviction. This attorney later stated that "the first time I followed the [sponsorship philosophy] in court, I was terrified. It was against everything I had been taught. It worked like a charm. The jurors all stated that they thought the impeachment by the prosecutor on the prior was a 'cheap shot.'"

Observation

Most of us like to think that we become more skilled at direct examination over time. One of the keys to improving our skills is to continue to consider alternative forms of direct examination. Whether we adopt them in all cases, only with particular witnesses, only in particular cases, or not at all, the process of "challenging, rethinking, and revalidating or modifying" our direct-examination techniques will make us better trial lawyers.

Endnote:

1. Robert H. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* (1990).

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

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



Bryan D. Beel

As noted in the prior issue, the Court of Appeals for the Ninth Circuit has, in the last couple months, addressed two significant issues regarding motions for injunctive relief in the context of copyright and trademark infringement claims. Last time, we learned how the Ninth Circuit signaled the breadth of the latitude it may grant a district court if the lower court makes a reasonable ruling on a motion for injunctive relief. In the second case, discussed below, the Ninth Circuit held that a party making a motion for preliminary injunctive relief must satisfy every element of the

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Supreme Court's *eBay v. MercExchange* test, rather than relying on any presumption of irreparable harm.

2. Preliminary injunctive relief after a claim of trademark infringement

In this case of first impression, the Ninth Circuit held that a party seeking preliminary injunctive relief in the trademark context must establish a likelihood of irreparable harm, rather than enjoying the presumption of harm that attached under prior Ninth Circuit precedent. On the facts of the case, the court held that the plaintiff failed to establish a likelihood of irreparable harm in the absence of the presumption and therefore reversed the district court's grant of a preliminary injunction. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, ___ F.3d ___, No. 12-16868, 2013 WL 6224288 (9th Cir. 2013).

The Platters were one of the most successful vocal groups of the 1950s, having, at one time or another, 40 singles on the Billboard Hot 100 List. *Herb Reed Enters., LLC v. Florida Ent. Mgmt., Inc.*, ___ F.3d ___, No. 12-16868, 2013 WL 6224288, at *1 (9th Cir. 2013). In recognition of this considerable success, The Platters were inducted into the Rock and Roll Hall of Fame in 1990. The founding members of The Platters included Herb Reed, Paul Robi, David Lynch, Zola Taylor, and Tony Williams. After the original members all gradually left, the group broke up, with the former bandmates continuing to perform individually under some variation of The Platters name. Before the band dissolved completely, however, the original members executed contracts with Five Platters, Inc. ("FPI"), in which they agreed to give up any rights in the name The Platters in exchange for shares of FPI stock. FPI, in turn, transferred rights in The Platters name to Live Gold, Inc., and, eventually, Larry Marshak ("Marshak"), who owns defendant Florida Entertainment Management, Inc., which organizes and promotes live musical performances, including by a group called The Platters.

The various parties who possessed rights in the name The Platters, either originally or by transfer of an interest, turned out to be quite litigious and filed numerous lawsuits, resulting in a variety of sometimes conflicting judgments. For example, in 1972, FPI sued Robi and Taylor for trademark infringement, resulting in a judgment in Robi's favor in which the court held that FPI was "a sham used... to obtain ownership of the name 'Platters.'" *Id.* at *1 (quoting *Robi v. Five Platters, Inc.*, 838 F.2d 318, 320 (9th Cir. 1988)) (emphasis added). A similar dispute between FPI and Williams "resulted in a 1982 decision holding that FPI had lawfully acquired exclusive ownership of the name" Platters. *Id.* (quoting *Marshak v. Reed*, No. 96-cv-02292(NG) (MLO), 2001 WL 92225, at *4 (E.D.N.Y. and S.D.N.Y. Feb. 1, 2001)) (emphasis added).

