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Jim Gidley Receives 2015 Judge Panner Professionalism Award

by Julia E. Markley, Perkins Coie LLP

Judge Owen M. Panner and James (Jim) M. Gidley

Perkins Coie partner James (Jim) M. Gidley received the 2015 Judge Owen M. Panner Professionalism Award at the Litigation Section Annual Dinner on February 27, 2015, in Skamania, Washington. The Award, which recognizes personal and professional qualities, reputation, and conduct of a lawyer actively engaged in Oregon litigation, is named for U.S. District Judge Owen M. Panner, the recipient of the first award in 1998. Judge Panner traveled from Medford to personally present the Award to Jim before an audience of approximately 122 people.

Three lawyers spoke at the Dinner about Jim. First, retired lawyer Austin Crowe reviewed Jim's distinguished career. Austin told of how Jim had joined as a new associate in 1967 at what is now the Cosgrave Vergeer Kester firm. Together, Austin and Jim as young lawyers learned how to zealously represent their clients, try cases to juries, and conduct themselves professionally along the way. After almost 30 years at the Cosgrave firm, they left to form Crowe & Gidley, joined Bogle & Gates in 1997, and joined Perkins Coie in 1999. Austin spoke with pride of Jim's accomplishments, which include trying more than 200 cases to verdict; being named as a fellow in the American College of Trial Lawyers; and being admitted as a member of the American Board of Trial Advocates, where Jim served as Oregon President in 2010.

Pendleton-based trial lawyer Eugene (Gene) Hallman, who has opposed Jim in several cases, spoke of Jim's consummate professionalism. Gene told a colorful story of Jim forcefully but respectfully bringing to the trial judge's attention the opposing party's expert witness who had been chatting with the jurors during a break in the trial. Gene also noted Jim's ability to break the ice by connecting with other lawyers on a personal level. More than once, Gene has seen Jim knowledgeably discussing the local high school football scene no matter in what Oregon county the deposition is taking place. Gene noted that, as lawyers, we sometimes have difficult cases—"There is no such thing as a motion for new facts," Gene lamented—but when opposing counsel is professional, we ultimately can better serve our respective clients.

Perkins Coie partner Julia Markley highlighted Jim's commitment to mentoring her and other attorneys. She described a trial where, with Jim's support, she

earned the client's approval to give her first opening statement and closing argument. In this era of the vanishing civil jury trial, Jim shares the "plum" aspects of trials with junior lawyers where appropriate.

In Jim's acceptance speech, he reflected on the culture of litigating and trying cases in Oregon, where our bar has for many years valued professionalism. He wove into his remarks quotes from historical Multnomah Bar Association articles and the Professionalism Statements of the Oregon State Bar and Multnomah Bar Association. In his typical modest fashion, he emphasized that the award was not about him, but about all Oregon lawyers and a shared desire to work together civilly and as professionals, a fact demonstrated by the very existence of the Judge Panner Professionalism Award. And picking up a theme from all the speakers, he acknowledged his love of sports and conceded that his golf game needs work. Jim specially thanked Karen, his wife of 39 years, for her support.

Dennis Rawlinson, Chair of the Annual Dinner and partner at Miller Nash Graham & Dunn, was the emcee and gave the closing remarks. Past recipients of the Award are Hon. Mark D. Clarke, William A. Barton, Judge Lynn R. Nakamoto, William B. Crow, Nancie Potter, Thomas E. Cooney, Carl Burnham, Jr., James L. Sutherland, Arthur C. Johnson, Donald B. Bowerman, Mic Alexander, Fred Hartstrom, Tom Tongue, Judy Snyder, Gene Hallman, Don McEwen, and Hon. Owen M. Panner. Nominations for the 2016 Award are due by August 1, 2015.

Comments from the Editor

End-Game Cross-Examination

by Dennis P. Rawlinson,
Miller Nash Graham & Dunn LLP

Dennis Rawlinson

Cross-examination can be one of the most challenging yet satisfying portions of any trial. There is a moment in time at the end of every cross-examination during which everyone in the courtroom, including the examiner, knows whether the cross-examination was a success or a failure. That moment in time comes not at the beginning of the examination but at the end.

I. The Importance of Ending Strong

When the witness falls silent after answering your last question, the moment should be memorable.

Primacy, recency, and repetition are the lawyer's tools. The power of recency (that we remember well what we hear last) should never be underestimated by the cross-examiner. As you retake your seat after having completed the cross-examination, everyone in the courtroom will remember the last line of questions and answers from the cross-examination, and whether the witness was "gored" or you were.

To a large degree, we will be protected from failures throughout a cross-examination if we are able to end strong. But we must end strong.

II. Don't Leave the Last Line of Questions to Chance

Realizing the importance of the last line of questions of any cross-examination, you should select your strongest and most certain point as the last point.

It is essential that the point be an important one. It should be central to your theme. It should be worth remembering. Don't waste this golden moment on trivia, minutiae, or quibbling over the unimportant.

The last point of a cross-examination should be undeniable—a line of questions from which the witness cannot escape. Such opportunities are often offered by an inconsistent statement or a document or testimony that directly contradicts the witness. Examples are:

- the expert's testimony in another case in which he or she took exactly the opposite position;
- the deposition testimony of a fact witness in which the fact witness testified on a key point 180 degrees differently from the way in which the witness is testifying now; and
- a contemporaneous document or testimony of another witness that flies in the face of the witness's testimony, directly contradicting it.

This is no time to leave admissibility to chance. Be certain that the deposition excerpt, inconsistent document, or earlier inconsistent statement is absolutely admissible. This is the one part of your cross-examination that deserves extra attention, extra research, and removal of any doubt as to its admissibility. Be prepared with authorities or a slip memorandum to support admissibility if there is a risk of any challenge.

The last line of cross-examination questions must be planned, certain, and deadly. Spontaneity and flexibility are important in cross-examination. Sometimes the most important nuggets from an adverse party's testimony can be derived from an unguarded or intemperate comment made during the discomfort of a cross-examination. But the last line of questions is not the portion of the cross-examination to leave to chance or inspiration.

The end game of any effective cross-examination is to save the best for the end. Your cross-examination will be judged in those brief moments of silence as the cross-examination witness utters the last words of his or her last answer. You and everyone else in the courtroom will know whether you or the witness prevailed. And at that moment in time, you will reap the benefits of end-game cross-examination.

Oral Advocacy in an Increasingly Diverse World

by Stephen F. English, Perkins Coie LLP

Stephen F. English

Lawyers must be able to persuade, both with the written word and the spoken word. In our increasingly technological world, I believe that the art of oral persuasion is being lost to emails, texts, IMs, Tweets, and other written communications. I also believe that the vanishing civil jury trial has created a (mis)perception that oral advocacy skills are not as necessary as they once were.

The ability to present a position orally and persuasively, whether giving a closing argument, arguing a motion to a judge, convincing a client of the right strategy to pursue, or even making a pitch to get work from a new client, is an art that can be learned, can be improved on, and can get rusty as well. Generally speaking, face-to-face communication remains the single best way to persuade. It allows one to more effectively read the body language of the audience and adjust and react accordingly.

While everyone is aware of the fact that jury trials have decreased in number and therefore denied many of our younger lawyers the opportunity to gain valuable jury trial experience, other experiences involving some form of oral advocacy certainly help develop these same basic skills. Communicating from the seclusion of one's office by either email or texting does very little to improve the skills needed for the activities I outlined above. Put bluntly, if you want to be a good public speaker, then you actually have to practice speaking publicly. If you do most of your advocacy in written briefs, however superlative they may be, you develop a different style of language than the spoken word. Words and phrases sound different when they are said than when they are read. Likewise, when the court has a motion heard over the phone, you end up making an argument to a speakerphone. Even this simple and common method of oral argument creates the potential to develop bad habits that hurt you when you actually have to appear in person. A recent example of this brought to my attention was a situation in a court proceeding in which a lawyer, after having an adverse ruling from a judge, rolled his eyes. The judge noticed this and appropriately reacted. The lawyer who did this very likely did not have the benefit of practicing maintaining composure in a face-to-face setting. Even in the mundane world of everyday communications, I have always felt that it is much more difficult to criticize face-to-face than it is by email, but it is ultimately far more effective.

The term "public speaking," as I have outlined above, is probably in some respects a misnomer. What we are really talking about is oral communication. The tricky part about communication in a changing world is that even if you practice speaking publicly, you need to be aware of the cultural shift that broadened diversity has brought about. As with many white males of my generation, I do not identify as diverse and therefore I have to work harder to be attentive to speaking effectively to all members of an increasingly diverse audience. In other words, not only do we have to keep from getting rusty, but we have to constantly modify our communication to fit today's audience. Some simple examples. I tried a case in federal court recently in which three of the eight jurors were immigrants, all from different continents. The jury also contained a 50-year age range. This is not an extreme example, but rather an accurate reflection of a diverse population all across the country, including Portland and Oregon. Not just younger lawyers but also older lawyers need speaking skills that address not only their peers in age and cultural background, but people whose country of origin may not be the United States. For example, businesses who we "pitch" for legal work are radically more diverse than 30, 20, or even 10 years ago. Sensitivity to and awareness of gender bias, ethnic diversity, generational issues, and sexual preference diversity is an important component in improving communication skills.

So, short of sudden reinvigoration of the jury trial from its low single-digit percentage of trials versus cases filed, what are some real world opportunities to practice? First, I would encourage our judges, both state and federal, to not only allow but encourage court appearances in person. I am referring now not just to motions, although they definitely are a major part of it, but also to status conferences, trial setting conferences, and the like — in other words, anything that will allow lawyers, particularly younger lawyers, to stand in front of the judge and speak in an open courtroom. Our judiciary, state and federal, is already burdened and pressured with extremely high case loads and, at least for the state judges, limited access to legal clerks. But an investment in allowing younger lawyers to argue motions orally or appear in person at status conferences in open court will ultimately benefit our judges as well as result in smoother trials with more experienced lawyers.

Another opportunity for public speaking is to create a Toastmasters-like event for lawyers to practice either within their law firm or within a larger group. I know that when Denny Rawlinson and I were talking about this the other day, he mentioned that Miller Nash Graham & Dunn has been doing a Toastmasters-type event to allow lawyers to practice speaking publicly. Both at Perkins Coie and my former firm, we have had a similar speech-giving series that allows lawyers, both young and old, both less experienced and very experienced, to give presentations on a topic of their choosing. I participate in a Toastmasters group at a club I belong to. People have asked me why I do this, given my level of oral advocacy experience. My response is a simple one. My audience knows me and actually expects a high level of performance which in turn keeps my "edge" and forces me to a higher level of performance. In a very similar way, getting together with 10 to 15 lawyers from first year associates through 25 year partners, has the potential to create exactly the same kind of edge. Both the older lawyers and the younger lawyers speaking to a diverse audience in age, gender, and hopefully ethnic diversity within the firm, want to perform at their highest level, and particularly if the expectations are high. Another way to improve your public communication is actually to watch people who already do it well and aren't necessarily lawyers. Finally, seek out opportunities to speak to groups who are not lawyers—whether it's a community

activity, service on a board, speaking at a dinner to a group of your fellow college alums, and generally anything that gets you in front of a group, even a small one, to make a presentation or to communicate formally or informally. Prepare for these opportunities by staying informed beyond the legal world. Pay attention to what is going on in the world outside the law. Watch TV, read the newspapers either on-line or hard copy.

