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In This Issue...

2005 Owen M. Panner Professionalism Award

Don Bowerman is truly a role model for other attorneys, particularly younger attorneys.

Don Bowerman has always encouraged new lawyers and lawyers new to Clackamas County to join and participate in the local Bar Association. Mr. Bowerman takes the time to meet these new lawyers and he will introduce them to other lawyers and the judges in the County. He makes them feel welcome, and acts as a resource on practical issues before the court. All one has to do is ask.

Donald B. Bowerman (left) with Owen M. Panner

As a litigation lawyer, his number one goal is the efficient resolution of disputes. Mr. Bowerman works very hard to reach an appropriate settlement, and like most excellent lawyers, he settles most of his cases. When he is involved in cases that cannot be settled, Mr. Bowerman is a capable and thorough advocate for his clients. He remains truly "professional" throughout the process, as he treats all participants with respect.

Mr. Bowerman exemplifies the Oregon State Bar's Statement of Professionalism— in particular, that portion of the Statement that "[p]rofessionalism fosters respect and trust among lawyers and between lawyers and the public, promotes the efficient resolution of disputes, simplifies transactions, and makes the practice of law more enjoyable and satisfying."

The Clackamas County Bar Association solicited and received many, many testimonials on Mr. Bowerman's qualifications for this prestigious award. Perhaps the one submitted by Judge Patrick D. Gilroy, retired, said it best:

"I have watched Don [Bowerman] grow over time, both personally and professionally – for the past 30 years from my perch as a Circuit Court Judge. He has become one of the most respected lawyers in the State of Oregon. He has served his profession tirelessly through countless committees, the Professional Liability Fund, the Board of Governors and as Vice President of the Oregon State Bar. He sits regularly throughout the state as a Pro Tem Circuit Judge. Nothing happens in Clackamas County that is not first run by Don Bowerman, including court construction and selection of Judges. He is our local 'all-star' whom we wish all lawyers would emulate. Don Bowerman could be the 'poster boy' for this award." ❐

Winning Their Hearts

Comments From the Editor

Dennis P. Rawlinson
Miller Nash LLP

Many believe that Cicero was one of the finest trial lawyers who ever lived. Cicero published six principles of persuasion, the first and foremost of which recognized the need to "move the mind and the heart" of the person or of the audience you are trying to persuade. In other words, in order to persuade, you need to provide not only logic (appealing to the mind) but also emotion (appealing to the heart). Your call to action should be not only reasonable but also emotionally compelling.

So how does one move the heart of a judge? Of a panel of arbiters? Of 14 jurors and 2 alternates?

1. Verbal Analogies.

We know as trial lawyers that one of our objectives is to boil down our case into a simple theme and to be able to explain our case in a single sentence. This is a skill that requires practice, energy, and thoughtfulness. For example, Michael Tigar (who defended Terry Nichols in the federally prosecuted Oklahoma bombing case) summed up his defense of Nichols in a single sentence:

"Terry Nichols was building a life, not a bomb."

Tigar's skill in creating a simple theme that was easy to remember may have had a lot to do with Terry Nichols' receiving a life sentence rather than death like his co-conspirator, Timothy McVey.

The masters, however, encourage us not only to reduce our case into a simple theme and explain our client's position in a single sentence but to reduce it to a verbal analogy. A verbal analogy is simply explaining our case using a simple, everyday occurrence that everyone can understand. The masters not only make the verbal analogy understandable but also often enhance it with an "emotional anchor." This is often done by using poetry or an excerpt from literature, history, or the Bible. For whatever reason, when we explain our case in terms of a verbal analogy that strikes a chord of familiarity through the use of a recognizable excerpt from literature, it creates a subliminal emotional impact.

The best trial lawyers realize that they can achieve Cicero's objective of moving the mind and the heart of the fact-finder by not only creating a logically compelling case but summarizing it with a verbal analogy from literature that makes it memorable and compelling.

For instance:

- "You never know how sweet the water is until the well goes dry." (A possible verbal analogy for a personal-injury case.)
- "A man's word is his bond." (A possible verbal analogy for breach-of-contract case.)
- "When the feeding bin is empty, horses begin biting each other." (A possible verbal analogy for a plaintiff against cross-claiming defendants.)

The best trial lawyers often regularly read great literature (poetry, proverbs, and famous quotations), equipping them, through the magic of a verbal analogy, to move not only the minds but also the hearts of those whom they are attempting to persuade.

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2. Visual Analogy.

An equally powerful means of emotional persuasion is the visual analogy: a simple word picture or demonstration showing that the logic you have applied to the evidence applies to the physics of everyday life and is consistent with common sense and experience.

A visual analogy can be created by a word picture drawn from experience as a youngster.

> "When I was a kid, I used to like to make peanut butter and sugar sandwiches for myself. I'd take a fresh piece of white Wonder Bread. I'd dig a butter knife deep into the soft goo of the peanut butter, spread the peanut butter on the bread, and then sprinkle it with sugar.
>
> "By the time my mother got home, I had eaten the sandwich. I had put everything away. And yet she always knew when I'd had a peanut butter and sugar sandwich. How did she know?
>
> "As a youngster, I never could figure out how she knew. Today, I realize it was the sugar granules. Try as I might to be careful, I would inevitably spill some sugar granules on the counter or on the floor. Those few granules made my activity just as obvious as if I had left the bread, knife, peanut butter jar, and sugar bowl on the counter.
>
> "The evidence in this case is applied in the same way. The defendant did not sign a letter saying that he was guilty. The defendant did not come before you and admit that he had caused damage and should be liable. But the circumstantial evidence,

> just like the granules of sugar, make the defendant's liability obvious, undeniable, and unavoidable."

Visual analogies can also be created by simple physical items that are available in a courtroom. For instance, in a recent case, defendants argued that their clients met the standard of care if the water-resistant barrier on the exterior surfaces of the building exposed to bad weather was 99 percent complete. After all (it was argued), the construction had occurred in a small bedroom community where subcontractors are held to a lower standard.

A simple styrofoam cup can demonstrate the error of such an argument by way of visual analogy. Take a pencil and poke a hole in the styrofoam cup. Then argue:

> "Defendants claim that the standard of care in placing building paper on buildings in this rural community is to use it on 99 percent of the exterior walls. Stop and think about that.
>
> "This is not a game of horseshoes. Close doesn't count; it isn't enough.
>
> "Take, for instance, this simple styrofoam cup. I poke a small hole in it with a pointed end of a pencil. It is now not only 99 percent complete but probably 99.9 percent complete. And yet, what's going to happen when I fill the cup with water?
>
> "The standard of care cannot be 'if the job is 99 percent done, it is good enough.' Just like the styrofoam cup, defendants' arguments don't hold water."