After several intervening suits, Herb Reed Enterprises ("HRE") (which manages Reed's business affairs and holds his rights) sued FPI and others in 2010 for trademark infringement. HRE alleged that the defendants' use of The Platters mark was confusingly similar to HRE's Herb Reed and the Platters mark, which Herb Reed had been using. *Id.*, 2013 WL 6224288, at *3. In the end, a default judgment was entered against FPI because it was apparently defunct and not represented; the judgment included a permanent injunc-

tion declaring that FPI never acquired rights in The Platters mark because its use of the mark was false and misleading, and that Reed had superior rights to The Platters mark as against all others, including FPI and anyone claiming rights from or through FPI. *Id.*, 2013 WL 6224288, at *3 (citing *Herb Reed Enters., Inc. v. Monroe Powell's Platters, LLC*, 842 F. Supp. 2d 1282, 1287 (D. Nev. 2012)).

After this favorable ruling, HRE sued Marshak in 2012, alleging trademark infringement based on The Platters mark and seeking a preliminary injunction against Marshak's use of that mark. After considering the parties' submissions, the district court entered a preliminary injunction, finding that HRE "established a likelihood of success on the merits, a likelihood of irreparable harm, a balance of hardships in its favor, and that a preliminary injunction would serve the public interest." *Herb Reed*, 2013 WL 6224288, at *3 (citing *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, No. 2:12-cv-00560-MMD-GWF, 2012 WL 3020039, at *8-17) (D. Nev. Jul. 24, 2012)). Marshak appealed to the Ninth Circuit the district court's grant of a preliminary injunction.

After disposing of Marshak's *res judicata* and laches arguments against the injunction, the Ninth Circuit turned to whether HRE properly established its right to the preliminary injunction under equitable principles. *Herb Reed*, 2013 WL 6224288, at *4-5.

The court first noted that HRE was only entitled to a preliminary injunction if it could show "that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Herb Reed*, 2013 WL 6224288, at *5 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Marshak argued that HRE failed to carry this burden both because Reed abandoned The Platters mark and because the district court erred in finding a likelihood of irreparable harm. *Id.*

The Ninth Circuit first held that Marshak's abandonment argument was without merit. The court noted that a successful claim for abandonment requires that the claimant show that the mark holder discontinued use of its mark with an intent not to resume use. Here, Marshak could not show abandonment because HRE presented evidence that "it continued to receive royalties from the sale of The Platters' previously recorded material," and the court felt that this was sufficient evidence of *bona fide* trademark use even in the absence of Reed performing new material under the mark. *Id.*

The court then turned to the issue of likelihood of irreparable harm. The Ninth Circuit first recognized, as did the district court, that the court's previous rule in this context, which allowed that "irreparable injury may be presumed from a showing of likelihood of success on the merits of a trademark infringement claim," was on shaky ground because the Supreme Court's decisions in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), and *Winter* changed the landscape on irreparable harm. *Herb Reed*, 2013 WL 6224288, at *7 (quoting *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1066 (9th Cir. 1999)) (emphasis in original).

Recounting the rules of *eBay* and *Winter*, the Ninth Circuit first noted that *eBay* “held that the traditional four-factor test employed by courts of equity, including the requirement that the plaintiff must establish irreparable injury in seeking a permanent injunction, applies in the patent context,” just as it does for copyright, because an injunction should not automatically follow a determination that an intellectual property right (such as a patent or copyright) has been infringed. *Herb Reed*, 2013 WL 6224288, at *7 (citing *eBay*, 547 U.S. at 391-393). The court next noted that *Winter* made clear that the irreparable injury that would support a preliminary injunction must be *likely* and not merely *possible* because the latter standard is too lenient in allowing injunctions to issue. *Id.* (citing *Winter*, 555 U.S. at 22).

The Ninth Circuit cited two of its earlier decisions as showing that it applied the likelihood-of-irreparable-harm standard in evaluating a preliminary injunction in a copyright case, and that it applied the actual-irreparable-harm standard in evaluating a permanent injunction in a trademark action. *Herb Reed*, 2013 WL 6224288, at *8 (citing *Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011); *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1137–38 (9th Cir. 2006)). Recognizing that the “irreparable harm requirement...in a trademark case applies with equal force in the preliminary injunction context,” the court stated that it “now join[s] other circuits in holding that the *eBay* principle—that a plaintiff must establish irreparable harm—applies to a preliminary injunction in a trademark infringement case.” *Herb Reed*, 2013 WL 6224288, at *8 (citing *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228–29 (11th Cir. 2008), and *Audi AG v. D’Amato*, 469 F.3d 534, 550 (6th Cir. 2006)).