I manage an increasingly diverse litigation department here in Portland. This allows me and all of the members of our litigation team to learn more about diverse cultures, respect those diverse cultures, and refine and upgrade our communication skills accordingly. The more we practice this, the more comfortable we get, the better we get in the situations I outlined at the beginning, and the more confidence we have. Practicing speaking publicly will build your confidence. If you have confidence as a public speaker, you will look and act confident, and the audience, whether large or small, however diverse, will focus on the content of what you are saying, and will not be distracted from that content by the manner of your delivery.

The Trial Lawyer's Duty of Inquiry

by Stephen H. Galloway, Stoel Rives LLP

Stephen H. Galloway

Trust but verify. The old Russian proverb that President Reagan used during arms control negotiations also applies to our work as trial lawyers. We get a lot of information from clients and witnesses. However, we cannot blindly rely upon these representations, especially when confronted with red flags as to their accuracy or veracity. Failure to investigate could prove to be a defining moment in a trial lawyer's career—and not in a good way.

The Oregon Rules of Professional Conduct state that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or . . . offer evidence that the lawyer knows to be false." Or. R.P.C. 3.3(a). But this rule does not directly address situations where the lawyer may *suspect* that information supplied by a client or witness is untrue but does not *know* that to be the case. The Oregon Rules of Civil Procedure, however, impose an obligation of inquiry: "An attorney who signs, files or otherwise submits an argument in support of a pleading, motion or other document . . . certifies that the certifications are based on the person's reasonable knowledge, information and belief, *formed after the making of such inquiry as is reasonable under the circumstances*." Or. R. Civ. P. 17 C(1) (emphasis added); *see also* Fed. R. Civ. P. 11(b). One of the certifications made by signing or submitting an argument is "that the allegations and other factual assertions in the pleading, motion or other document are supported by evidence," unless otherwise specified. Or. R. Civ. P. 17 C(4); *see also* Fed. R. Civ. P. 11(b)(3) (imposing similar standard).

The obvious question is, "what constitutes a reasonable inquiry?" The Advisory Committee Notes to Federal Rule 11 indicate that the reasonableness of an inquiry depends on several factors:

> [H]ow much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Adv. Comm. Notes to 1983 Amend., Fed. R. Civ. P. 11.

Although reliance on a client's representations may be a factor in the reasonableness of the lawyer's inquiry, when the lawyer has reason to believe (or there are objective indicators) that those representations may be suspect, the lawyer may not simply ignore those red flags and continue to rely on the client's or witness's word. As the American Bar Association noted in a Formal Ethics Opinion, "[i]f any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry." ABA Formal Op. 335. If further inquiry is insufficient to resolve the doubt, the lawyer should not rely upon the suspect facts. *Id.*

The Oregon Court of Appeals has reached a similar conclusion. In *Roop v. Parker Northwest Paving Co.*, the plaintiffs sued a gravel company and its lawyers for malicious prosecution after dismissal of the gravel company's defamation suit. 194 Or. App. 219, 94 P.3d 885 (2004). The plaintiffs argued at trial that the company's attorney lacked probable cause to prosecute the case because she had failed to investigate the truth of the allegedly defamatory statements. *Id.* at 231. The trial court granted the attorney's motion for directed verdict, finding that the circumstances of the investigation did not indicate malice. *Id.* The Court of Appeals affirmed, noting that lawyers typically will only be liable for failing to inquire further into their clients' representations if they have reason to believe they have not been given the full or accurate story:

> Plaintiffs urge us to adopt a hard-and-fast rule that lawyers always are obligated to conduct independent investigations and may not merely rely on the information provided by their clients before filing a complaint. That, however, is not the law in Oregon. As the Supreme Court held in *Lambert v. Sears, Roebuck*, 280 Or. 123, 131, 570 P.2d 357 (1977), whether an attorney has an obligation to conduct an investigation to verify independently the information provided by a client depends on the facts of each case, specifically, whether the facts create the appearance that the client may not be providing the attorney with all the necessary information.

Id. at 242.

The *Parker Northwest Paving* case illustrates one potential adverse consequence of blindly relying on the truth of a client's or witness's representations: you could be sued for malicious prosecution. In evaluating such claims, the

court will determine not only whether the claim was baseless but also whether the attorney made "a reasonable and competent inquiry." *K.F. Jacobsen & Co. v. Gaylor*, No. 3:12-CV-2062-AC, 2014 WL 273140, at *3 (D. Or. Jan. 23, 2014). An attorney who fails to conduct the required inquiry may also be subject to Rule 11 sanctions, which can include the payment of the other side's fees. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990); *see also Barkley v. Hermundslie*, 110 F.3d 67 (9th Cir. 1997) (affirming sanctions against lawyer who relied solely on client's declaration and failed to investigate underlying facts).

Apart from adverse consequences to the lawyer directly, the failure to confirm suspect allegations or evidence from a client representative or witness can also result in dismissal of the client's case. This lesson was demonstrated in especially brutal fashion in a recent Texas case, where the plaintiff's billion-dollar claim was dismissed. In *Moncrief Oil International, Inc. v. OAO Gazprom*, plaintiff Moncrief Oil alleged trade secret misappropriation by Russian energy company OAO Gazprom. No. 017-229664-08 (17th Judicial Dist. Ct., Tarrant County, Tex. 2008). Moncrief Oil sought $1.4 billion in damages based on Gazprom's alleged misappropriation of a proprietary financial model. After a decade of pre-trial proceedings and discovery, the case went to trial in January 2015. The cornerstone of plaintiff's trade secret evidence was Plaintiff's Trial Exhibit 1, which purported to be a detailed financial model that formed the basis for all the other trade secret evidence in the case. However, Exhibit 1 was a complete fabrication.

Moncrief's CFO, David Maconchy, testified on direct that he personally created and printed Exhibit 1 in 2004. But in a moment straight from Perry Mason, the defense confronted him with incontrovertible evidence that the document had actually been created no earlier than 2012. An image that appeared in the exhibit was titled "Figure 11," but there were no Figures 1 through 10, raising the suspicions of the defense. Maconchy testified that he copied the image from an industry publication available at the time, but Gazprom's lawyers were able to locate the original image in an article from June 2012.

Armed with evidence that Maconchy had fabricated and misrepresented the central piece of evidence in the case and then lied about it on the stand, Gazprom moved for "death penalty" sanctions, including dismissal of Moncrief's case and an award of attorneys' fees. By agreeing to dismiss the $1.4 billion case with no award of fees, Moncrief and its lawyers avoided what surely would have been difficult questions about how falsified evidence had made it all the way to trial without being discovered. Though Moncrief has not yet brought any claims against its lawyers for not discovering its CFO's misrepresentations, one could imagine a set of facts that could result in a malpractice claim against the lawyers for the company.

The *Moncrief* case illustrates the kinds of red flags that should cause a lawyer to investigate further. First, despite the importance of the document, CFO Maconchy did not produce it until years into the case. Five of the six documents comprising the alleged trade secret information were produced in response to a 2008 request for production, but Maconchy

Litigation Journal Editorial

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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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did not produce Exhibit 1 until late 2014. Second, Maconchy could not produce a native file of the document; he claimed to have only a hard copy that he printed out in 2004. Finally, despite the fact that virtually all hard copies of Moncrief's financial documents from the period had been shredded according to company policy, Exhibit 1 had miraculously survived.

The lesson here is of critical importance to trial lawyers: trust but verify. While turning over every rock to corroborate the facts of your case is not required, trial lawyers should pay close attention to circumstances that may cast doubt on the credibility of their evidence. The failure to fully investigate in such circumstances runs the risk of not only dismissal of the case or other sanctions against your client, but also the imposition of sanctions or the assertion of tort claims against you by the opposing party or your own client.

The Scope of the Privilege Waiver in Attorney Malpractice Cases: Discovery from Non-Party Attorneys

by Mark Friel, Shareholder, Stoll Berne

Mark Friel

A new client contacts you because one of its former attorneys made a mistake—a big one. Maybe the attorney blew a deal, or negligently drafted an agreement, or failed to take some action that would have protected your client as its business relationship with a third party started falling apart. And your client, understandably, wants to know its options. How can it be made whole? So you talk about a potential malpractice suit. The facts seem strong, the claim is timely, but you still need to disclose the risks.

One of the major risks, of course, is that by filing a malpractice suit, your client will be waiving its attorney-client privilege. You explain that the attorney-client privilege is a very old and widely recognized evidentiary privilege. It protects most communications between lawyer and client from the prying eyes of strangers. Its purpose is to encourage full and open communication and, while not absolute, is subject to only a few narrow exceptions. One of those exceptions, you note, deals with communications relevant to allegations of malpractice made by the client against the lawyer. As to those communications, no attorney-client privilege exists. They will be discoverable and possibly admissible in court.

"Not a problem," your client says. "If our company's communications with that attorney come out, we can handle it. This is important. The risk is worth it."

Having had this exchange, would you be satisfied that the client was making a fully informed decision as to the waiver issue?

If your answer was "yes," then you may be right. But you may also be surprised when, during discovery, your client's other attorneys are served with subpoenas asking for their files. Remember, the potential defendant attorney was just one of many attorneys your client consulted over the years—before, during, and after it received the advice from the potential defendant. Some of those other attorneys advised your client on deals similar to the one now at issue. And some of them advised it on aspects of the same deal.

"Are they really entitled to all of this?" your client asks, suddenly worried.

To answer that question, you will not find any clear guidance from the Oregon appellate courts, although the Oregon Supreme Court's decision last summer in *Longo v. Premo*, 355 Or. 525 (2014), is somewhat helpful. Instead, your analysis will largely depend on federal and state cases from other jurisdictions. Even then, the best you'll be able to say to your client is, "It depends."

The attorney-client privilege was first codified in Oregon in 1862, and finds its modern incarnation in OEC 503(2). *Longo*, 355 Or at 533-34. The evidence rule provides, in pertinent part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer….

OEC 503(2). This privilege against forced disclosure "serves not only to encourage full and frank communications between lawyers and their clients, but further promotes important interests beyond the interests of represented individuals who assert the privilege." *Longo*, 355 Or at 537-38, *citing State ex rel. OHSU v. Haas*, 325 Or 492, 500 (1997).

Of course, the lawyer-client privilege is not absolute. A client may waive it voluntarily, *see* OEC 511, and OEC 503 creates exceptions to the privilege. One such exception deals with legal malpractice actions. Under OEC 503(4)(c), there is no privilege "[a]s to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer." Referred to as the "self-defense" exception, OEC 503(4)(c) lifts the lid on some attorney-client communications, but "the filing of a breach-of-duty claim has not been generally viewed as removing the privilege entirely." *Longo*, 355 Or at 539. In fact, in *Longo*, the court held that OEC 503(4)(c) is "a limited exception permitting disclosures of confidential information only as reasonably necessary for a lawyer to defend against allegations of breach of duty." *Id.*

"Reasonably necessary" is an inexact standard. In *Longo*, the court was faced with the appeal of a trial court's denial of a protective order in a post-conviction proceeding in which the petitioner alleged his court-appointed appellate counsel on direct review had provided inadequate and ineffective assistance, in violation of the petitioner's state and federal constitutional rights. The petitioner asked for an order precluding

the state—which had sought production of the appellate attorney's file—from disclosing the file to third parties, especially those who might be involved in prosecuting a retrial of the petitioner's criminal case. In reversing the trial court, the Oregon Supreme Court refused to decide what would or would not be "reasonably necessary" under the circumstances. Instead, it merely held that it was error to deny petitioner any protections at all. The court left the ultimate determination to the trial court on remand, a determination in which "[b]oth the state's interest in preparing a defense against petitioner's allegations of breach of duty and petitioner's interest in protecting the unnecessary disclosure of confidential communications must be enforced under OEC 503(2) and OEC 503(4)(c)." *Id.* at 542.