Visual analogies can also be used to impeach a witness based on time or distance. Often, when testifying about how much time went by before an accident occurred, witnesses exaggerate or miscalculate how long "20 seconds can be." A skillful trial lawyer can demonstrate how long 20 seconds can be by simply forcing the jury to listen and sit still in silence for 20 seconds. In the courtroom, 20 seconds of silence can seem like an eternity.

3. Observations.

Most of us went to good law schools, worked hard, and got good grades. Our backgrounds arm us to come up with logically persuasive arguments for trial.

But the masters realize, as Cicero did, that logic needs to be combined with emotion to reach the highest level of persuasion. Verbal analogies and visual analogies are powerful tools in reaching this level. Consider creating an inventory of proverbs, poems, and quotations to use as verbal analogies in your cases. Consider whether your case or some aspect of it can be reduced to a common, everyday experience that you can share with the jury through a demonstration or word picture.

In my experience, those who succeed stand out from the rest of us. ❐

Pretrial Professionalism in Oregon

A Summary of the American College of Trial Lawyers Code of Pretrial Conduct

By Thomas L. Hutchinson & Stephen F. English

Many of us have had the opportunity to litigate against attorneys from other parts of the country, particularly from either the East Coast or California. These experiences have brought home to me the striking difference between the collegiality and professionalism enjoyed by and among lawyers in our profession in Oregon and those from other jurisdictions. As more and more cases involve lawyers from out of this jurisdiction, we need to, whether in our role as adverse counsel or local counsel, educate and familiarize them with our high standards of professionalism, courtesy to one another, and collegiality. Not only we as members of the Bar, but also our judiciary and our clients have an interest in keeping practice in Oregon at high levels of professionalism.

Thomas Hutchinson

Stephen English

Many of you have heard Judge Mike King talk to us about rules of pretrial conduct promulgated by the American College of Trial Lawyers which provide practical applications of professionalism for use by lawyers in their everyday pretrial and trial conduct and dealings with opposing counsel. At the time of the publication of this article, a committee of our federal Bar is reviewing and considering formally referencing these rules in our local Oregon federal practice. The rules are worth reviewing because, whether they are formally referenced or not, they provide a handy application of professionalism in practice.

The American College of Trial Lawyers Code of Pretrial Conduct, *available at* http://www.actl.com/PDFs/USCodesofPreTrialandTrialConduct.pdf, was adopted in 2002 as a companion to American College of Trial Lawyers Code of Trial Conduct adopted in 1956. A summary of some of the key Standards for Pretrial Conduct follow:

1. Scheduling:

All reasonable requests for accommodations of witnesses and lawyers should be made and last minute requests should be avoided. Prompt notice and reasons should be provided for rescheduling and recipient of request should strive to accommodate. The lawyer requesting rescheduling should be responsible for giving notice. All reasonable requests for extensions should be explained and granted.

2. Service of Process and Pleadings:

The method of service should not create a disadvantage or embarrassment and should be the same for all recipients. Even if technically in compliance with rules, service should not be made late in the day, shortly before a hearing, or at another time that does not afford the opponent adequate time to respond.

3. Written Submissions to the Court:

Briefs and memoranda should not refer to facts that are not part of the record, nor should they disparage the integrity, intelligence, morals, ethics or personal behavior of an adversary. Any highlighting should be on all copies.

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4. Communication with Adversaries:

Lawyers should maintain appropriate standards of civility and decorum and should not reflect ill feelings that clients may have toward their adversaries. Lawyers should treat all involved in litigation courteously in all communications and should refrain from manifestation of bias or prejudice. Letters intended only to make a record should be used sparingly and should not be written to ascribe an adverse party's position that has not been taken or to make a record of events that have not occurred. Letters between counsel should not be sent to judges. Lawyers should strictly adhere to all promises and agreements with opposing counsel whether oral or in writing. Lawyers should agree to reasonable requests for waiver of procedural formalities.

5. Discovery Practice:

Lawyers' conduct should be honest, fair and courteous. Lawyers should follow all applicable rules in drafting and responding to discovery and conducting depositions. Lawyers should respond in a reasonable manner and should not interpret requests in a strained or unduly restrictive way in an effort to conceal relevant, non-privileged information. Objections should be in good faith and adequately explained and limited. Lawyers should refrain from filing motions to compel or for sanctions unless they have genuinely tried to resolve the dispute through all reasonable avenues. Interrogatories and requests for documents should be carefully tailored to ellicit information relevant to the pending case. Objections should not be made solely to avoid producing relevant documents or information. If part of a question is objectionable, then the remainder should be responded to. All reasonable accommodations should be made for review and copying of documents by opposing counsel, and documents should never be arranged in a manner calculated to hide

or obscure the existence of particular documents or discoverable information.

Depositions should be limited to those necessary to develop claims or defenses or to perpetuate testimony. Lawyers should arrive punctually or provide prompt notice of and reasons for any delay. Notice and reasons of any cancellation should be provided as soon as possible and canceling lawyers should seek to reschedule to minimize inconvenience. Lawyers should strictly limit objections only to preserve the record or assert privilege. Objections should not be used to obstruct questioning, improperly communicate with witness or disrupt the search for facts germane to the case. A lawyer is justified in setting a deposition without agreement from opposing counsel only: if opposing counsel fails to accept or reject time offered; if opposing counsel raises an unreasonable number of conflicts; if opposing counsel consistently fails to comply with standards for pretrial conduct; or under extraordinary circumstances.

6. Motion Practice:

All reasonable efforts should be made to resolve the issue without involving the court. If no valid objections exist, position should be promptly made known to opposing party. If, after opposing a motion, a lawyer recognizes the movant's position is correct, lawyer should promptly advise opposing counsel and court. Lawyer charged with preparing a proposed order should draft it promptly, fairly and accurately. A copy of the proposed order should be provided to opposing counsel no later than the day following the hearing, and any objection should be promptly voiced.

7. Communication with Nonparty Witness:

A lawyer must be truthful with facts and law and disclose his or her role in the pending matter, correct any express misunderstanding, and avoid unnecessary burdening of the nonparty. If the lawyer knows nonparty is represented, lawyer should not contact witness without permission from counsel. Lawyer should scrupulously follow rules of jurisdiction governing conduct with nonparty witnesses that are employees or agents of an organization represented by counsel in the pending matter. Lawyer should not obstruct another party's access to a nonparty witness or induce a nonparty witness to evade or ignore process. Subpoenas should not be issued except to compel appearance for a proper purpose. All counsel should be sent subpoena and notice for deposition of nonparty witness. Lawyer should provide all counsel documents obtained through deposition subpoena even if deposition cancelled or adjourned after documents are produced.