On the merits, the Ninth Circuit held that even though the district court applied the correct standard to irreparable harm (having anticipated that *eBay* might be applied in this context), the lower court erred by granting a preliminary injunction based on “unsupported and conclusory statements regarding harm [HRE] might suffer.” *Herb Reed*, 2013 WL 6224288, at *8 (emphasis in original). The Ninth Circuit held that it was not enough for the district court to base its finding of “likely” irreparable harm on “platitudes rather than evidence,” and a finding of irreparable harm in a similar case with a different factual record. The Ninth Circuit noted that by failing to require sufficient evidence of *likely* irreparable harm, the lower court “collapse[d] the likelihood of success and the irreparable harm factors,” contrary to the requirement that “[t]hose seeking injunctive relief must proffer evidence sufficient to establish a likelihood of irreparable harm.” *Id.*, 2013 WL 6224288, at *9. In light of these failings of the evidentiary record, the Ninth Circuit reversed the district court’s grant of a preliminary injunction, and remanded for further proceedings, because the lower court did not recite facts establishing likely irreparable harm.

Lesson Learned: The Ninth Circuit has now made clear that no presumption of irreparable harm will apply in the trademark context, and that a claimant seeking a preliminary injunction based on an allegation of trademark infringement must be prepared to satisfy the requirements of *eBay v.*

MercExchange. Thus, when seeking a preliminary injunction based on a claim of trademark infringement, the trademark owner must provide the court with sufficient factual evidence to support a finding of likely irreparable harm. By failing to do so, the trademark owner risks either not obtaining an injunction or losing on appeal any injunction granted by the district court. Defendants facing a motion for preliminary injunction should focus on, and bring to the court’s attention, any evidentiary deficiencies in the plaintiff’s case, and point out that any unsupported assertions or generalized claims of harm are not sufficient to support an injunction.

Non-Competes: The California Myth

By Susan K. Eggum, Shareholder, Lane Powell, PC



Susan K. Eggum

I was asked last April by the International Association of Defense Counsel to present in Chicago on my experience in filing and defending multi-state non-compete litigation. I will do so again this October in Philadelphia for one of the committees of the United States Law Firm Group. Most L & E and business litigation lawyers understand some of the rudimentary principles concerning the enforceability of a non-compete. Some may not fully appreciate the intellectual property implications of such litigation, and application of Section 187(2) of the Restatement (Second) of Conflicts of Laws in deciding which state law shall govern the enforceability of the non-compete.¹

Courts will not enforce a non-compete if there is no interest to protect. The doctrine of a protectable interest is frequently set out on the face of a state’s statute² or, if not, may be found in the state’s decisional law. Employers have a protectable interest in trade secrets. The effective prosecution or defense of a non-compete in a TRO or preliminary injunction action will often involve first party and third party claims for misappropriation of trade secrets. Though not always, proving or disproving the existence, and misuse, of a trade secret bolsters the ability to prove or disprove a protectable interest. And, depending on the law of the state that governs the dispute, this is also true for common law claims for unfair competition.

The Uniform Trade Secrets Act (UTSA) has been enacted by 47 states, including the District of Columbia. States that have enacted statutes making non-compete agreements void, subject to enumerated exceptions (California, Montana, North Dakota, Alabama and Oklahoma), have also enacted the UTSA in whole or with minor exceptions. Thus, even states that subject a non-compete agreement to rigorous restraint-on-trade scrutiny often will, if asked, enforce a non-compete to the extent necessary to protect against improper usage or disclosure of a trade secret. For example, Colorado

has an announced public policy that non-competes “shall be void,” but also expressly excepts “[a]ny contract for the protection of trade secrets.” C.R.S. 8-2-113(2)(b).

And, states like California that make non-competes void without any express statutory exception for the protection of trade secrets, will often fashion and enter TRO and preliminary injunction orders if necessary for the protection of the former employer.