Not only did the Oregon Supreme Court avoid specifics, but it was faced with a slightly different issue from the one facing your client in the above hypothetical. The Court did not have occasion to consider whether OEC 503(4)(c) permits the discovery of the files of lawyers who have not been targeted by the client. The court was less concerned with *what* is subject to disclosure than it was with to *whom* it is disclosed. But other courts have considered the scope of what is discoverable.

Under California Evidence Code section 958 (which is cited in the commentary to OEC 503(4)(c)), the exception for "a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship," "applies only where the alleged breach is by the attorney from whom the information is sought." *Miller v. Superior Court*, 111 Cal App3d 390, 392-93 (1980) ("Where, as here, the client has not alleged a breach by the attorney involved in the communication in question, the privilege for that communication remains intact."). Courts in Wisconsin, Florida, and New Hampshire have come to the same conclusion. *See Dyson v. Hempe*, 413 N.W.2d 379, 387 (Wis App 1987) ("sec. 905.03(4)(c) excepts from the privilege only communications between the client and the lawyer who is accused of a breach of duty or between the lawyer and the client who is accused of a breach of duty"); *Shafnaker v. Clayton*, 680 So2d 1109, 1111 (Fla App. 1996) (Florida's evidentiary exception to the attorney-client privilege, § 90.503(4)(c), Fla. Stat., "excludes otherwise privileged information between the attorney being sued for legal malpractice and the client being sued"); *see also Emerson Electric Co. v. Oullette*, 1998 WL 34088465, *5 (DNH 1998) (concluding that New Hampshire's Evidence Rule 502(d)(3) applies "only to communications between the client and the attorney the client has charged with wrongdoing").

These cases appear to stand for the general proposition that discovery of third party lawyers in a malpractice suit is never permitted, and at least a couple of courts seem to have taken that approach. In *Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So2d 504, 508 (Fla Dist Ct App 2006), *rev denied*, 96 So2d 932 (Fla 2007), the court refused to allow discovery of communications between the plaintiffs and non-party attorneys with whom the plaintiff had also consulted on the same matter that was the basis of the plaintiffs' malpractice suit. According to the court:

> Here, the clients have asserted claims for damages based on the advice they received from the lawyers. The clients' claims are not based on the advice they received from the other counsel, and the lawyers have not shown that the clients must necessarily introduce communications with the other counsel to prove their claims against the lawyers.

Coates, 940 So2d at 510; *see also Chemtob Moss Forman & Talbert, LLP v. Leopold*, 23 Misc.3d 1135(A), *2 (N.Y. Sup. Ct. 2009) (in law firm's action for fees in which client brought counterclaim for malpractice against law firm relating to representation in underlying divorce action, refusing to allow discovery as to communications with another lawyer whom plaintiff consulted with on the same matter, holding: "Outside communications relating to the divorce action is immaterial as Plaintiff's duty was to best represent its client regardless of what other advice Defendant may have been seeking.").

However, a broader survey of the case law reveals decisions in which, under certain circumstances, courts have allowed discovery of third party attorneys who represented the plaintiff in connection with the matter underlying the malpractice lawsuit.

For example, in *Pappas v. Holloway,* 787 P2d 30 (Wash 1990), an attorney (Pappas) sued a former client (Holloway) for unpaid fees, and the client counterclaimed for legal negligence in the underlying trial in which Pappas had represented Holloway. Pappas then impleaded the three other attorneys who had also represented Holloway during that trial and sought discovery of their files. The court permitted the discovery, over the plaintiff's objection that the files were privileged, because Pappas "has alleged the same cause of action against third-party defendants as the Holloways have alleged against him." *Pappas*, 787 P2d at 35; *see also Lyon Fin. Servs., Inc. v. Vogler Law Firm, P.C.*, 2011 WL 3880948 at *3 (SD Ill. Sep 2, 2011) (defendant permitted to discover files of attorneys who subsequently represented the plaintiff in the underlying trial because plaintiff alleged that defendant lawyer's actions "hamstrung" its subsequent counsel, meaning that the effects of the defendant's negligence extended beyond its representation of the plaintiff in the underlying action).

The court in *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, *7 (Del Ch 2009), found a waiver of the privilege as to certain communications with a non-party attorney for the plaintiff who had formerly been employed by and had been the coordinating attorney at the defendant law firm with respect to the underlying matter. Discovery was limited to communications that occurred during the time in which both he and the defendant law firm concurrently represented the plaintiff in the underlying case. *Id.*, 2009 WL 2501542, *6-*7.

In *Christenbury v. Locke Lord Bissell & Liddel, LLP*, 285 FRD 675 (ND Ga 2012), the plaintiffs sued the defendants for negligent advice in connection with a transaction. The defendants tried to obtain communications between the plaintiffs and another law firm the plaintiffs had retained to advise it on the same transaction. The plaintiffs had separately sued the second law firm for malpractice in connection with the same transaction, and, according to the court, "appear to seek damages overlapping those sought in this case." *Id.* at 683-84. The court allowed discovery of communications with the second

law firm, at least to the extent they related to the transaction at issue and were made during the period of time in which the alleged malpractice took place. *Id.* at 684.

Assuming that such decisions allowing discovery would persuade an Oregon court, it is likely some restrictions would nonetheless be imposed.

First, despite OEC 503(4)(c)'s use of the word "relevant" to describe the scope of the waiver, the court in *Longo* held that the waiver is more limited; it permits disclosure "only as reasonably necessary for a lawyer to defend against allegations of breach of duty." *Longo*, 355 Or at 539. This interpretation is in line with decisions from other jurisdictions holding that "relevance is not the test for waiver of the attorney-client privilege," *Dana*, 295 P3d at 313, and that "waiver occurs when a party raises claims that will *necessarily* require proof by way of privileged communication." *Coates*, 940 So2d at 508 (emphasis in original; citation and quotation omitted).

Second, because the privilege belongs to the client and the waiver is dependent on the nature of the *client's* allegations, an argument could be made that a defendant attorney should not be able to dictate the scope of the waiver through its *own* allegations (such as an affirmative defense). Indeed, this argument finds support in the case law.

The plaintiff in *Dana v. Piper*, 295 P3d 305 (Wash App 2013), retained a law firm to advise him regarding the sale of his business interest. The plaintiff later sued the entity that purchased his business interest, and then sued the law firm regarding the advice it had provided about the sale. The defendant law firm pursued discovery from the firm that represented the plaintiff in his lawsuit against the purchaser of his business interest, seeking to support its affirmative defense that the plaintiff had sought and received advice from other advisors with respect to the sale transaction. The Washington Court of Appeals held that the plaintiff had not waived his attorney-client privilege with the second firm:

> [The defendant law firm] seeks to discover attorney-client communications to prove a defense. But [the firm's] assertion of that defense cannot waive [plaintiff's] privilege: even though [plaintiff] has put his *damages* at issue, he did not put his *communications with* [the other law firm] at issue.

Dana, 295 P3d at 311 (emphasis in original).

Other authorities have likewise taken the position that to invade the privilege merely on the basis of an affirmative defense would render it illusory. *E.g., Jakobleff v. Cerrato, Sweeney & Cohn*, 468 NYS2d 895, 897 (NY App Div 1983) (even though defendant attorney sued for malpractice impleaded plaintiff's present attorney on the issue of damages, plaintiff did not waive the privilege, since "[t]o conclude otherwise would render the privilege illusory in all legal practice actions: the former attorney could, merely by virtue of asserting a third-party claim for contribution against the present attorney, effectively invade the privilege in any case"); *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 727 N.E.2d 240, 244 (Ill. 2000) (in denying discovery to defendant attorney of communications between plaintiff and subsequent counsel, court held: "To allow Fischel & Kahn to invade the attorney-client privilege with respect to subsequently retained counsel in this case simply by filing the affirmative defenses it did would render the privilege illusory with respect to the communications between van Straaten and Pope & John.").

Third, perhaps the most straighforward and widely-recognized limitation on third party attorney discovery has to do with timing. Courts have consistently held that "the attorney client privilege is not waived where the protected communications occurred only after the end of the underlying matter giving rise to the malpractice claim." *Dana*, 295 P3d at 311; *see also Jakobleff*, 468 NYS2d at 898 ("[I]t simply cannot be said that plaintiff has placed her privileged communications with her present attorney in issue, or that discovery of such communications is required to enable defendants to assert a defense or to prosecute their third-party claim"); *Saan v. Mastrian*, 280 F.R.D. 437, 439 (S.D.Ind. 2011) ("this 'at issue' waiver does not extend to communications with attorneys that occurred subsequent to the alleged malpractice. The issue of damages or mitigation of damages alone is not sufficient to effectuate an 'at issue' waiver as to subsequent counsel; to permit this would allow any attorney involved in a malpractice action to obtain privileged communication between his former client and the client's new counsel and would render the privilege illusory"); *Dyson*, 413 NW2d at 387 (communications between plaintiff and divorce lawyer she retained after she terminated defendant lawyer were privileged), *rev denied*, 416 NW2d 65 (Wis 1987); *Fischel & Kahn*, 727 N.E.2d at 245-47 (refusing to allow discovery of attorney-client communications with subsequent counsel, because, among other reasons, "no question exists regarding who allegedly committed the malpractice complained of. There are no allegations in van Straaten's counterclaim referring to Fischel & Kahn's conduct during the Mesirow litigation. Here, Fischel & Kahn's alleged negligence, occurring in 1986, was already complete at the time Pope & John was retained."); *Woodbury Knoll LLC v. Shipman and Goodwin, LLP*, 48 A.3d 16, 38 (Conn. 2012) (refusing to allow discovery of communications with subsequent counsel who assisted the plaintiff in resolving litigation allegedly caused by the negligence of the defendant firm, where "[t]he plaintiffs' malpractice claim concerns only the allegedly negligent representation by the defendants, which is separate from the plaintiffs' subsequent representation by Finn Dixon"); *Miller*, 111 Cal App 3d at 392-93 (same).

As the Oregon Supreme Court held in *Longo*, the extent of the attorney-client privilege waiver under OEC 503(4)(c) is governed by a "reasonable necessity" standard, and will depend on the weighing of the accused attorney's interest in preparing a defense and of the client's right to protect confidential communications from unnecessary disclosures. *Longo* and case law developed in other jurisdictions suggest that the nature and timing of any third party attorney's representation will likely drive the analysis; of particular importance will be whether the third party attorney represented the client on the same matter at the time of the alleged negligence. Understanding the nature of the risk of discovery as to third party attorneys will help you make the necessary disclosures to the client when discussing a potential malpractice suit. The client may still decide the risks are worth it, but at least you'll be prepared if the subpoenas start flying.

Whose Privilege Is It, Anyway? Asserting the Attorney-Client Privilege in Insurance Coverage Disputes

by Peter Hawkes, Lane Powell PC[1]

Consider the following common scenario: A general contractor is hit with a construction defect claim. The contractor submits a claim for coverage and tenders the defense to its liability insurer. The insurer accepts the defense under a reservation of rights and hires defense counsel on the insured's behalf. The insurer also begins to investigate coverage, and both the insurer and the insured hire separate counsel to advise them on coverage issues. Eventually, the insurer denies the insured's claim, and litigation over coverage commences. In that litigation, can the insurer assert that its communications with its coverage counsel prior to its denial of the claim are protected by the attorney-client privilege?