8. Communication with the Court:

When a lawyer informally communicates with the court, the highest degree of professionalism is demanded. Communications on subject matters that could reasonably be perceived as substan-

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tive must be avoided. Even if applicable law permits ex parte communication with the court, a lawyer should promptly and diligently attempt to notify opposing counsel or the opposing party unless there is a bona fide emergency. Lawyers should provide opposing counsel copies of all written communications and notify opposing counsel of all oral communications related to a pending case. A lawyer should never exhibit inappropriate informality with a presiding judge. A lawyer should avoid taking any action that appears to be calculated to gain any special personal consideration.

9. Settlement and Alternative Dispute Resolution:

A lawyer should educate clients early in the process about methods of resolving disputes without trial, including mediation and arbitration. Lawyers should advise clients of the benefits of settlement and should work to formulate a settlement strategy designed to accomplish client's realistic goals. As early as possible, lawyers should provide client with realistic assessment of potential outcome and should revise the assessment as necessary. When enough is known about the case to make settlement negotiations meaningful, lawyer should explore settlement with client and opposing counsel. Throughout the representation of a client, lawyer should pursue possibility of settlement. Lawyer should negotiate in good faith and recommend reasonable compromises consistent with client's best interest. When requested by opposing counsel and authorized by the client, lawyers should informally provide documents that will promote and expedite settlement efforts. Lawyers should never make proposals designed to antagonize or polarize the parties. Lawyers should never engage in negotiations to delay discovery or gain an unfair advantage.

10. Pretrial Conferences:

Lawyers should comply with order setting pretrial deadlines and complete any required statement in full seeking to reach agreement with opposing counsel to limit issues to be addressed during trial. Prior to the pretrial conference it is desirable for discovery to be complete, responses to be supplemented, exhibits to be furnished and settlement negotiations exhausted. Lawyers should determine trial judge's customs and practices and should consult and comply with all of the local rules and requirements of the trial judge. Prior to the conference a lawyer should ascertain client's willingness to participate in mediation. Pretrial conferences should be attended by trial lawyer who should be thoroughly familiar with each aspect of the case.

11. Communication with Consultants and Expert Witnesses:

Lawyers should be familiar with the rules for qualification of experts and should provide the experts with information believed to be relevant and material. Retained experts should be fairly compensated but a lawyer must not make compensation contingent in any way upon the substance of the expert's opinion or upon the outcome of the matter for which the expert has been retained.

12. Scope of the Code of Pretrial Conduct:

Code is intended to provide guidance except to the extent rules of professional conduct of a particular jurisdiction require or permit otherwise. It does not give rise to any claim or create a presumption that a legal duty has been breached.[1]

(Footnote)

[1] A United States District Court decision recently quoted from the Code of Pretrial Conduct in sanctioning a trial attorney for failing to make himself available to two telephonic pretrial conferences. *In re Ruiz*, 2004 WL 2732247 (Bankr WD Ky 2004). In its "conclusion of law" the court recognized that the American College of Trial Lawyers suggest "several minimum standards for lawyers' pretrial conduct," which plaintiff's counsel had failed to meet in the following manner: (1) not reading and complying with an order scheduling a conference; (2) not determining, in advance of a pretrial conference, the trial judge's custom and practice in conducting such conferences; (3) not attending a pretrial conference; (4) not having an attorney who will try the case or is familiar with the case attend the pretrial conference; and (5) not alerting the court of scheduling conflicts as soon as is practicable. The *Ruiz* decision indicates that at least some courts will look to the Pretrial Code when examining an attorney's ethics and professional responsibility in handling a client's case. ❐

Practical Advice & Inexpensive Sources for Legal Research

By Angela A. Hodge, J.D., M.L.S.

Information professionals possess many tips and tools which can be utilized by all legal researchers. While not intended to be exhaustive, this article gives professional legal research strategies and lists reputable sources for legal research sites.

Angela Hodge

I. Start at the Beginning

Take a moment and think about your strategy. You wouldn't show up in court and argue a case without first planning your strategy, would you? In addition, having an idea about what is the "best" source for the information you're seeking, whether print or online, is key. Launching into a research project without taking a minute to think about what you want to know and where the information might be found is also a recipe for stress – at least. Here are some basic questions to assist in figuring out where to start:

Are you only interested in primary sources (cases, statutes, and regulations) or would a secondary source (someone else's opinion on the law) be more useful to you right now? How do you know? Think about this - if you're the type of person who likes to approach issues without the static of first hearing someone else's viewpoint, you're likely going to be drawn to primary resources. On the other hand, if you prefer reading others' interpretation of the law and then finding loopholes or gaps in others' logic, you'll likely be more at ease with secondary resources.

After deciding what you like, it's easy to make a checklist of the sources that *might* apply to your particular question.

Here are two lists I've used for years that have proved handy to get people thinking about where they might start their research project.

A. Primary Sources

Primary sources can be relied upon in a court of law. They are "binding" because they are law. Primary sources often do nothing to explain the law or assist users with accessing the law. Here is a small list of primary sources:

Cases: *Oregon Reports*, *Oregon Appellate Reporter*, *Pacific Reporter*, *Federal Reporter*, *Federal Supplement*, Digests. There are also many treatises that are so full of cases, they border on case reporters – take the *UCC Case Reporter* for example. Specialty reporters abound (*Bankruptcy Law Reporter*, *Tax Reports*, etc.).

Statutes: *Oregon Revised Statutes* (ORS), *United States Code* (USC, or commercial versions like USCS or USCA), Legislative History, Treaties, *US Code Congressional & Administrative News*, City or County Codes, Court Rules, Supplementary Local Rules.

Regulations: *Oregon Administrative Rules* (OAR), *Code of Federal Regulations* (CFR), and *Federal Register* (Fed Reg).

B. Secondary Sources

Secondary sources are persuasive and encompass everything but cases, statutes and regulations. It is in the arena of secondary sources that the majority of "editorial enhancements" will be found. Editorial enhancements are features such as explanatory material, opinions, interpretations or drawing together of discordant points of law. A small list of secondary sources would include: CLE publications, Web research, treatises or books, periodicals, law reviews, form books, association publications, medical information, news, science information, weather

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reports, and settlement and award databases.

When starting any legal research project, try not to get overwhelmed. The universe of all possible sources might be large, but the world of types of sources is quite manageable. Make a list, break down your questions into primary and secondary source concepts, think about where those answers might be found and start researching.