If a key executive or manager in possession of proprietary information defects to a competitor, and relocates their residence and job site to a state that is exceedingly unfriendly to non-competes, then one of you is going to be the first to file a suit to enforce the non-compete, or to bar its enforcement. If the former employee is the first to file, then examine whether there is personal jurisdiction, venue under 28 U.S.C. § 1391(a)(2), and/or whether the action is transferable under 28 U.S.C. § 1404(a), assuming the non-compete has a valid forum selection clause.³

Failing grounds for a Section 1404 transfer of the employee’s first filed suit, and assuming a favorable governing law provision, the former employer should consider filing a second suit to enforce its non-compete in the former employer’s friendly home state, and request the home state court to enter an order barring the first filed action from proceeding. This was done successfully in *Advanced Bionics Corp. v. Medtronic*, 29 Cal. 4th 697 (2002), modified en banc, reh’g denied 29 Cal.4th 1195A (2003). The action is procedurally complex but, in sum, involved a senior manager employed by a Minnesota company, Medtronic, who was recruited by a competitor, Advanced Bionics, based in California. On the same day he resigned, he and Advanced Bionics filed a declaratory relief action in California to declare his otherwise valid non-compete void and unenforceable.

The former employer, Medtronic, responded by removing the California suit to the federal court, and by filing suit in Minnesota against Advanced Bionics and its former employee seeking, *inter alia*, a TRO barring the opposing parties from seeking any relief in the action pending in California. The Minnesota court agreed. In the meantime, the former employee moved his residence to California, where he began work for Advanced Bionics. Then, Advanced Bionics obtained its own TRO from the California court barring Medtronic from proceeding with its Minnesota action. Both sides appealed each other’s TROs. Medtronic won.

Disputes over comity in the context of the first-filed rule were extant, along with the question as to whether Minnesota or California had a materially greater interest in the enforcement of differing law. In brief, once the matter had climbed to the California Supreme Court, it found that Minnesota has a greater interest in protecting the expectations of parties to an enforceable contract made in Minnesota than California has in declaring non-competes void.

According to the concurring opinion of Justice Brown of the California Supreme Court: “Relocating to California may be, for some people, a chance for a fresh start in life, but it is not a chance to walk away from valid contractual obligations, claiming California policy as a protective shield.”

It is true that *Advanced Bionics* was the result of a unique procedural posture. But, this action, and other similar reported decisions out of other states, remind the multistate non-compete litigator that all is not lost when a key defector takes essential IP to states that void non-compete agreements as a matter of public policy.

Susan focuses her practice in tort litigation, including business tort, unfair competition and IP litigation to enforce or invalidate non-compete, non-disclosure and non-solicitation agreements.

Endnotes

- 1 Until the Uniform Law Commission or the U.S. Congress passes a uniform statute, all 50 states have their own statutes, elements, and case law that make multistate non-compete litigation ever-an-adventure. This article will address briefly and only the IP impact of executive and key manager defections to competitors, and a strategy for enforcing a non-compete against California residents.
- 2 *E.g.*, ORS 653.295(1)(c).
- 3 The U.S. Supreme Court recently recognized in *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas, et. al.*, 134 S. Ct. 568, 582 (2013), that “[public interest factors] will rarely defeat a transfer motion” and “the practical result is that forum selection clauses should control except in unusual cases.”

Recent Significant Oregon Cases

By Stephen K. Bushong
Multnomah County Circuit Court

Claims and Defenses

PIH Beaverton, LLC v. Super One, Inc., 355 Or 267 (2014)

Sunset Presbyterian Church v. Brockamp & Jaeger, 355 Or 286 (2014)



Stephen K. Bushong

Under ORS 12.135, the 10-year statute of ultimate repose for claims arising from the construction, alteration, or repair of improvements to real property begins to run upon “substantial completion” of the project. In *PIH Beaverton*, the Supreme Court held that the trial court erred in concluding that “substantial completion” of a hotel construction project occurred when the owner posted a completion notice and the hotel opened for business. The court concluded that the record in this case gave rise to a material question of fact on whether the owner accepted the construction as fully complete because construction continued after the hotel opened for business and the county did not issue a certificate of final occupancy until seven months later. 355 Or at 284. In *Sunset Presbyterian*, the Supreme Court held that, under the terms of the parties’ contract, claims arising out of the construction of a church accrued when the architect issued a Certificate of Substantial

Completion, not on the date the church held its dedication service. ORS 12.135 did not bar the claims because there was a material question of fact on when construction was sufficiently complete to constitute “substantial completion” within the meaning of the statute. 355 Or at 296.