Instinctively, most attorneys would answer, "Of course!" After all, both the insurer and insured were separately represented by counsel. The advice that each received would seem to lie at the heart of the attorney-client privilege.

But a complicating factor is the duty of good faith that an insurer owes to its insured, both in discharging its duty to defend and in adjusting the claim for coverage. Do those duties make the insurer a fiduciary on behalf of the insured? And if so, can the insurer shield from the insured legal advice that the insurer obtained while it was supposed to be acting on the insured's behalf? In other words, whose privilege is it anyway—the insurer's or the insured's?

An insurer's duties to its insured

In *Georgetown Realty Inc. v. Home Ins. Co.*, 313 Or. 97, 110-11 & n. 7, 831 P.2d 7 (1992), the Oregon Supreme Court held that an insurer who undertakes the duty to defend its insured takes on a fiduciary duty toward the insured in handling the defense, including negotiating settlement. As the Court explained, "When a liability insurer undertakes to 'defend,' it agrees to provide legal representation and to stand in the shoes of the party that has been sued. The insured relinquishes control over the defense of the claim asserted. Its potential monetary liability is in the hands of the insurer." *Id.* at 110-11.

However, in *Farris v. U.S. Fidelity and Guaranty Co.*, 284 Or. 453, 458-60, 587 P.2d 1015 (1978), the Supreme Court held that an insurer's bad faith denial of coverage gives rise to a claim only in contract, not in tort. The Court found that, because the insurer had denied coverage and never undertook the duty to defend, "[i]t never undertook any fiduciary duty

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by purporting to act in the interests of the insured." *Id.* at 460. Thus, under Oregon law at least, an insurer's duty of good faith to its insured in making a coverage determination is contractual, rather than fiduciary, in nature.

Other courts, however, have reached a different conclusion. The Washington Supreme Court, for example, has stated broadly that "[t]he good faith duty between an insurer and an insured arises from a source akin to a fiduciary duty." *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wash.2d 122, 196 P.3d 664, 667 (2008). The court found that "[t]he duty of good faith is not specific to either of the main benefits of an insurance contract [*i.e.*, liability coverage and defense] but permeates the insurance arrangement." *Id.*

The "fiduciary exception" to the attorney-client privilege

A number of courts around the country have recognized a "fiduciary exception" to the attorney-client privilege. Under that exception, the beneficiary of a fiduciary relationship can gain access to communications between its fiduciary and the fiduciary's counsel, at least if there is good cause to do so. *See generally Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege*, 47 A.L.R.6th 255 (originally published in 2009).

One of the leading cases recognizing the exception, *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), explained the exception's rationale in the context of corporate management's fiduciary duty toward shareholders. The *Garner* court noted that "it must be borne in mind that management does not manage for itself and that the beneficiaries of its action are the stockholders…. There may be many situations in which the corporate entity or its management, or both, have interests adverse to those of some or all stockholders. But when all is said and done management is not managing for itself." *Id.* at 1101. The court found that both management and shareholders "have a mutuality of interest" in management's ability to "freely" seek legal advice, "[b]ut management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised." *Id.*

Other courts, however, have rejected the fiduciary exception and its underlying rationale. For example, in *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), the Texas Supreme Court held that a trustee could claim the attorney-client privilege in litigation with the trust beneficiary, notwithstanding the fiduciary relationship between them. The *Huie* court explained, "A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee's actions. Alternatively, trustees might feel compelled to blindly follow counsel's advice, ignoring their own judgment and experience." *Id.* at 924.

The state of the law in the Ninth Circuit is unclear. In *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981), the court acknowledged *Garner*'s holding, but, "[w]ithout passing on [its] merits[,]" found it "inapposite" to a non-derivative securities class action. While the Ninth Circuit has held that "the fiduciary exception applies generally in the ERISA context," *see, e.g.*, *Stephan v. Unum Life Ins. Co. of America*, 697 F.3d 917, 931 (9th Cir. 2012), neither the Ninth Circuit nor the District of Oregon has applied it in the context of other types of fiduciary relationships.

Application of the "fiduciary exception" to the insurer-insured relationship

Returning to the insurer-insured relationship, in *Cedell v. Farmers Ins. Co. of Washington*, 176 Wash.2d 686, 295 P.3d 239, 246 (2013), the Washington Supreme Court held that, because "an insurance company has a quasi-fiduciary duty to its insured[,]" a court must "start from the presumption that there is no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process, and that the attorney-client and work product privilege are generally not relevant." The court held, however, that "the insurer may overcome the presumption of discoverability by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead in providing the insurer with counsel as to its own potential liability; for example, whether or not coverage exists under the law." *Id.* In that event, an insurer can obtain an *in camera* review of the claims file and redact those portions that "reflect[ ] the mental impressions of the attorney to the insurance company, unless those mental impressions are directly at issue in its quasi-fiduciary responsibilities to its insured." *Id.*

The *Cedell* opinion has been subject to criticism by other courts. In *Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, No. C13–543RAJ, 2014 WL 6908512, at *4 (W.D. Wash. Dec. 8, 2014), the court observed that it was "aware of no state other than Washington that has declared the attorney-client privilege presumptively inapplicable in a bad faith claim from a first-party insured." In *Philadelphia Indem. Ins. Co. v. Olympia Early Learning Ctr.*, No. C12–5759 RBL, 2013 WL 3338503, at *3 (W.D. Wash. July 2, 2013), the court stated that *Cedell* "creates rather than alleviates confusion about what must be produced, and under what circumstances[,]" and in *MKB Constructors v. Am. Zurich Ins. Co.*, No. C13–0611JLR, 2014 WL 2526901, at *4 (W.D. Wash. May 27, 2014), the court similarly described *Cedell* as "inconsistent" and "unclear[.]"

Indeed, the *Cedell* opinion appears to conflate two separate issues: whether coverage counsel is essentially performing a non-legal function in investigating or adjusting the claim, and whether coverage counsel's communications with the insurer should nevertheless be accessible to the insured due to their "quasi-fiduciary" relationship. Some authorities have held that documents or communications reflecting an attorney's "*factual investigation* into whether the claim should be paid" are not privileged. Allen D. Windt, *Insurance Claims and Disputes* § 9:21, at 9-81 (6th ed.) (emphasis added; citation omitted); *cf. id.* at 9-79 n. 1 ("of course, [the attorney-client privilege exists] with respect to any counsel that the company might have hired on its own behalf to monitor the case"). In other words, "[c]laim file information is not protected by the attorney-client or attorney work product privilege simply because the in-house claims adjuster also happens to be a licensed

attorney." *Id.* However, it is generally recognized that "communications that reflect the requesting of, or rendering of, *legal advice* are protected by the attorney-client privilege." *Id.* (emphasis added).

In distinguishing between an attorney's performance of the "tasks of investigating and evaluating or processing the claim" and "providing the insurer with counsel as to…whether or not coverage exists under the law[,]" 295 P.3d at 246, the *Cedell* court appears to be drawing a distinction between legal and non-legal functions performed by an attorney. But of course, the line between "investigating and evaluating" a claim and providing legal advice on "whether or not coverage exists under the law" can be elusive, to say the least. Moreover, the *Cedell* court appears to suggest that, even if the attorney is providing advice concerning "whether or not coverage exists under the law[,]" the communication is nevertheless discoverable if the attorney's "mental impressions are directly at issue in [the insurer's] quasi-fiduciary responsibilities to its insured." *Id.* But when an attorney's coverage advice is "directly at issue" with respect to an insurer's "quasi-fiduciary responsibilities to its insured" in a coverage dispute is rather unclear.

Oregon's rejection of the "fiduciary exception"

Just last year, the Oregon Supreme Court declined to recognize a "fiduciary exception" to the attorney-client privilege under Oregon law. In *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or. 476, 493-94, 326 P.3d 1181 (2014), a client that had sued its attorneys for malpractice contended that, because those attorneys owed it a fiduciary duty as its counsel in the underlying lawsuit, the attorneys could not assert the attorney-client privilege with respect to communications with the firm's in-house counsel regarding the potential malpractice claim. The Court began its analysis by noting that the "fiduciary exception" to the attorney-client privilege is "a judicially created rule that originated in English trust cases in the mid- to late-nineteenth century" that had subsequently been adopted by some—but by no means all—American courts. *Id.* at 494-95. The Court observed, however, that most of the courts adopting the exception "are not governed by a legislatively adopted privilege[.]" *Id.* at 496. By contrast, OEC 503, the rule of evidence governing the attorney-client privilege in Oregon, "is a statute, enacted into law by the legislature. Accordingly, the scope of the privilege—as well as any exceptions to it—is a matter of legislative intent." *Id.* The Court concluded that, because OEC 503(4) specifically enumerates five exceptions to the attorney-client privilege, "the legislature fairly may be understood to have intended to imply that no others are to be recognized." *Id.* at 497. The Court found it immaterial that the communications at issue might actually violate the attorneys' ethical obligations to their clients, stating that, while "rules of professional conduct may require or prohibit certain conduct, and the breach of those rules may lead to disciplinary proceedings[,] …that has no bearing on the interpretation or application of a rule of evidence that clearly applies." *Id.* at 500-01. The Court therefore held that the "fiduciary exception" to the attorney-client privilege "does not exist in Oregon[.]" *Id.* at 501.

While *Crimson Trace* did not deal with the specific context of the insurer-insured relationship, its reasoning strongly suggests that Oregon courts would *not* require disclosure of an insurer's pre-denial communications with its coverage counsel in the scenario described at the outset of this article. Even if the insurer-insured relationship is in some respects "fiduciary" in nature, there is no "fiduciary exception" to the attorney-client privilege under Oregon law.

Moreover, under *Georgetown Realty* and *Ferris*, the fiduciary relationship between the insurer and the insured arises only with respect to the *defense* of the claim against the insured, not to the insurer's *coverage determination*. It would make little sense to require an insurer to disclose its communications with its coverage counsel on an issue where no fiduciary duty exists simply because the insurer owes a fiduciary duty to its insured in a separate aspect of their relationship.

Recently, the Oregon Supreme Court granted an alternative writ of mandamus in response to a petition challenging a trial court's order requiring an insurer to produce to its insured communications with its coverage counsel prior to its denial of coverage. *See Liberty Surplus Ins. Co. v. Seabold Constr. Co.*, No. S062915, Order Allowing Petition for Alternative Writ of Mandamus (Or. Sup. Ct. Apr. 9, 2015). (Full disclosure: my firm and I represented the insurer in that mandamus proceeding.) While the underlying case settled before the matter could be fully briefed and argued, the fact that the Court allowed the writ suggests that it at least harbored serious doubts about the viability of a "fiduciary exception" argument in the insurer-insured context.

Conclusion

Insurance coverage disputes can present difficult questions regarding the application of the attorney-client privilege. Whether an insurer owes a fiduciary duty to the insured in making its coverage determination, and the extent to which any such duty may vitiate the attorney-client privilege between the insurer and its coverage counsel, can vary significantly depending on what jurisdiction's law applies. While it is highly likely that the privilege can be maintained at least in Oregon courts, other jurisdictions, such as our neighbors to the north in Washington, may apply a different analysis that is less favorable to insurers.