II. Begin Researching

Now that you have a list of where the answer *might* be found, start taking detailed notes on your list. Your research notes should be akin to your case notes and they should go into your case file. Write down what you have done and where searches were performed. Keeping such a research log will help in avoiding doing things twice or skipping an important step. For example, what words or phrases are you planning to use? Have you run the words or terms of art through a thesaurus to obtain all possible alternate words? If no *Roget's Thesaurus* is handy, go to www.thesaurus.com. If you're planning to use Lexis® or Westlaw®, there are online thesauruses, but take care to not run up a large bill while online – there are ways around this; get training.

You're now ready to get online or go to the library. In addition, you have an arsenal of questions to be answered and ideas of where you're going to start looking for information. This is the step at which it's important to know your strengths:

- Do you consider paper resources to be the only REAL way to do legal research? You won't get any argument from me - paper research is just as valid a methodology as online. If this is your preferred research method, use it. It will be important to update paper research using online sources when currency is key, but this can be done after you have identified the salient cases and issues. If paper is your preferred methodology, rely upon your strength; use paper to start and finish with online. Using your skills will save you time, money and frustration.

- If you simply think better with a keyboard under your fingers, once you've determined the search terms and appropriate databases or systems to use, get online. Remember to keep an open mind and not get frustrated if what you're looking for isn't found. Again, if you start online, you'll still want to scan paper sources not found online if aiming for exhaustive coverage. One trouble with online research is the lack of serendipity … or stumbling across what you didn't know you needed in an index.

Whatever your method, don't waste valuable time trying to force yourself to like Coke® when you simply prefer Pepsi®.

A. Online Sites for Primary Sources:

Still feeling like only those in the big firms have access to the best online information? Don't. There are many ways to access primary sources and if one knows how to use the products (again – get training – it's often free!) there's no need for a casual researcher to be using *potentially* higher-dollar sources like Lexis® or Westlaw®.

i) A few examples of inexpensive or free online sources for case law are:

- **Casemaker**: Oregon Cases, OSB member-only access.
- **Fastcase** <fastcase.com> Fee-based.
- **LoisLaw** <loislaw.com> Fee-based.
- **VersusLaw** <versuslaw.com> Fee-based.
- **Free Case Law** – It's often possible to get court orders and opinions for free or no cost, but fulltext searching is not really an option. FindLaw.com has a great list of links to court sites. Oregon Court of Appeals, Supreme Court & Tax Court opinions are free at <publications.ojd.state.or.us>.
- **Premise** is a West Group CD-Rom product. There are no online charges. It's not free, but is a great way to search fulltext case law. Good search engine functionality is present, as is dual-column formatting, KeyNumbers and Headnotes. When dealing with Oregon Premise, the following libraries are available:

  Oregon Attorney General Opinions, Oregon Workers' Comp. Decisions, OARs, Oregon Archival Session Laws, Oregon Cases (with parallel Pacific Reporter citations available), Oregon Court Rules, Oregon Lit. and Arb. Reports, Oregon LUBA Reports (hardbound LUBA reporters cost $175.00 a volume!), Oregon Court Orders, Oregon Session Laws, Oregon Statutes Archival 2001, Oregon Table of Cases, Oregon Tax Court Decisions, West's OR Rev. Stat-Ann.

The main downside to Premise is that updates only occur on a quarterly basis. Additionally, the interface can be a little difficult to manage if on a large network and users must contend with multiple concurrent user fees. For a small office or a sole practitioner, pricing is very competitive.

ii) A few examples of inexpensive or free online sources for Statutes:

- Findlaw.com is great as it's free and has links to virtually all federal and state statute cites.
- Oregon Revised Statutes: <leg.state.or.us/ors>.
- Premise: In Oregon, the ORS Annotations are provided via Premise.

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iii) A few examples of inexpensive or free online sources for Regulations:

- Findlaw.com is great as it's free and has links to virtually all federal and state regulation cites.
- Cornell's Legal Information Institute: <Law.Cornell.edu>.
- The Library of Congress now has the Statutes at Large on the Web for free at <memory.loc.gov>.

Also, don't be afraid of calling "the big guns" to find out about their services. Yes, Lexis® or Westlaw® used to be prohibitively expensive. But, this is no longer always true. Recent conversations with representatives from both Lexis® and Westlaw® have confirmed that monthly contracts with flat rates can be had for under $100.00. Remember, the online systems of both providers produce bills that will allow you to include those costs in client billings. Westlaw® can be reached via Westlaw.com or 1-800-WESTLAW. Lexis® can be reached via Lexis.com or 1-800-543-6862. Don't be afraid to negotiate with these vendors!

Finally, remember that just because legal information is available on the Web, it's not necessarily "free." Computers, printers, paper, ink cartridges, etc. all can be expensive. These hidden costs will add up over time so make sure to include them in your factoring. In addition, watch out for coverage issues when using online sources. Most electronic sources do not have coverage of materials that precede the 1980s. Each database or Web site is different and exceptions do occur. However, the rule is generally applicable. Finally, if using electronic sources and doing fulltext searching, one must get comfortable with good search strategies. I won't go into it here, but suffice it to say, learning how to use Boolean terms and connectors ("and," "or," "w/25") will do you no harm in the long run.

B. Online Sites for Secondary Sources

There are many types of secondary sources. Unfortunately, however, unless they are reference materials, most secondary sources are not available free via the Web.

Lexis & Westlaw

There are so many secondary sources in Lexis® and Westlaw® that to even try to list them would be futile. Suffice it to say the database directories for each company are over 500 pages each.

Law Libraries

Using an online law library catalog can be a great way to find out what resources are available on any given topic. In addition, law schools usually use the Library of Congress classification system and call numbers should be the same throughout any law library. Accordingly, while Multnomah County Law Library does not have an online catalog, one could use the catalog at Lewis & Clark <lawlib.lclark.edu>, find a call number and call the law library at Multnomah County (or any other county) Law Library. The Library of Congress is available on the Web at <loc.gov>.

OSB CLE CD-ROM Libraries

The Oregon State Bar offers an option to obtain all or part of its CLE publications on CD-ROM. Having the CD-ROM collection can be an excellent option, as having such libraries on a network, or loaded onto your computer, allows for fulltext searching and means no more loose-leaf filing! Most CD-ROM holdings are no more expensive than the print editions. In addition, if one orders seven or more individual publication titles, it's possible to earn a 15% discount off the total order. All of the OSB CLE publication holdings can be found on the Web at <osbar.org>.