***Dunn v. City of Milwaukie*, 355 Or 339 (2014)**

Plaintiff brought an inverse condemnation claim against the City of Milwaukie after sewage backed up through her toilets and bathroom fixtures while the city was cleaning its sewage system. The Supreme Court reversed a jury’s verdict in plaintiff’s favor, concluding that the city’s actions did not amount to a compensable taking. To prevail on that claim, plaintiff had to establish that the city acted intentionally. In determining intent, the court adhered to and clarified the “natural and ordinary consequences” test adopted in *Morrison v. Clackamas County*, 141 Or 564 (1933). Under that test, a factfinder “is entitled to impute the requisite intent to take property if the invasion to the property owner’s interests was the necessary, substantially certain, or inevitable consequence of the government’s intentional acts.” 355 Or at 358 (emphasis in original). Here, the evidence showed that sewage back-up was a “known risk” that rarely came to pass. “Without any evidence that the sewage backup into plaintiff’s house was the necessary, certain, predictable, or inevitable result of the city’s intentional manner of hydrocleaning the adjacent sewer, the evidence was insufficient to support plaintiff’s inverse condemnation claim.” *Id.* at 361.

***Westfall v. Dept. of Corrections*, 355 Or 144 (2014)**

Plaintiff alleged in this tort case that he was imprisoned longer than his lawful term of incarceration because the Oregon Department of Corrections (ODOC) unlawfully ran his sentences on two crimes consecutively, not concurrently. The trial court granted ODOC’s motion for summary judgment, concluding that defendant was entitled to discretionary immunity under ORS 30.265(6)(c) because ODOC’s written policies required its employees to treat the second sentence as consecutive to other sentences imposed on the same day. The Court of Appeals reversed, concluding that any discretionary immunity that would apply to ODOC’s decision to adopt the written policies did not apply to the employees who carried out the policies. The Supreme Court reversed the Court of Appeals, concluding that “a discretionary policy choice by upper-level governmental officials does not lose the protection of discretionary immunity under ORS 30.265(6)(c) whenever lower-level employees apply that policy to particular circumstances.” 355 Or at 164.

***Peace River Seed Co-Op v. Proseeds Marketing*, 355 Or 44 (2014)**

In *Peace River*, the Supreme Court analyzed an aggrieved seller’s remedies under the Uniform Commercial Code, concluding that “a seller can recover market price damages, even if the seller resells some of the goods at above the market price at the time and place for tender.” 355 Or at 60. The court further concluded that plaintiff was not entitled to recover attorney fees under a contractual provision that allowed it to recover “charges for collection of payment” because plaintiff

“did not demonstrate through text and context, including trade usage, or through evidence of the parties’ intent, that the term ‘charges for collection’ includes attorney fees.” *Id.* at 70.

***Wright v. Turner*, 354 Or 815 (2014)**

Plaintiff was injured when two vehicles collided, in short succession, with plaintiff’s truck. A jury awarded her \$979,540 in damages. The trial court reduced the judgment to \$500,000, reasoning that (1) defendant’s liability for underinsured motorist benefits under the terms of its policy was limited to \$500,000 for “any one accident,” and (2) plaintiff’s damages were incurred in one “accident” within the meaning of the policy. The Court of Appeals agreed, but the Supreme Court reversed. The court first explained that, because the policy provision was required by statute, the court must “attempt to determine the legislature’s intention in enacting that statute rather than the parties’ contractual intention in entering into the insurance contract.” 354 Or at 820, quoting *Fox v. Country Mut. Ins. Co.*, 327 Or 500, 506 (1998). The court then concluded that the Oregon legislature intended “accident” to mean “one event, happening, or occurrence.” 354 Or at 827. Finally, the court concluded that plaintiff “presented evidence that was at least sufficient to give rise to a jury question” on whether plaintiff was injured in one accident or two. *Id.* at 833.