Caveat Venditor: The Consequences of *Bagley v. Mt. Bachelor, Inc.* for Negligence Releases and Other Contract Provisions[1]

by Michael Willes, Tonkon Torp LLP

Michael Willes

Late last year, the Oregon Supreme Court significantly altered the doctrine of contractual unconscionability. In *Bagley v. Mt. Bachelor, Inc.*, the Court struck down Mt. Bachelor ski resort's anticipatory negligence release, which became the object of controversy following a patron's devastating injury. By consolidating consideration of procedural and substantive unconscionability into a single totality-of-the-circumstances analysis, the Court made enforcement of anticipatory negligence releases more challenging. Within the decision's reasoning lie lessons and questions about the constraints on contract formation and the Court's role in setting public policy.

Bagley arose out of a tragic accident that left a self-described expert snowboarder paralyzed. He alleged that the ski resort negligently built, maintained, and inspected the man-made jump from which he fell. Bagley had signed a season-pass agreement under circumstances familiar to most skiers and snowboarders—the resort offered use of its slopes, chair lifts, and other amenities at a given price, without negotiation of the terms set forth in its standard form contract. These terms included a release barring "any claim" for injury, "even if caused by negligence."[2] Some version of the subject language appeared on each of the resort's passes and lift terminals, meaning that Bagley could have seen the substance of that language over a hundred times before his life-altering accident.

The trial and appellate courts found the release decisive. The Supreme Court, on the other hand, invalidated the release as unconscionable.

As a question of law, unconscionability rests with the court.[3] And "in Oregon, as elsewhere," this question traditionally "ha[d] both a procedural and a substantive component" that courts considered separately.[4] Procedural unconscionability captures oppression and surprise in contract formation itself, which evokes images of terms discreetly submerged in a morass of fine print. But that perception is not sufficiently inclusive. Because it encompasses any form of unfairness before execution of the agreement, a better moniker for procedural unconscionability may be "ex ante unconscionability." Evidence on point includes disparity between the contracting parties' bargaining power, a factor that considers only status, not conduct. Likewise, evidence that the stronger party used take-it-or-leave-it bargaining tactics where no meaningful alternatives were available to the weaker party also signals defects,[5] when negotiating consumer contracts on an individual basis necessarily raises transaction costs. For Bagley's case, a broader understanding of procedural unconscionability proved crucial.

The substantive aspects of unconscionability focus on the results of the contract rather than its formation. Substantively unconscionable terms "unreasonably" favor the more powerful party or "otherwise contravene the public interest or public policy."[6] In other words, where enforcement of a term would produce unfairness characterized by "overly harsh" or "one-sided results" there is substantive unconscionability.[7]

Unconscionability had been in flux before *Bagley* came down. In a 2007 Court of Appeals decision, plaintiffs successfully challenged an arbitration rider to a predatory loan agreement they had signed. Evidence of both identified forms of unconscionability was present: The borrowers spoke no English and therefore could not understand that they had purportedly agreed to arbitrate disputes with their lender, who had inserted a provision into the form arbitration rider barring class arbitration.[8] Yet the court noted that strong evidence of procedural unconscionability "[b]y itself . . . would not necessarily render the arbitration rider unenforceable. Under Oregon law, . . . procedural unconscionability is relevant, but the emphasis is clearly on substantive unconscionability."[9] Moreover, only substantive unconscionability was "absolutely necessary."[10]

As recently as 2012, the Court of Appeals remarked that it had "not fully explained the interplay between the two identified unconscionability 'components.'"[11] But one thing was clear: Substance trumped process.[12]

The critical innovation in *Bagley* consists of fusing consideration of the substantive and procedural unconscionability "components" into a single analysis not bounded by strictly defined factors. The Supreme Court explicitly refused to determine whether one, the other, or both components of unconscionability are needed to invalidate a contract or its terms,[13] and instead established an all-encompassing standard:

> Nothing in our previous decisions suggests that any single factor takes precedence over the others or that the listed factors are exclusive. Rather, they indicate that a determination whether enforcement of an anticipatory release would violate public policy or be unconscionable must be based on the totality of the circumstances of a particular transaction. The analysis in that regard is guided, but not limited, by the factors that this court previously has identified; it is also informed by any other considerations that may be relevant, including societal expectations.[14]

This effectively lowers the unconscionability standard—or at minimum makes the outcome of the analysis more unpredictable—by throwing all indicia of unconscionability into a single hopper. It places greater emphasis on evidence of procedural unfairness, which is commonplace or inherent in contracts of adhesion, click-wrap agreements, and other consumers-corporation bargains.

In *Bagley* the Court considered the following factors to weigh against enforcement of the release:

1. Mt. Bachelor's comparative bargaining strength,

2. the take-it-or-leave-it proposition offered to patrons,
3. the "harshness" that enforcement of the waiver would entail, and
4. policy considerations favoring imposition of liability on businesses holding their premises out to the public.[15]

In favor of enforcement were:

1. the principles of freedom of contract and
2. the Court's acknowledgement that skiing and snowboarding pose inherent risk to participants.[16]

In the end, the Court did not maintain the traditional distinctions between procedure, substance, and public policy when it invalidated Mt. Bachelor's release: "Because the factors favoring enforcement of the release are outweighed by the countervailing considerations that we have identified, we conclude that enforcement of the release at issue in this case would be unconscionable."[17] Defense practitioners no doubt read that language and grimaced; advising clients is difficult enough when the courts have applied some rigor to their reasoning, but overlaying a balancing test on a totality-of-the-circumstances amalgamation of undefined factors exposes businesses to guesswork when they design the language and procedures for obtaining releases at the front end and potentially inconsistent enforcement when they get sued at the back end. Other things being equal, a release is least likely to hold together when its enforcement would be most useful precisely because of the harshness of the result.

What makes *Bagley* so interesting—and perhaps so consequential—is its potential effect on other similar releases as well as contract terms outside the negligence context. Anticipatory releases are ubiquitous. Indeed, the Court noted that it had enforced provisions similar to Mt. Bachelor's release with some frequency in the past.[18] But when considerations of procedural unconscionability stand on equal ground with substantive factors, large consumer-facing businesses will always have to defend their contract terms on the back foot. These types of defendants have systematically stronger bargaining positions than their customers and normally must engage in the take-it-or-leave-it bargaining that in part doomed Mt. Bachelor's release in *Bagley*.[19] The steep transaction costs under any other system would hardly be in the interest of the consuming public as a whole. And so, corporate defendants will begin from a position of weakness when their carefully crafted form contracts are challenged on unfairness grounds. Perhaps of greater concern to these defendants is their inability to cure procedural concerns by providing additional notice or especially clear information.[20] After all, *Bagley* was not a controversy over the plaintiff's understanding of the release but the effect that release would have on his claims coupled with his relatively weak bargaining position when agreeing to the terms.

On the other hand, *Bagley* seems particularly susceptible to the old saw that hard facts make bad law. The harshness at issue was the injury itself, not the contract term. Courts must measure unfairness at the time of contract formation,[21] yet it is doubtful that the Justices would have found Mt. Bachelor's waiver as "harsh" or "inequitable" had the plaintiff, say, broken his arm. Noticeably absent from the decision is any framework for gauging "harshness." Is it measured against the expectations of a typical person who has entered into the contract, the reasonable person who would consider exercising a right to sue for negligence, or some other counterfactual? Moreover, the analysis appears to be case specific—in *Bagley* the Court "beg[a]n with . . . whether enforcement of the release would cause a harsh and inequitable result to befall the releasing party" and jumped directly to the conclusion that the "plaintiff would not have been injured if defendant had exercised reasonable care in designing, constructing, maintaining, or inspecting the jump on which he was injured."[22] This is the traditional approach for analyzing complaints, taking for granted the veracity of the ultimate facts plaintiff has pleaded. However, this runs counter to the whole purpose of releases, which is to avoid having to argue over negligence issues in the first instance and thereby avoid the need to spread that cost to all consumers.

Critics can justifiably fault the Supreme Court for legislating from the bench. As the Court of Appeals noted, the political branches of Oregon's government supported limitations on ski resorts' negligence exposure.[23] The policy embodied in ORS 105.682 favors indemnification of landowners whose property is put to recreational uses, such as skiing. Further, ORS 30.970 and 30.975 acknowledge that the "inherent risks of skiing" include "conditions which are an integral part of the sport, such as . . . variations or steepness in terrain, snow or ice conditions, surface or subsurface conditions, . . . lift towers and other structures and their components." Despite legislative determinations that ski resorts are not responsible for insuring the risk of injury to their patrons, the Court held that "defendant alone can effectively spread the cost of guarding and insuring against such risks among its many patrons."[24] Out of this conflict of policies, however, the Court provided no rationale dictating which one should take precedence.

Bagley leaves open important questions: How broadly should one read it? Should it raise concerns only over insuring against catastrophic accidents, or does it mean something more? Recreational service providers like fitness facilities, climbing gyms, and resorts ignore *Bagley* at their own peril. But nearly every large consumer-facing business that makes sales in Oregon would be wise to consider the potential fallout, too. At its logical extreme, *Bagley* represents a limitation on the freedom of contract; at minimum, it threatens to open up new challenges to heretofore air-tight provisions across a wide variety of agreements. And the size and strength of the contracting parties may be as important as the fine print.

(Endnotes)

1 Special thanks to Scott Seidman for providing helpful comments during the drafting of this article.

2 *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 546 (2014).

3 *Best v. U.S. Nat'l Bank*, 303 Or 557, 560 (1987).

4 *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 562 (2007) (citing *W.L. May Co. v. Philco–Ford Corp.*, 273 Or 701, 707–08 (1975); *DEX Media, Inc. v. Nat'l Mgmt. Servs.*, 210 Or App 376, 387 n.4 (2007); *Carey v. Lincoln Loan Co.*, 203 Or App 399, 422–23 (2005)).

5 Richard A. Lord, 8 Williston on Contracts § 18.10, 91 (4th ed. 2010).

6 *Id.* The Court noted in *Bagley* that the parties' public-policy arguments had converged with their arguments on substantive unconscionability, obviating consideration of Bagley's standalone violation-of-public-policy argument. 72 Or at 554 & n.6. A timely example, which may illustrate the

error in subsuming public policy in the unconscionability analysis can be found in contracts for the purchase and sale of marijuana. Such a contract represents an affront to public policy, because it, at least nominally, violates federal drug statutes. Arguing that that contract is unconscionable by virtue of that violation, however, is risible. This would require the courts to divorce unconscionability from its relationship with extreme unfairness as opposed to simple illegality.

7 See *AT&T Mobility LLC v. Concepcion*, 131 SCt 1740, 1746 (2011).

8 210 Or App 553, 567; *see also Hatkoff v. Portland Adventist Med. Ctr.*, 252 Or App 210, 218 (2012) ("It is clear that, if a challenged provision is substantively unconscionable, it is unenforceable—regardless of whether it is procedurally unconscionable. Conversely, a contractual provision that is neither substantively nor procedurally unconscionable is enforceable. Our case law has not clarified the proper result when a court determines that the challenged provision is procedurally unconscionable but substantively fair.").

9 *Bagley*, 356 Or at 569.

10 *Id.* at 567.

11 *Hatkoff*, 252 Or App at 218. Mentioning "identified" components of unconscionability now seems quite prescient, because Bagley recognized that unfairness is not limited to these two criteria and may take a number of other forms that are germane to the analysis.