Finding People / Docketing Information / Legislation:

OpenOnline

<openonline.com> is a great resource for finding criminal records, civil suit checks, DMV records (in Oregon and some other states, dependent upon state law), Oregon Motor Vehicle registrations, professional license verification, Social Security Number verification, workers' compensation filings, real property records, business records, Oregon ID card information and Fish & Wildlife license information. Depending upon the database, searches can run from $4.00 to about $20.00 each. However, once one knows what the OpenOnline data means, most questions can be answered without going any further. If, however, one needs to look at the records found via the searching, it generally costs $5.00 a record to open them for full detail. Yes, it's easy to run up a HUGE bill using OpenOnline, but the information is excellent, the search engine is very friendly and the company reps are very helpful. In addition, if you're doing a great deal of verifying information, they have services where they'll do the work for you and charge with one bill. Finally, OpenOnline asks what your FCRA ("Fair Credit Reporting Act" and GLB "Gramm-Leach-Bliley") permissible purpose is. Accordingly, if you're interested in this service, be aware that you will be asked WHY you want to know what you want to know. OpenOnline can be used to access OJIN information. Users of OpenOnline must sign a contract and fill out a FCRA questionnaire. Someone in the office will be the designated account manager and be responsible for the account. Accounts must be set up in advance, but turnaround time is usually less than 48 hours. In addition, there is a monthly service fee of approximately $25.00.

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CourtLink

CourtLink is used primarily to obtain state court filings. In Oregon, state court dockets can be obtained online via OJIN, which is difficult to use and search, OpenOnline, and CourtLink. CourtLink can be expensive. Most searches cost in the neighborhood of $20.00 and by the time one pulls and prints documents, costs can add up. However, if it saves one from having to go to the courthouse, go through security, wait in line in the file room, photocopy court records at 75 cents a sheet, it's likely worth the costs. Users of CourtLink must sign a contract. Someone in the office will be the designated account manager and be responsible for the account. Accounts must be set up in advance, but turnaround time is usually less than 48 hours. In addition, there is a monthly service fee of ~$25.00.

PACER

If one is practicing in Federal Court, PACER ("Public Access to Court Electronic Records") should be very familiar. One can obtain filings from most cases, get pleadings, e-mail addresses of attorneys on a case, and full dockets. To quote PACER, "The PACER Service Center is the Federal Judiciary's centralized registration, billing, and technical support center for electronic access to U.S. District, Bankruptcy, and Appellate court records." http://pacer.psc.uscourts.gov. The search engine in PACER isn't the greatest, but it's not really a search engine. PACER uses an indexed set of fields. It's possible to search by region, case filed date, party name, case number, and nature of suit. Yes, one could go online and search for all of the Ninth Circuit Courts of Appeal cases on the Medicare Act from 2002 onwards, but the results will be painful to scan, open and understand. In addition, errors in the data entry are known to happen and mean that sometimes it can be difficult to find what one knows is there. It is getting better all the time, however! PACER is very inexpensive. Searches don't cost anything, there is no charge for online time and downloading or printing dockets or other pleadings costs 8 cents a page. In addition, it is possible to have PACER set up so that one must enter in a client matter number so that charges can be recouped when the bills arrive. Users of PACER must sign a contract. Someone in the office will be the designated account manager and be responsible for the account. Accounts must be set up in advance, but turnaround time is usually less than 48 hours. There is no monthly service fee.

Accurint

Another online service that is great for finding people and assets. Simply go to <accurint.com>. Accurint is the successor to CDB Infotek. Users of Accurint must sign a contract. Someone in the office will be the designated account manager and be responsible for the account. Accounts must be set up in advance, but turnaround time is usually less than 48 hours. There is no monthly service fee, but Accurint will cut off service if bills are late. The online billing took some time to get used to because the amounts owed don't always match the monthly billing statements, but once it was figured out, it wasn't difficult to manage and paying online with a credit card each month turned out to be the best way to manage. Allegedly, information on Accurint is obtained from the major credit bureaus. Accordingly, the information is very current and complete. Unfortunately, there's so much information and it is not verified via any independent means, so it can be out of date, incorrect or organized so that subjects appear worse than they really are. However, for a complete report that costs under $10.00 (searching included) who can really complain? If you're interested in this service, be aware that you will be asked WHY you want to know what you want to know.

Tax Assessor Information

Of course, one can always simply pull up the blue pages of the phone book and call the county tax assessor to get this information. However, there's a free resource that is great. Check out <portlandmaps.com>. Simply enter an address, no zip code necessary, and find out the last time a property was sold, tax lot information, square footage, description of property, tax history, assessment history, permit history, nearby schools, parks. Watch out; there are errors.

CapitolOnramp

If your job involves keeping an eye on legislation, CapitolOnramp cannot be beat. The service costs are approximately $100.00 a month during the time the Oregon Legislature is in session and $20.00 a month when not. This service allows tracking of legislation by keyword with ability to track approximately 100 topics at a time. In addition, alerts with action are e-mailed directly to participants. For more information, go to <CapitolOnramp.com>.

III. Finish Up

The most common worry I hear voiced by attorneys is, "How do I know when I'm done?" With legal research, because the process is not linear, there's no "right" place to start. However, when you continue to see the same references again and again, you'll know you're done. Don't forget to tidy up your research notes and date your last entry. Doing this last step often seems like overkill, until the next time you get asked the same question and you have to start from scratch because you didn't mark where you stopped. ❐

Jury Empowerment

Cross-Examination—Going Beyond the Ten Commandments

By William A. Barton

This paper offers novel techniques and insights into cross-examination that aid in empowering the jury to do the work that is traditionally reserved for lawyers and judges.

When Irving Younger first published his Ten Commandments in the late 1960s, he intended them as an anchor for beginners and guidelines for journeymen. The Ten Commandments were the first systematic approach to cross-examination and remain the primer in this area of advocacy. Acquiring skills that transcend Younger's Commandments is crucial to the trial lawyer who desires to confront their fears and pursue excellence in the courtroom.

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 and comments the Commandments have generated.[1] 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 are losing your case, and therefore have nothing to lose, consider ignoring the rules and going for broke. Thomas Mauet, author of *Trial Techniques,* 6th ed., frames cross-examination as "realistically attainable goals" rather than the application of rules. James Jeans, author of *Trial Advocacy*, 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."