***Rice v. Rabb*, 354 Or 721 (2014)**

***Cannon v. Dept. of Justice*, 261 Or App 680 (2014)**

In *Rice*, the Supreme Court held that plaintiff’s claims for conversion and replevin were not barred by the six-year statute of limitations in ORS 12.080(4). The court concluded that a “discovery rule” applies to those claims, so plaintiff’s claims “accrue when the plaintiff knows or reasonably should know of the elements of such claims.” 354 Or at 733-34. The plaintiff in *Cannon* filed his tort action within 180 days of injury but did not serve the summons until after the 180-day period had elapsed. The Court of Appeals held that plaintiff’s claim was not barred by the 180-day notice provision of the Oregon Tort Claims Act, ORS 30.275. The court concluded that “the trial court erred interpreting the statute to require both filing of the complaint and service of the summons within 180 days of the alleged injury” in order to “commence” the action. 261 Or App at 691.

***Frontgate Properties, LLC v. Bennett*, 261 Or App 810 (2014)**

***Emerson v. Kusano*, 260 Or App 577 (2014)**

Frontgate involved a land sale contract that included the two parcels in dispute, and a subsequent deed did not include those parcels. The Court of Appeals held that the doctrine of merger did not bar a claim for specific performance of the contract, because the discrepancy between the contract and the deed was either a scrivener’s error—“a species of mutual mistake”—or it resulted from fraud or defendants’ “failure to alert plaintiff that the deed did not conform to the parties’ bargain, as they were obliged to do if they were aware of the discrep-

ancy[.]” 261 Or App at 814. In *Emerson*, the defendant’s insurance adjuster tendered the “policy limits” of \$50,000 to settle plaintiff’s personal injury action; plaintiff accepted. Plaintiff later discovered that the policy limits were in fact \$100,000. The trial court granted plaintiff’s motion to reform the terms of the parties’ settlement agreement. The Court of Appeals reversed, concluding that reformation was improper because “there was no evidence that the trial court could find clear and convincing that the parties had an antecedent agreement to settle for policy limits of \$100,000.” 260 Or App at 582.

***Neumann v. Liles*, 261 Or App 567 (2014)**

Plaintiff filed claims for defamation and invasion of privacy by false light after defendant posted a negative review of plaintiff’s wedding venue on the internet. The trial court dismissed the case under Oregon’s anti-Strategic Lawsuits against Public Participation (anti-SLAPP) statute, concluding that plaintiff failed to establish a *prima facie* case as required by ORS 31.150(3). The Court of Appeals reversed, concluding that “the evidence supporting the defamation claim was sufficient to meet the ‘low bar’ established by ORS 31.150 ‘to weed out meritless claims meant to harass or intimidate’ a defendant.” 261 Or App at 575, quoting *Young v. Davis*, 259 Or App 497, 508 (2013). The court explained that couples “often intend weddings to be significant, once-in-a-lifetime events that (they hope) will be unblemished by breaches in etiquette and unexpected hitches.” *Id.* at 576. A factfinder could find that defendant’s online statements impute to plaintiff “conduct that is incompatible with the proper conduct of the operation of a wedding venue.” *Id.* Among other things, defendant’s statement that plaintiff was “crooked,” “apart from implying that she is not a wedding vendor who can be trusted, alleges that she is dishonest, and would be defamatory for that reason.” *Id.* at 577. Plaintiff was not required to present evidence of special harm to establish a *prima facie* case of defamation because “a factfinder could find that defendant’s statements attacked [plaintiff]’s professional or business reputation, and, for that reason, would be defamatory *per se*[.]” *Id.*