12 *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 567 (2007) ("Thus, both procedural and substantive unconscionability are relevant, although only substantive unconscionability is absolutely necessary.").

13 *Bagley*, 356 Or at 556 n.8 ("This court has not addressed that issue, and because, as explained below, we conclude that both procedural and substantive considerations support the conclusion that the release here is unconscionable, we do not decide that issue in this case.").

14 *Id.* at 560.

15 *Id.* at 570–71.

16 *Id.* at 572.

17 *Id.* at 573.

18 *Id.* at 570 (citing *K-Lines v. Roberts Motor Co.*, 273 Or 242, 249 (1975)).

19 *Id.* at 562 ("Simply put, plaintiff had no meaningful alternative to defendant's take-it-or-leave-it terms if he wanted to participate in downhill snowboarding.").

20 The Supreme Court did note the possibility of allowing a counterparty to "pay an additional fee for protection against defendant's negligence." *See Bagley*, at 562.

21 *Best v. U.S. Nat'l Bank*, 303 Or 557, 560 (1987).

22 *Bagley*, 356 Or at 565.

23 258 Or App at 410.

24 *Bagley*, 356 Or at 563.

When to "Break the Rules"

by William A. Barton, Barton Law Firm PC

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At my Advocacy Boot Camp we spend hours going over the standard do's and don'ts; yet, some of the best teaching on how to be a plaintiffs' jury trial lawyer occurs after hours over dinner or drinks. A common question involves exceptions to rules and when to break them. I'm going to stretch the topic a little and offer some alternatives to business as usual. You'll recognize some suggestions because, with the benefits of technology and insights from social sciences, many of yesterday's rules are being swallowed by today's exceptions. So, pour yourself a cup of coffee and draw close . . .

- Don't start your trial story at the time and date of the injury; instead, start your narrative long before the actual liability event occurred, thus showing the plaintiff was merely a statistic, an accident waiting to happen.
- Just because evidence is objectionable doesn't mean you should object. File aggressive pre-trial motions to identify what's going to be admissible, and then object in front of jurors only if the evidence hurts you. Ask for a continuing objection when necessary so you don't have to keep jumping up and down to protect your record.
- Don't speak "legalese" to jurors. Be bilingual: speak the King's English to the court, but talk plain English to the jury. Be "ABC," accurate, brief, and clear.
- Don't talk about liability and negligence; instead, characterize each allegation of fault as a choice.
- Don't make your case about the plaintiff; make it about the defendant(s) and their bad choices. Keeping the focus of judgment on the defendants and their later attempts to point out the plaintiff's shortcomings will cause them to appear opportunistic.
- Embrace your client's weaknesses. What is ostensibly a case deficiency can become a strength if you artfully argue the "as is" features of UCJI 70.06 "Previous Infirm Condition."
- Lawyers and judges think deductively but jurors think inductively. Legal training teaches us to proceed from the bottom up, from facts to a conclusion. Conversely, jurors start early forming quick impressions and then continually back-fill with facts to support their earlier conclusions. It's called the "confirmation" bias and is why first impressions matter. This means your jury selection, opening statement, and first witnesses are crucial. The jurors may not have made up their minds about who's going to win, but that doesn't mean they haven't made up their minds about who they want to win!
- Strategically list defendants in your case caption. Place the deep pocket front and center. It's easy for a target institution to hide if you place them last in a long line of defendants.
- Lawyers are inclined to be thorough and, thus, over-inclusive. Less is more; edit the clutter.
- Don't start your trial preparation at the beginning; instead, begin at the end with the jury instructions. The law is your case's legal road map and source of powerful case themes. The judge is your ally when she reads jury instructions that support your case to the jury. I prefer that the judge instruct the jurors before closing argument for this very reason. Also remember, ORCP 59-B requires that the judge provide written instructions to the jurors.
- Don't argue for justice; instead argue against injustice. Questions of justice invite contemplative responses;

however, we all instinctively sense injustice on a gut level.

- Don't argue that a verdict in your client's favor will improve health care or community safety. This suggests you're the one who's seeking change. Jurors resist changing the status quo. Instead, argue that it's the defendant who wants the change; the defendant seeks to reduce the standard of care, and thereby provide less protection for jurors and the community.
- Rarely should you make your case about the plaintiff's story. Why? Because, even though it may have been devastating to the plaintiff, it often isn't "big enough." Instead, tell the jury's story, but in the plaintiffs' voice.

There are three stories in every trial: the plaintiff's, the defendant's, and the jury's. Focus groups will help you identify and refine the dominant community narrative. The more the plaintiff's story is congruent with the jurors' story, the more they will naturally "recognize" the plaintiff's story and, thus, see themselves in the plaintiff's shoes. Once this happens a finding for the plaintiff becomes "common sense." This also turns your case into a de facto class action; the plaintiff's case becomes everybody's case.

- Most lawyers allow their feelings of countertransference (their emotions toward their clients) to trump their legal responsibilities as professionals. Being truly "client centered" is much more than just being loyal and devoted to your clients. It ultimately means preparing your client to be an effective witness and participant throughout the entire trial process.

Of course, every client wants your empathy and emotional support; however, as important as this is in gaining their trust, it's simply one step, and an early one at that. We all know litigation is stressful; that's not news. Use best practices to prepare and, thus, empower damaged clients to effectively participate and testify. This might include hiring trial consultants or another lawyer to prepare your clients for challenging cross-examination, thus assuring they will have the best chance of receiving just compensation.

It seems a cruel irony that victims who are the most fragile are least capable of standing up for themselves. It's your job as a plaintiffs' lawyer to prepare them, to empower them, and thereby see that wrongdoers aren't rewarded by injuring someone so badly that they later can't effectively participate in their legal and emotional recovery. Rather than seeking a monetary result that's "just and proper," I prefer to think in terms of maximum legal compensation.

During the first interview every client says they don't want what happened to them to happen to anyone else. The best way to honor their request is to get them all the money they deserve. Holding wrongful parties financially fully responsible generates maximum deterrence and therefore is the best guarantee this won't happen again. Significant verdicts and settlements assure that you're using the law as an instrument for positive community change and, therefore, are truly a social engineer or architect.

Breaking the Rules in Cross-Examination: Going Beyond the Ten Commandments and Jury Empowerment

In 1975 Irving Younger first published his Ten Commandments of Cross-examination.[1] They were the first systematic approach to cross-examination and remain the primer forty years later. Acquiring judgment that allows you to transcend Younger's Commandments and understanding the limits of many of his "rules" are two necessary further steps in pursuing excellence.

Younger's Ten Commandments are:

1. Be brief.
2. Ask short questions, use plain words.
3. Ask only leading questions.
4. Ask no question to which you don't know the answer.
5. Listen to the answers.
6. Don't quarrel with the witness.
7. Don't let the witness explain.
8. Don't go over direct examination.
9. Don't ask one question too many.
10. Save the explanation for final argument.

Let's survey some of the criticisms of the Commandments.[2]

Some have characterized the Commandments as a nice starting point, but only that. Others say breaking the rules is purely a "risk-reward" decision. Janis Joplin sang, "Freedom's just another word for nothing left to lose." If you're losing your case, and therefore have nothing to lose, consider ignoring the rules and going for broke. Thomas Mauet, author of *Trial Techniques*, 7th ed., frames cross-examination as "realistically attainable goals" rather than the application of rules. James Jeans, author of *Trial Advocacy*, 2nd edition states: "The Commandments are painting by the numbers. After that level, we need to do more than go outside a line now and then. We need to forget painting by the numbers and get more creative—to break out of stultifying rules. The whole thrust of the Commandments is 'Don't make an ass of yourself.' They are strictly defensive. And like the 'prevent' defense in football, they almost guarantee mediocrity."

As Michael Doyen points out in his essay "On Breaking Commandments":

> "[t]he . . . edifice was built on two premises: that 'competence' in cross-examination is a matter of sticking to the rules, and that mastery is a matter of ineffable instinct to which only the chosen may aspire.
>
> Both premises are false. Following the rules will not bring competence, and the achievements of the masters are within our common comprehension. The false premises reflect a deeper mistake: the attempt to understand cross-examination without regard for the larger strategies of the trial. Any such attempt is doomed.
>
> . . . Younger portrays cross-examination as a hustle: your job is to create the illusion that the witness lacks

a percipient basis for his testimony, and then, before the illusion is discovered, to sit down. But even as a confidence trick, this cross-examination is doomed. The illusion will be punctured by your adversary on re-direct. Sitting down at counsel table, as Younger recommends, is better than standing in the middle of the courtroom when the jury discovers your examination is a scam and you are a scoundrel; but beyond that, the 'stop and sit down' strategy has not much to recommend it."[3]

From the jurors' perspective it seems fair that witnesses should be able to explain their answers; after all, the witness oath was not just to tell the truth, but the whole truth.

There are additional reasons why Younger's Commandments aren't as effective today as they once were. The Commandments are all about the lawyer controlling the witness, and more judges are allowing witnesses to explain their answers. Why the change? In the 1960s and 70s, becoming a judge was seen as an honorable way to complete a career in the courtroom after a long and successful career as a jury trial lawyer. This isn't as true today. Many lawyers ascend to the bench at a much younger age with very few civil jury trials (at least as lead counsel). Some may have enjoyed long highly successful courtroom careers (in domestic relations, for example), but have little jury trial experience.

The limited number of civil jury trials results in a trial bench and bar with less and less civil jury trial experience. The less jury skill and trial experience judges accumulate during their careers, the less likely they will rein in non-responsive witnesses. It's my impression judges generally don't give cross-examining lawyers more witness control than the judge could marshal as a lawyer. In addition to judicial changes, Oregon courts now generate electronic records instead of using court reporters. This eliminates the lawyer's ability to have the court reporter "read my last question back."

My favorite writer on cross is the Hon. Herbert Stern. In *Trying Cases to Win* he strikes directly at the heart of Younger's rule to save the last point for closing:

"We have seen the advice to be fluid in opening and save the thrust for summation. We have seen the advice to avoid being too clear on direct, so that the jurors can come to their own conclusions, which will be more meaningful by dint of their own discoveries. And now, even on cross-examination, we are advised to withhold the punch, to save the point, to wait even now…for summation.

I suppose these commentators believe that summation is when the jurors will make up their minds. I do not. I believe the jurors have formed opinions early during opening. I believe that they are voting again on every question and answer during both direct and cross, and are trying their best to vote along the lines of their already-formed preferences and prejudices; and that by summation—in any trial of any length—they are so fixed in their views that they are past any fair votes on the advocate's offering: the jurors will instead struggle to deny the recollections of the testimony presented by attorneys whose view of the case they do not share, or rationalize away that which they cannot deny. In my view, trying a case to win it in summation is not the way to try it to win."[4]

Stern continues:

"Dishonest cross-examinations that dwell in half-truths and distortions should never be undertaken at the peril of the advocate's standing before the jury; while legitimate confrontations with adverse witnesses should never be avoided once the advocate has calculated the rules and laws of probability are favorable. The fact that the witness can make an answer does not require that he will be believed—but the avoidance of putting the question detracts from the believability of the advocate and hence his side of the case.

It is a hard lesson—but a valuable one. The mere fact that a witness presented with a question *may* be able to come up with *something* in the moment does not mean that the point has been lost, the cross-examination defeated. The point will be won *or* lost, the cross-examiner victorious *or* defeated, depending on how the jurors vote as they listen to the assertion in the question and the assertion in the answer. And that, after all, is what the trial is all about."[5]

My Jury Empowerment Model

The jury empowerment method allows you to effectively break the rules when the Commandments don't work. My trial philosophy is always jury oriented. Ask yourself: "Is there a way to shift punishment for witness non-compliance from the judge to the jury?" There are two ways to empower the jury to do what judges used to do.