I submit there are clear reasons why the Commandments are not as effective now as they were 30 years ago. The Commandments are all about the lawyer controlling the witness, something today's judges are less likely to allow than in the past. What accounts for this difference? Many of today's judges are different critters. In the 1970s and 80s, becoming a judge was seen as a respected and honorable way to complete a career in the courtroom after a long and successful career as a jury trial lawyer. This is not necessarily true today. Most lawyers ascend to the bench at a much younger age, with very few jury trials under their belts (at least as lead counsel). They may have enjoyed highly successful courtroom careers (in domestic relations, for example), but have little jury trial experience. The reduced number of civil jury trials results in a civil trial bench and bar with increasingly less experience. The less skill and experience your judge accumulated during his or her career as a civil jury trial lawyer, the less likely it is he or she will later, when serving as a judge, rein in non-responsive witnesses.

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FEAR IS OUR JUMP-OFF POINT FROM THE COMMANDMENTS

If the Commandments are the presumed level of competence for most lawyers, what does the next level of competence consist of, and how do we get there? I have selected the fear possessed by each lawyer as my instructional "jump-off" point from the Commandments. Why fear as a point of departure? Because it is common to all and so paralyzing. Only in cross-examination are so many inexperienced lawyers so worried about embarrassing themselves. There are good reasons for this. If things go poorly on direct, the witness looks bad. If things go badly on cross, it is you, the lawyer, who looks bad. This is because on direct the witness is testifying, while the lawyer slips into the background. In contrast, on cross, dynamically, it is the lawyer who is "testifying" through his or her declarative questions.

You carefully prepare all your cross-exam questions with the Commandments in mind, but everything begins to fall apart when the witness refuses to answer your exact questions. It gets worse when the judge allows the witness to explain every answer. It wasn't supposed to be like this! You know the Commandments by heart. All that was supposed to be necessary was for you to confidently rise from your chair and object, request the judge strike the witness's answer as non-responsive, then caution the jurors to disregard the stricken answer. The judge would then turn and sternly instruct the witness to answer the question. That's what the Commandments say is supposed to happen.

What happens instead? Even if the judge instructs the witness to answer your question, which he or she will generally do, more often than not, the judge will then destroy your cross-examination by allowing the witness to generously explain his or her answers. This makes you, the cross-examiner, look aggressive, inconsiderate, incompetent, and disinterested in the truth. You are understandably reluctant to repeat this debacle, so your future cross withers, as your credibility and confidence plummet. This has happened to every trial lawyer, not just to you.

And so we come to the exact departure point I have selected from Younger's Commandments, the intersection of the questions: "How do I avoid this embarrassing situation?" and "What can I do when it happens?" Here's where my "Jury Empowerment" model might be helpful.

When saddled with a judge who is reluctant to allow you to control a witness on cross-examination, the jury empowerment method is the alternative to retreating. My trial philosophy is always jury oriented. This approach asks "Is there a way to shift responsibility from the lawyer or judge to the jury?"

THE JURY EMPOWERMENT MODEL

When saddled with a judge who is reluctant to allow you to control a witness on cross-examination, the jury empowerment method is the alternative to retreating. My trial philosophy is always jury oriented. This approach asks "Is there a way to shift responsibility from the lawyer or judge to the jury?" In the area of cross-examination there are two applications of jury empowerment.

1. Don't vanquish a witness on cross - no matter how justified it may seem.

When it feels like you should, and probably can, bury a witness, that is exactly when you should walk away. If the witness is a liar, and it is obvious, you don't need to say it. If it isn't obvious, then it is too risky. It's just that simple. During your closing, it is okay to discuss the reasonable inferences that can be drawn from the evidence concerning a witness's credibility. I didn't say argue the evidence or inferences. I said discuss them. Avoid stating the ultimate conclusion that the witness has been lying. That conclusion belongs to the jury. Judging, after all, is their job, not yours. It's acceptable for you as a lawyer to judge acts, but leave judging people to the jury.

Gerry Spence says "Never vanquish a witness without the jury's permission." 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 thereby gives you permission to do so, that is when you should walk away. Leave witness abuse to the jury. They will express their displeasure by the size of their verdict. When you tear up a witness, what is left for the jurors to do?

2. Even a cursory review of the Commandments shouts that the rules are a system of techniques for maintaining witness control.

What is to be done if the judge won't allow you to acquire and maintain witness control, for whatever reason? I say embrace the chaos and use it to your advantage. View witness noncompliance as an opportunity, not a problem. My jury empowerment method is the only real alternative to retreat when the judge isn't helping.

On destructive cross, when witnesses

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Jury Empowerment

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decline to respond to your questions with the obvious "Yes" answer, they are revealing their partisanship, thus their bias, by their non-responsive narrations. Their conduct also flouts the courtroom's "rules of the road." I submit this is an opportunity . . . this is good.

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. If the judge won't control an obviously biased witness on destructive cross, then comport yourself in a manner that favorably contrasts your professionalism with the partisanship of the witness. This is an opportunity for you to enhance your own stature and for the jury to punish recalcitrant witnesses by discounting their testimony. None of this will occur without brief, clear questions or statements that command obvious "Yes" answers, combined with your behavior clearly contrasting with the witness's.

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. Alternatively, rather than repeating your last question, consider having the court reporter read it back. Glancing at your watch during the repetitions adds to the effect. Either way, you will have won. During closing, you can later argue the witness's obvious bias, interest and motive.

If you have a judge who allows you to control witnesses, then do so. This also educates the jurors. When the judge admonishes a witness, it sets judicially approved expectations, which cues the jurors on how witnesses should conduct themselves when testifying. This is especially 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 for the opponent's key witnesses. Let the judge spank the less important ones.

The use of jury empowerment techniques requires experience, judgment and some risk. These suggestions are somewhat counter-intuitive, in that like some martial arts, they offensively use the opponent's energy against them. They are not for everyone, and should be considered as no more than tools in the trial lawyer's arsenal of alternatives.

CONCLUSION

The use of jury empowerment techniques requires experience, judgment and some risk. These suggestions are somewhat counter-intuitive, in that like some martial arts, they offensively use the opponent's energy against them. They are not for everyone, and should be considered as no more than tools in the trial lawyer's arsenal of alternatives. ❐

(Endnotes)

[1] 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.

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Reefer Madness at the Court of Appeals

Collision of Medical Marijuana and Oregon Disability Law Leaves Employers in Limbo

By Lynda J. Hartzell and Dennis E. Westlind of Tonkon Torp

Among the challenging issues for Oregon courts in the last decade is the question of whether, and to what extent, employers must accommodate employees who are legally using marijuana for disabling medical conditions such as cancer, glaucoma, AIDS or chronic pain. Earlier this year, in *Washburn v. Columbia Forest Products*,[1] the Oregon Court of Appeals ruled that employers may be required to accommodate otherwise disabled employees who are legally using medical marijuana under the Oregon Medical Marijuana Act ("MMA").[2]

Oregon Court of Appeals Holds Employers May Be Required to Accommodate Medical Marijuana Use.