***Leach v. Scottsdale Indemnity Co.*, 261 Or App 234 (2014)**

Plaintiff’s insurance company refused to defend or indemnify him on a claim for injuries sustained by a motorcycle rider (Warberg) during a practice session at plaintiff’s motocross track. The trial court granted the insurer’s motion for summary judgment, concluding that the policy’s “athletic participant” exclusion barred coverage for Warberg’s claim. The Court of Appeals reversed, concluding that “the injured party must have been ‘practicing for or participating in’ a *particular* athletic contest or exhibition at the time of the injury in order for the exclusion to bar coverage.” 261 Or App at 244 (emphasis in original). The insurer had a duty to defend because Warberg’s complaint alleged that he was injured when he was engaging in a practice motocross run “without identifying any facts or circumstances regarding the purpose of the practice session.” *Id.* at 246. The trial court erred in granting summary judgment on the duty to indemnify because the evidence “would permit a factfinder to find that the purpose of

the practice session in which Warberg was injured was simply recreational, and was not for the purpose of preparing for a contest or exhibition sponsored by Leach.” *Id.* at 248.

***Nkrumah v. City of Portland*, 261 Or App 365 (2014)**

Plaintiff sued the City of Portland for wrongful discharge and unpaid wages relating to his employment as communications director for former Portland Mayor Sam Adams, claiming that he was forced to quit “in order to fulfill the important public duty to protect the public trust by not participating in Adams’s continued misrepresentations to the public.” 261 Or App at 365. The trial court granted the City’s motion for summary judgment; the Court of Appeals affirmed. The court concluded that (1) plaintiff “failed to present evidence from which a jury could find that he was discharged *because of his refusal to breach the public duty that he identifies*” (*Id.* at 365 (emphasis in original)); and (2) the City did not owe plaintiff any wages for his work before Mayor Adams took office because plaintiff was not yet a City employee. *Id.* at 382.

Procedure

***Kohring v. Ballard*, 355 Or 297 (2014)**

The trial court in *Kohring* concluded that venue for plaintiffs’ medical malpractice action was proper in Multnomah County because defendants’ medical clinic engaged in “regular, sustained business activity” in Multnomah County within the meaning of ORS 14.080(2). The Supreme Court disagreed. The court explained that “regular, sustained business activity” required an “evaluation of both the qualitative nature of the business activity and the frequency with which it occurs.” 355 Or at 306. The activity must be “normal and ordinary in the light of the nature of the particular commercial or industrial enterprise. It must be something more than incidental to the ordinary operation of the enterprise.” *Id.* And the activity “must occur often enough to be sustained; it is not sufficient if the activity is only infrequent and occasional.” *Id.* Advertising and solicitation activities targeting Multnomah County residents were not enough in this case because those activities “are incidental to [defendants’] regular business activity.” *Id.* at 315.

***Two Two v. Fujitec America, Inc.*, 355 Or 319 (2014)**

Plaintiffs were injured when an elevator dropped unexpectedly and stopped abruptly. They asserted claims for negligence and strict liability, alleging that defendant negligently designed, installed and maintained the elevator, and that it was defective and dangerous. The trial court granted defendant’s motion for summary judgment; the Court of Appeals affirmed, concluding that an ORCP 47 E affidavit stating that plaintiffs had retained a qualified elevator expert to support plaintiffs’ claims that defendant “was negligent” was insufficient to avoid summary judgment because the affidavit only addressed the standard of care, not causation. The Supreme Court reversed on the negligence claim. The trial court erred, the court concluded, “either because it failed to recognize that the affidavit reasonably could be interpreted to address all issues, including causation, raised by defendant’s motion, or because it failed to recognize that, even if the affidavit

addressed only the standard of care, the affidavit combined with other evidence of what occurred, would enable a jury to infer that defendant's breach caused plaintiffs' injuries." *Id.* at 332-33.