1. Contrary to popular practice and belief, I submit you should never vanquish a witness on cross—no matter how justified it may be. When it feels like you can and should bury a witness, I say that's exactly when you must walk away. If the witness is a liar, and it's obvious, then you don't need to say it. If it's not obvious the witness has lied, then it's too risky. It's about that simple. It's proper during your closing to discuss any reasonable inferences that can be drawn from the evidence concerning a witness's credibility. I didn't say don't argue the evidence or inferences, I said discuss them. Avoid stating the ultimate conclusion that the witness has lied. This conclusion belongs to the jury. Judging is their job, not yours. As a lawyer it's okay for you to judge acts; however, leave judging people to the jury.

Gerry Spence says "Never vanquish a witness without the jury's permission."[6] I agree so far as the statement goes; however, I see it a bit differently. When the jury wants you to punish the witness, and thus gives you permission to do so, that's exactly when you should walk away. With jury empowerment you leave witness punishment to the jury; that's their job. They'll express their displeasure by the size of their verdict. Ask yourself: If you act as the jury's surrogate and destroy a witness, what's left for the jurors to do? Here's where your instincts can betray you . . .

2. Even a cursory review of Younger's Commandments reveals the rules are a system of techniques for maintaining

witness control. What's to be done if the judge doesn't allow you to acquire and maintain witness control? I say embrace the chaos and turn it to your advantage. Witness noncompliance is a gift, not a problem!

Think of cross specifically, and the trial generally, like the martial art of jujitsu. Turn the opponent's aggression to your advantage. Rise above the witness's noncompliance by remaining conspicuously respectful and professional. On destructive cross, comport yourself in a manner that favorably contrasts your professionalism with the witness's partisanship if the judge won't control an obviously biased witness.

On destructive cross, when witnesses respond to your questions with the non-responsive narrations other than the obvious "Yes" answer, they're revealing their partisanship and bias. I submit this is a gift; this is good! This approach is only as effective as the quality and delivery of your question.

Only ask short, simple questions that answer themselves with one word: yes. Here's an example: Isn't it true you only saw the plaintiff one time since the injury? Why? Because short, simple questions naturally invite short, simple answers. This is an opportunity for you to enhance your own stature and for the jury to punish recalcitrant witnesses by discounting their testimony. This can't and won't occur without brief, clear questions or "statements" that command obvious "yes" responses. Remember, you're testifying through the witness. Your behavior should clearly contrast with the witness's. Don't let there be any question about who's wearing the white hat or, at least, the whitest hat.

When a witness refuses to answer your question with the obvious "Yes," firmly but politely ask the exact question again. Repeat this cycle as necessary for the desired effect. Glancing at your watch adds to the effect. Later, during closing, you can argue the witness's obvious bias, interest, and motive. It's important to understand the witness is actually self-impeaching. The more a witness wanders from answering your narrow question with a "yes" or "no" answer, the more he self-discloses his partisanship.

If you have a judge who allows you to control witnesses, then do so. A judge instructing the witness to answer your question sets judicial expectations, which cues the jurors on how witnesses should behave. This is particularly true the closer you are to the end of a long day. A nice variation is to alternate using the judge to control some witnesses and the jury for others. Save the jury empowerment for your opponent's key witnesses. Let the judge set the cadence early by spanking the less important ones; leave the important ones for the jury.

Finally, every teacher of advocacy insists you are most persuasive when you are yourself, i.e., authentic. Beginners over-simplify and treat sincerity and spontaneity as synonyms. It seems odd to have to practice being natural; yet, when it comes to public speaking, it's essential. An example is when you prepare by writing a speech out so that when you deliver it you can step away from the podium, speak with no notes, and thus from your heart. It looks extemporaneous and, in a sense, it is but only because of your preparation.

Conclusion

"Breaking the rules" requires preparation, judgment, and the acceptance of some risk. Some of my suggestions are somewhat counter-intuitive and, like some martial arts, offensively use your opponents' aggression against them.

Pablo Picasso's father was an art instructor in realism. His precocious son soon mastered his father's craft, and then one day Picasso's dogs turned into sausages. Focusing on his new and creative results misses the years the student spent studying and learning the rules before he presumed to break them.

(Endnotes)

1 Irving Younger, "The Art of Cross-Examination," a speech given by Prof. Younger at the American Bar Association's Annual Meeting in Montreal, Canada on August 12, 1975.

2 McElhaney, James W., "Breaking the Rules of Cross: Fast Thinking Will Lift Inquiry Beyond Mediocrity." *Litigation: The Journal of the ABA Litigation Section*. April (1994): 96.

3 Michael R. Doyen, "On Breaking Commandments," 34 Litigation Magazine 3, Spring 2008, p. 1.

4 Stern, Herbert J., *Trying Cases to Win—Cross Examination*, 1993 Aspen Publishers/Wolters Kluwer, p. 226.

5 *Id.* at 229.

6 Spence, Gerry, *Win Your Case*, p. 64.

Recent Significant Oregon Cases

by Stephen K. Bushong,
Multnomah County Circuit Court

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Claims and Defenses

Eclectic Investment, LLC v. Patterson, 357 Or 25 (2015)

The plaintiff property owner hired a contractor to excavate the slope above a parking lot. About a year after the excavation, a rainstorm caused topsoil to wash off the slope, damaging plaintiff's property. Plaintiff sued the contractor for negligent excavation, and Jackson County for negligently approving the excavation. The county filed a cross-claim for common-law indemnity against the contractor; the parties agreed to sever that claim and address it after trial of the negligence claims. The jury found that plaintiff was more than 50 percent at fault, the county was 7 percent at fault, and the contractor was 4 percent at fault. The trial court then denied the county's indemnity claim. The county appealed, contending that the contractor was required to indemnify the county for its defense costs because the county's negligence was "passive" and the contractor's negligence was "active." The Supreme Court disagreed. The court explained that common-law indemnity "is a judicially created claim intended to equitably allocate liability among joint tortfeasors." 357 Or at 38. The court concluded

that "Oregon's comparative fault system eliminates the need for judicially created indemnity in situations such as this one—in which a defendant is liable, if at all, for only the damages that resulted from its own negligence[.]" *Id.*

Gonzalez v. Standard Tools and Equipment Co., 270 Or App 394 (2015)

Under the traditional rule of successor liability, where one corporation transfers its assets to another, the successor entity does not assume the liabilities of the transferor, except in limited circumstances. In *Gonzalez,* plaintiff argued that a new "product line" exception to the rule of successor liability should be recognized. Under the proposed exception, a successor entity could be liable in tort for defects in units of the same product line previously manufactured by the predecessor entity. The Court of Appeals declined to adopt this new exception, concluding that it "would require us to depart from the long-established rule and would 'risk potential conflict with the policies expressed by the legislature' with regard to products liability." 270 Or App at 398-99, quoting *Dahlke v. Cascade Acoustics, Inc.*, 216 Or App 27, 38 (2007).

Johnson v. Jones, 269 Or App 12 (2015)

The defendant in *Johnson* engaged in unprotected sexual intercourse with plaintiff without disclosing that he carries the herpes simplex virus. Plaintiff sued after she became infected with genital herpes, a sexually-transmitted infection (STI). A jury ruled in plaintiff's favor on her battery claim; on appeal, defendant contended that he was entitled to a directed verdict on that claim because plaintiff failed to prove that he intended to infect her with genital herpes. The Court of Appeals disagreed, concluding that "the requisite intent is the intent to subject another to offensive contact, regardless of whether that contact results in physical harm." 269 Or App at 13. The court acknowledged that, "until now, no Oregon appellate decision has addressed whether, or in what circumstances, engaging in sexual contact without disclosure of a known STI can give rise to liability for civil battery." *Id.* at 20. But the court concluded that such a holding was "unremarkable" and comports with holdings in other jurisdictions. *Id.*

Smith v. Providence Health & Services—Oregon, 270 Or App 325 (2015)

The plaintiff in *Smith* suffered a stroke and permanent brain damage. He brought a medical malpractice claim, alleging that defendants negligently failed to recognize and treat the early symptoms of a stroke before an MRI, taken 7 days after plaintiff first arrived at the hospital, revealed substantial brain damage from a stroke. Plaintiff alleged that, as a result of defendants' negligence, he "lost a chance for treatment which, 33 percent of the time, provides a much better outcome, with reduced or no stroke symptoms." 270 Or App at 328. The trial court dismissed the complaint; the Court of Appeals affirmed. The court concluded that "loss of chance is not a cognizable theory of relief at common law." *Id.* at 329. The court explained that plaintiff's allegations "do not assert that it is more likely than not that plaintiff would have had a better outcome with prompt and proper treatment for stroke." *Id.* at 332. Instead, the allegations "rely on speculation that plaintiff would have fallen within the fortunate minority of individuals who, with proper treatment, would have 'reduced or no stroke symptoms.'" *Id.*, quoting *Myers v. Dunscombe*, 64 Or App 722, 723 (1983).

Bridge City Fam. Med. Clinic v. Kent & Johnson, LLP, 270 Or App 115 (2015)

Vukanovich v. Kine, 268 Or App 623 (2015)

In *Bridge City,* the Court of Appeals held that a series of emails between the parties formed a binding agreement to settle the underlying lawsuit and mutually release their claims. The court explained that "the signing of the release was a condition precedent to the performance of the contract, not to the formation of the contract." 270 Or App at 124. In *Vukanovich,* the Court of Appeals held that the trial court erred in granting defendant's motion for a JNOV on plaintiff's breach of contract claim. The court explained that, from the evidence presented at trial, "the jury could permissibly find that plaintiff and defendant entered into a contract to buy the property together and that defendant breached the express terms of that contract when, after the bank accepted the parties' joint offer to purchase the property, . . . defendant refused to close on the purchase and subsequently repudiated the contract, even though defendant had the capacity to close" the transaction. 268 Or App at 637.

De Zafra v. Farmers Ins. Co., 270 Or App 77 (2015)

Deardorff v. Farnsworth, 268 Or App 844 (2015)

The plaintiff in *De Zafra* was the victim of a drive-by shooting. She sought uninsured motorist (UM) benefits from her insurer. The trial court granted the insurer's motion for summary judgment, concluding that plaintiff's injury did not "arise out of" the use of an uninsured vehicle within the meaning of ORS 742.504(1) and the policy. The Court of Appeals reversed, concluding that the statute "requires UM coverage when the injury arises out of the use of an uninsured vehicle and that coverage cannot be denied based on an interpretation that the gunshots were the 'direct cause' of injury." 270 Or App at 85. In *Deardorff,* the Court of Appeals held that "in the absence of an insurance agent's interpretation of an ambiguous policy provision[,] estoppel cannot be used to negate an express exclusion in an insurance policy." 268 Or App at 853.

Turner v. Dept. of Transportation, 270 Or App 353 (2015)

The plaintiff in *Turner* was injured in a motorcycle accident; he sued the driver of the car that hit him, and the state, county, and city for negligently designing and maintaining the intersection. The trial court granted summary judgment in favor of the governmental entities, concluding that the claims were barred by the statute of limitations in the Oregon Tort Claims Act (OTCA) and by discretionary immunity under ORS 30.265(6)(c). The Court of Appeals affirmed on the county's discretionary immunity, but concluded that "issues of fact on the accrual of the period of limitations and the existence or extent of any discretionary immunity preclude entry of summary judgment in favor of the state and city." 270 Or App at 355.