The MMA states that "[n]othing in the Medical Marijuana Act shall be construed to require … [a]n employer to accommodate the medical use of marijuana in any workplace."[3] Employers throughout Oregon assumed this exception meant they could continue to apply their drug-free workplace rules to keep marijuana – and any employee who tested positive for marijuana use – out of the workplace.

The *Washburn* case tested this assumption. The plaintiff, Robert Washburn, obtained a medical marijuana card to treat muscle spasms and sleeping problems. He began smoking marijuana before he went to sleep each night.

Washburn worked as a millwright at a lumber mill owned and operated by the defendant, Columbia Forest Products ("Columbia"). Columbia has a workplace drug policy that prohibits employees from "[r]eporting for work with the presence of [a] controlled substance, intoxicant, or illegal drug in their system." An employee who violates Columbia's policy is "subject to disciplinary action, up to and including termination."

After suffering a workplace injury, Washburn provided Columbia with several urine samples that tested positive for marijuana. The tests did not and could not reveal whether Washburn was impaired by his use of marijuana but confirmed the presence of marijuana in his system, which was a violation of the company's drug and alcohol policy. While participating in drug treatment through the company's Employee Assistance Program, Washburn obtained a medical marijuana card. Columbia refused to accept his use of marijuana and gave him an extended leave of absence to obtain an alternative source of treatment that would allow him to remain employed. When Washburn returned to work and could not provide a clean urine sample, Columbia terminated his employment in March 2001. Washburn then sued Columbia, alleging violations of the Americans with Disabilities Act[4] and Oregon disability law.[5]

The trial court in *Washburn* granted Columbia's motion for summary judgment, agreeing that employers had the right to enforce drug policies with respect to any use of marijuana and that the MMA excuses employers from accommodating off-site marijuana use. The Oregon Court of Appeals reversed.

In a ruling that may have effects on future cases requiring statutory interpretation, the Court of Appeals narrowly construed the MMA's exception that employers are not required "to accommodate the medical use of marijuana in any workplace." According to the Court, "use of marijuana" means only the "production, possession, delivery or administration" of marijuana.[6] Under this definition, Washburn only "used" marijuana at home. The Court rejected Columbia's argument that Washburn "possessed" the marijuana in his bloodstream when he reported to work.[7]

Columbia also argued that it was incorrect to focus on where the plaintiff actually "used" marijuana, and that the purpose of the MMA's exception was to make clear that an employer should not be required to make workplace accommodations for an employee's use of marijuana regardless of where that use occurred. Columbia pointed out that under the Court of Appeals' construction, the MMA would allow medical marijuana users to be under the influence of medical marijuana while at work.[8] The Court of Appeals rejected this argument[9] but did not articulate why it would be improper to read the statute in this way.

Because there was no evidence that Washburn possessed, smoked or otherwise ingested marijuana in the workplace, the Court of Appeals held that the trial court erred in concluding

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Reefer Madness

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that the MMA excused Columbia from reasonably accommodating Washburn.[10] The court remanded the case to the trial court to determine whether Washburn's requested accommodation was reasonable under Oregon disability law, including whether it placed an undue hardship on Columbia.[11]

The bottom line: while employers may still prohibit the physical use of marijuana at work, employers may be required to accommodate an employee's off-site use of medical marijuana when the employee has a valid medical marijuana card.

The Oregon Supreme Court recently granted Columbia's petition for review, but a decision will not be forthcoming before 2006. The Oregon legislature considered amending the disability laws to clarify an employer's obligations to employ medical marijuana users but failed to reach agreement on a bill before the 2005 session ended. Until a legislative or judicial resolution is made, employers must tread carefully with an employee who presents a valid medical marijuana card.

Must Employers Always Accommodate Medical Marijuana Use?

The answer to this question is "maybe." The Court of Appeals stated that its ruling is not a mandate to accommodate all medical marijuana users in the workplace.[12] As with any disability, an employer must explore whether a "reasonable accommodation" could allow the employee to continue to work while using medical marijuana.[13] This means that when an employee tests positive for the use of marijuana and is able to produce a valid medical marijuana card, the employer must initiate an accommodation dialogue before any termination decision can be made. The same would be true when an employee makes a voluntary disclosure of a medical marijuana card.

Whether allowing a medical marijuana user to report to work with marijuana in his system is "reasonable" may be treated by trial courts, like most questions of "reasonableness," as a question for a jury. In litigating the "reasonable accommodation" question, the employee has the initial burden to show that the requested accommodation was a reasonable one. If the employee meets that burden, the employer has to prove undue hardship.[14] In some cases, the court can decide as a matter of law that the requested accommodation is unreasonable.[15] However, in most disability accommodation cases, whether the requested accommodation is or is not reasonable is unclear, meaning that it will eventually be decided by the jury. We would expect employers to argue that their medical marijuana cases can be decided as a matter of law, because the job is safety-sensitive or for some other reason. However, if the Court of Appeals decision in *Washburn* stands, it will mean that whether accommodating an employee's use of medical marijuana is reasonable will have to be decided by juries in many instances.

Oregon disability law creates an exception to the "reasonable accommodation" standard where an employer can prove that the requested accommodation is an "undue hardship on the operation of the business of the employer."[16] *Washburn* leaves open the issue whether allowing an employee to report to work with marijuana in his or her body is an "undue hardship." Whether a requested accommodation is an "undue hardship" is typically decided on a case-by-case basis, and that may be the case with medical marijuana use as well. For example, a court may be more likely to agree as a matter of law that allowing a millwright or an anesthesiologist to come to work with marijuana in her system is an "undue hardship" than for other less sensitive positions.

Conclusion

The legislature or the Oregon Supreme Court may provide more clear direction in the future. In the meantime, attorneys should take each medical marijuana accommodation case one at a time. Some cases may turn on the reasonableness of the request, while others may turn on undue hardships. Still others may not be such good choices to litigate under the current state of the law.