***Purdy v. Deere and Company*, 355 Or 204 (2014)**

The jury in *Purdy* returned a defense verdict in a products liability and negligence case, answering "no" to questions on the verdict form that "included both the issue of culpability—either the existence of a defective and unreasonably dangerous product (in the strict liability claims) or a breach of the applicable standard of care (in the negligence claims)—and the issue of causation." 355 Or at 208-09. Plaintiff appealed, citing numerous instructional and evidentiary errors. The Court of Appeals affirmed without addressing 9 of the 10 assignments of error, concluding that it could not tell if the claimed errors "substantially affected" plaintiff's rights, as required for reversal under ORS 19.415(2), as construed in *Lyons v. Walsh & Sons Trucking Co., Ltd.*, 337 Or 319 (2004). The Supreme Court reversed, expressly overruled *Lyons*, and remanded the case to the Court of Appeals to consider plaintiff's assignments of error and, if necessary, determine whether any error substantially affected plaintiff's rights. 355 Or at 232-33. In his concurrence, Chief Justice Balmer noted that "simply separating the question of liability from the question of causation on the verdict form would have provided substantial assistance to the appellate courts in seeking to determine whether any trial court errors had 'substantially affected' the judgment." *Id.* at 238 (Balmer, C.J., concurring).

***Evergreen West Business Center, LLC v. Emmert*, 354 Or 790 (2014)**

The issue in *Evergreen West* was whether plaintiff's election of an equitable constructive trust remedy was foreclosed by a jury's damage award on a breach of fiduciary duty claim. The Supreme Court observed that, subject to certain limiting principles, "when it comes to an election of remedies, the choice is for the claimant to make, not the defendant or the court." 354 Or at 806. The court concluded that "the jury's damage finding did not foreclose equitable relief because the trial court did not adopt it," the finding was "not necessary to plaintiff's constructive trust claim," and the constructive trust remedy was not "identical to the damage award." *Id.*

***Croghan v. Don's Dugout, LLC*, 262 Or App 130 (2014)**

***Merrill Lynch Commercial Finance Corp. v. Hemstreet*, 261 Or App 220 (2014)**

In *Croghan*, the Court of Appeals held that, by allowing the jury to be discharged without requesting clarification of the verdict, defendants "forfeited their ability to invoke the one proper way to remedy an allegedly inconsistent verdict—the ORCP 59 G(4) procedure—and waived their ability to challenge the sufficiency of the verdict on appeal." 262 Or App at 132. In *Merrill Lynch*, the Court of Appeals held that "ORS 88.060(2) does not prevent a creditor that has a judgment encompassing both a money award based on debtors' personal obligations and foreclosure provisions from collecting on the

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money judgment before any foreclosure sale has occurred.” 261 Or App at 233 (emphasis in original).

Evidence

Piazza v. Dept. of Human Services, 261 Or App 425 (2014)

Plaintiff contended on appeal that the trial court erred in excluding as inadmissible hearsay statements that a five-year old boy (K) made to his parents approximately four days after K was allegedly sexually abused by an older boy while in foster care. Plaintiff argued that the statements qualified for admission under OEC 803(3)’s exception for statements of existing mental or emotional condition of the declarant. The Court of Appeals disagreed, concluding that the statements consisted of K’s “descriptions of the older boy’s conduct or statements the older boy made to K,” and that “nothing in the content of those statements raises an inference as to K’s emotional state while making them.” 261 Or App at 436.

Miscellaneous

Rogue Valley Sewer Services v. City of Phoenix, 262 Or App 183 (2014)

Plaintiff Rogue Valley Sewer Service (RVS) alleged that the City of Phoenix lacked authority to impose a five percent fee on gross receipts that RVS collects from city residents for sewer services. RVS argued that the city “must have a specific and express statutory grant of authority to charge the fee against RVS” because RVS was considered a “local government” and a “public body.” 262 Or App at 188. The Court of Appeals disagreed. The city’s charter, adopted under the “home-rule” authority derived from Article XI, section 2, and Article IV, section 1(5) of the Oregon Constitution, “confers on the city the power to impose local taxes and to regulate matters subject to municipal regulation.” *Id.* at 191. “Thus, the question is not whether the city can identify an express statutory authorization for the franchise fee imposed on RVS for use of the city’s rights-of-way—because the city’s charter grants it all authority to the limit of municipal power—but whether the city was prohibited from imposing the fee by state or federal law.” *Id.* Finding no such prohibition in state or federal law, the court concluded that the trial court “did not err in entering a general judgment for the city declaring the city’s ordinance to be a valid exercise of the city’s authority.” *Id.* at 202.

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