Dunn v. City of Milwaukie, 270 Or App 478 (2015)

The plaintiff in *Dunn* sued the City of Milwaukie for inverse condemnation after the city's high-pressure sewer line cleaning caused sewer water to back up through plaintiff's toilets and bathroom fixtures. The Court of Appeals concluded that the claim was barred by plaintiff's failure to give the city notice within 180 days as required by the OTCA, ORS 30.275. The court explained that "plaintiff was aware of the three elements necessary to trigger the 180-day notice period—harm, causation, and tortious conduct—as of the date of the wastewater incident in August 2005, and her notice to the city, which was provided more than 180 days later, was untimely." 270 Or App at 488.

Harkness v. Platten, 270 Or App 260 (2015)

In the case underlying this legal malpractice action, plaintiffs sued an individual, Joanne Kantor (Kantor) and her successive employers, Sunset Mortgage Company (Sunset) and Directors Mortgage, Inc. (Directors). Plaintiffs alleged that Kantor induced them to borrow money from Sunset and Directors for investment in private, hard-money loans that were supposed to have been secured. Plaintiffs settled those claims for $600,000, an amount significantly less than their damages. In the malpractice action, plaintiffs alleged that defendant's negligence caused them to settle their underlying claim for less than they would have received if they had proceeded to trial. The trial court granted a directed verdict in defendant's favor, concluding that plaintiffs would not have prevailed on the underlying claims against Sunset or Directors because they failed to present evidence that Kantor had apparent authority from those companies to engage in the hard-money loan investment scheme. The Court of Appeals affirmed. The court explained that the "touchstone for apparent authority is that the principal must be responsible for the information that leads a third party to reasonably believe that the principal consents to the agent's acts." 270 Or App at 269-70. In this case, plaintiffs "did not put on sufficient evidence of apparent authority to survive defendant's directed verdict motion." *Id.* at 272.

WSB Investments, LLC v. Pronghorn Devel. Co., LLC, 269 Or App 342 (2015)

Plaintiff, the owner of an interest in a timeshare unit at a condominium association, sued the uncompensated members of the developer's board of directors for breach of fiduciary duty and other claims. The trial court granted defendants' motion for summary judgment, concluding that defendants' actions did not constitute "gross negligence" as required by ORS 65.369. The Court of Appeals affirmed on claims other than breach of fiduciary duty. With respect to the breach of fiduciary duty claim, the court reversed as to five specific allegations of breach, and otherwise affirmed. The court explained that (1) "gross negligence" within the meaning of the statute "generally means negligence characterized by near total disregard or indifference to the rights of others or the probable consequences of a course of conduct" (269 Or App at 360); (2) when assessing whether a director's breach of a statutory duty resulted from the director's gross negligence, courts "must identify which of the director's statutory duties is implicated by the director's conduct" (*Id.*); (3) "a director's statutory duties under ORS 65.357 will generally encompass the duty to act in accordance with governing corporate documents" (*Id.* at 362); and (4) "evidence that a director has disregarded his or her unambiguous obligations under the corporation's governing documents may be sufficient to support a finding that the director's breach of any of those duties was the product of gross negligence." *Id.*

Leonard v. Moran Foods, Inc., 269 Or App 112 (2015)

While driving on the job, defendant Feliciano's car struck and killed plaintiff's daughter (Leonard) as she was crossing the road in a marked but faded crosswalk under a streetlight that was not working. Plaintiff sued, among others, the City of Portland for negligently maintaining the crosswalk. The trial court granted the city's motion for summary judgment; at trial against the remaining defendants, the jury found that Leonard was 51 percent at fault, so the trial court entered judgment in favor of all defendants. The Court of Appeals reversed the summary judgment as to the city, and remanded for a new trial. The court explained that the evidence in the summary judgment record would permit a reasonable factfinder to find that (1) "Feliciano was looking in the direction of the crosswalk as he approached the intersection" (269 Or App at 125); (2) "the crosswalk markings in the westbound lanes were faded to varying degrees, effectively creating a visual 'dark zone'" (*Id.*); (3) "although there is no direct evidence that Leonard was located in the 'dark zone' when she was struck by Feliciano's vehicle, that would be a rational inference" (*Id.* at 126); and (4) a reasonable factfinder "could infer that, had the crosswalk markings been properly maintained, thereby eliminating the 'dark zone,' Feliciano more likely than not would have been able to see Leonard . . . enabling him to take steps to avert the collision or to minimize harm from the collision." *Id.*

Grants Pass Imaging & Diagnostic Center v. Marchini, 270 Or App 127 (2015)

Toohey v. Aviation Adventurers, LLC, 269 Or App 416 (2015)

Htaike v. Sein, 269 Or App 284 (2015)

In *Grants Pass Imaging*, the Court of Appeals held that the term "member" as used in a non-compete clause of an LLC's operating agreement "was not ambiguous and means only an active or current member of the LLC, not a former member." 270 Or App at 129. In *Toohey*, the Court of Appeals held that wrongful death claims brought by the estate and heirs of a man killed in a plane crash were barred by the exclusive-remedy provision in Oregon's Workers' Compensation Law. The court affirmed the trial court's conclusion that the decedent and the pilot were "acting in the course of their employment at the time of the crash and that Toohey's injury arose out of that employment." 269 Or App at 418. In *Htaike*, the Court of Appeals held that the trial court erred in applying the "accrual rule" in holding that plaintiffs' ORICO claims were barred by the statute of limitations in ORS 166.725(11)(a). The court explained that the statute "plainly provides that an action can be brought within five years of the last act that violated ORICO." 269 Or App at 302.

Bernard v. S.B. Inc., 270 Or App 710 (2015)

DeHarpport v. Johnson, 270 Or App 681 (2015)

The plaintiff in *Bernard* sued her former employer for intentional interference with economic relations (IIER), alleging that defendant had threatened to enforce an invalid noncompetition agreement. The Court of Appeals held that the trial court properly granted summary judgment to defendant because (1) a party invoking the express terms of a contract has a legitimate purpose and cannot be liable for IIER (270 Or App at 715); and (2) the noncompetition agreement was voidable under ORS 653.295, and plaintiff's "failure to show that she took any steps to void" the agreement precludes her claim. *Id.* at 719. In *DeHarpport*, the Court of Appeals held that the trial court erred in granting summary judgment to defendant on a claim for wrongful initiation of civil proceedings. The court concluded that the summary judgment record did not contain evidence establishing that defendant had probable cause as a matter of law to initiate, without malice, an abuse prevention restraining order proceeding against plaintiff, as required to defeat plaintiff's claim. 270 Or App at 688.

Procedure

Towe v. Sacagawea, Inc., 357 Or 74 (2015)

Plaintiff was injured when his motorcycle hit a cable stretched across a private access road to prevent entrance to a quarry at the end of the road. Plaintiff brought negligence claims against the quarry's owner (Mountain View) for placing the cable, and against a real estate company, Re/Max Ideal Properties,, Inc. (Re/Max), for leaving a directional "for sale" sign at the road's entrance. The trial court granted summary judgment for defendants, concluding that plaintiff was responsible for his injuries. The Supreme Court affirmed in part and reversed in part. The court concluded that the trial court erred in granting summary judgment to both defendants on the ground that plaintiff was the sole cause of his injuries. The court explained: "Although a jury could conclude on this record that plaintiff was not riding his motorcycle as safely as he could have or should have, the nature of his conduct was not such that the only reasonable conclusion is that plaintiff would have driven into the cable despite any negligence on either Mountain View's or Re/Max's part." 357 Or at 108-09. However, the court concluded that Re/Max was entitled to summary judgment on the alternative ground of lack of evidence of cause-in-fact, because no reasonable juror could find "that Re/Max's conduct in leaving its directional sign on the entrance to the access road. . . actually caused plaintiff to travel up the access road, be distracted, and ride into the cable." *Id.* at 109. The court further concluded that Mountain View was not entitled to summary judgment on the theory that plaintiff was a trespasser to whom Mountain View owed only a narrow duty to avoid wanton conduct. The court explained that a disputed factual issue exists as to whether portions of the access road were open for public use. Finally, the court concluded that Mountain View was not entitled to summary judgment on the ground that plaintiff was comparatively more negligent, because that determination "is ordinarily one for the jury." *Id.* at 110.

Hinchman v. UC Market, LLC, 270 Or App 561 (2015)

Plaintiff was injured when she tripped over a floor mat located at the exterior doorway of defendant's convenience store after high winds caused the floor mat to fold over. The trial court granted defendant's motion for summary judgment, concluding that plaintiff's ORCP 47 E affidavit was insufficient to create an issue of fact as to whether defendant knew or should have known of the hazard. The Court of Appeals reversed. The court concluded that the ORCP 47 E affidavit was sufficient to avoid summary judgment because (1) the evidence would "permit a factfinder to find or infer that the floor mat was lightweight, placed outdoors and unsecured" (270 Or App at 574); and (2) having proved those predicate facts, plaintiff could prove "that defendant was negligent in selecting, locating, and failing to secure the floor mat through expert testimony regarding industry standards for safe floor mat use." *Id.*

Teegarden v. Oregon Youth Authority, 270 Or App 373 (2015)

Plaintiff filed claims against his former employer, the Oregon Youth Authority (OYA). The trial court granted OYA's motion for judgment on the pleadings under ORCP 21 B, concluding that the parties had resolved their dispute through a settlement agreement. The Court of Appeals reversed. The court concluded that OYA was not entitled to prevail as a matter of law "on the issues of (1) the enforceability of the release or (2) whether the release precluded plaintiff's malicious prosecution and intentional interference claims." 270 Or App at 384. The court further concluded that the trial court erred in dismissing the declaratory judgment claim. The court explained that, "because there was a justiciable controversy, the court could dispose of the claim for declaratory relief only by entering a judgment containing a declaration regarding the validity and enforceability of the agreement." *Id.* at 385.

Couch Investments, LLC v. Peverieri, 270 Or App 233 (2015)

The plaintiff in *Couch Investments* operated a gas station on defendants' property under the terms of a long-term lease. A dispute arose that was resolved through arbitration under the terms of the lease. The arbitrator ruled that the defendant landlords were liable under the terms of the lease for the cost of storm water drainage improvements ordered by the Department of Environmental Quality. The landlords moved to vacate the arbitration award, contending that the arbitrator exceeded his authority. The trial court denied the motion; the Court of Appeals affirmed. The court concluded that the remedies ordered by the arbitrator were within his powers "as derived from the parties' stipulation and ORS 36.695(3)." 270 Or App at 244.

Miscellaneous

Moro v. State of Oregon, 357 Or 167 (2015)

Petitioners alleged that legislative amendments to the Public Employee Retirement System (PERS) adopted in 2013 in an effort to reduce the cost of retirement benefits

unconstitutionally impaired public employees' contract rights. The Supreme Court held that two legislative changes—ending income tax offset payments to nonresident retirees, and making prospective changes to the cost-of-living adjustments (COLA)—did not unconstitutionally impair any contract rights. The court further held that, under *Strunk v. PERB*, 338 Or 145 (2005), applying the COLA changes retrospectively to retirement benefits earned before the effective dates of the 2013 legislation unconstitutionally impaired public employees' contracts.

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