Lynda J. Hartzell is an employment law partner at Tonkon Torp LLP in Portland, Oregon. She represents employers and management before administrative agencies, in private and public arbitrations, and in state and federal courts, in cases involving wrongful discharge, harassment, workplace torts, wage and hour disputes, trade secret and noncompetition matters, and all types of discrimination. She also advises managers and human resource professionals on a wide range of employment problems and policies. She can be reached at 503-802-2153 or lynda@tonkon.com. ❐

(Endnotes)

1 197 Or App 104, 104 P3d 609 (2005).
2 ORS 475.300 to 475.346.
3 ORS 475.340(2).
4 42 USC §§ 12101 to 12213.
5 ORS 659A.112 to 659A.139.
6 197 Or App at 112, 104 P3d at 614, citing ORS 475.302(7).
7 197 Or App at 113-14, 104 P3d at 614, citing *State v. Daline*, 175 Or App 625, 632, 30 P3d 426 (2001).
8 197 Or App at 112, 104 P3d at 613-14.
9 197 Or App at 112, 104 P3d at 614.
10 197 Or App at 114, 104 P3d at 614.
11 197 Or App at 116-17, 104 P3d at 616.
12 197 Or App at 116-17, 104 P3d at 616.
13 See ORS 659A.112 (2)(e) (requiring employers to make reasonable accommodations for known disabilities unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer's business).
14 *Honstein v. Metro West Ambulance Service*, 193 Or App 457, 90 P3d 1030, rev denied, 337 Or 327 (2004).
15 *See, e.g., US Airways v. Barnett*, 535 US 391 (2002) (requested accommodation that conflicts with a seniority system will ordinarily be unreasonable as a matter of law).
16 ORS 659A.112 (2)(e).

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Are Federal Courts Enforcing the Deposition Rules?

By David B. Markowitz and Lynn R. Nakamoto

In December 1993, the Federal Rules of Civil Procedure were significantly amended. Some of those amendments addressed perceived "Rambo" litigation tactics, both by attorneys taking and defending depositions, as the Advisory Committee notes to the 1993 amendments make clear. *See generally* Advisory Committee Notes, 146 F.R.D. 401, 664 (1993) (depositions "frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy" and discussing the amendments in detail).

As we all know, Rule 30 changed how depositions were to be conducted. Among other changes, Rule 30 required that objections "be stated concisely and in a non-argumentative and non-suggestive manner," and prohibited instructions not to answer except "to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [for a protective order]." Rule 30(d)(1). The Committee Notes stated that objections

> ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, *i.e.*, objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

146 F.R.D. at 664-65. Rule 30 was amended to authorize (but not require) a court to impose sanctions, including resulting attorney fees, if the court finds that "any impediment, delay, or other conduct has frustrated the fair examination of the deponent." Rule 30(d)(3). We know, however, that attorneys frequently question whether Rule 30 has any teeth, and whether federal courts are enforcing it.

There has been at least one effort to examine whether the 1993 amendments have made a difference. In late 1997, at the request of the Judicial Conference's Advisory Committee on Civil Rules, the Federal Judicial Center published the results of its survey of 1200 attorneys in 1000 recently closed civil cases to examine discovery. Among other issues, attorneys were queried about problems during discovery and the effect of the 1993 rule changes. Overall, 10% of the attorneys who participated in depositions reported experiencing problems with witness coaching, 9% observed improper instructions not to answer, and 8% experienced other unreasonable conduct at depositions. Thomas E. Willging, et al., *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases* at 1, 8, 33-34. Not surprisingly, the frequency of reported deposition problems varied with the kind of case involved. For example, 66% of the attorneys involved in a reported "contentious" case experienced

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Deposition Rules

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a deposition problem, as opposed to 10% in a "non-contentious" case, and 13% of attorneys in contract cases had a deposition problem, whereas 35% of attorneys in civil rights cases did so. *Id.* at 33-34. When asked what would best reduce litigation costs during discovery, most lawyers (almost two-thirds) in the survey chose judicial availability to resolve disputes and case management, or changing attorney behavior through more frequent or severe sanctions and imposition of attorney civility codes. *Id.* at 10, 43-46.

Shortly thereafter, on June 1, 1998, the District of Oregon's version of an attorney civility code, L.R. 83.8, became effective. It requires counsel to cooperate, "consistent with the interests of their clients, in all phases of the discovery process and be courteous in their dealings with each other, including the matters relating to scheduling and timing of various discovery procedures." L.R. 83.8(a). The rule also provides that the court "may impose sanctions if it finds that counsel has been unreasonable in not accommodating the legitimate requests of opposing counsel." L.R. 83.8(b). The District of Oregon is not alone in adopting professional conduct guidelines. *See Ross v. Kansas City Power and Light Co.*, 197 F.R.D. 646, 647 (W.D. Mo. 2000) (district court noted that it had made its expectations regarding professional and civil conduct known to attorneys through an order calling attention to the local Kansas City bar's tenets of professional courtesy).

Other courts have utilized specific deposition guidelines to help curb deposition abuses. *See, e.g.*, Discovery Guidelines for the United States District Court for the District of Maryland, Appendix A to Local Rules (available on the court's website at www.mdd.uscourts.gov/LocalRules/localrule2004finalver.pdf); Guidelines for Discovery Depositions of Magistrate Judge Foschio, Western District of New York (available at the court's website at www.nywd.uscourts.gov/document/Depose_F.pdf).

Such guidelines can play a significant role in motions for sanctions. For example, Judge Foschio has incorporated the Guidelines into his Rule 16 case management orders, thereby expanding the available options for sanctions for discovery abuse. *See Jones v. J.C. Penney's Dept. Stores, Inc.*, 228 F.R.D. 190, 196-98 (W.D.N.Y. 2005). In that case, the offending attorney violated Rule 30, parallel local deposition guidelines, and the Rule 16 order of the court at his client's deposition. Although the magistrate judge declined to punish his client on the merits of the case because the violations did not relate directly to the opponent's ability to mount a defense to the claims, he recommended that the attorney be held in civil contempt through violation of the order under Fed. R. Civ. P. 16(f) and 37(b)(2)(D) and also be required to pay the defendant's fees and costs for the plaintiff's deposition. 228 F.R.D. at 198. *See also Boyd v. University of Maryland Medical System*, 173 F.R.D. 143, 146 (D. Md. 1997) (attorneys are referred to the local guidelines and asked to become familiar with them in Rule 16 orders, and compliance, although not mandatory, is considered in determining whether sanctions should be imposed); *Ross*, 197 F.R.D. at 647 (lawyers made aware of local professional guidelines required to donate the amount of the expenses claimed to have been incurred by each because of discovery disputes to a local legal services law office, but stay of the order pending review of their future conduct in the case).

As for sanctions, are the courts really enforcing the deposition rules when violations are brought to their attention? We have surveyed opinions and orders available on Westlaw to see how the district courts have been addressing instructions not to answer questions, witness coaching, obstruction, and similar violations under Rule 30. We found surprisingly few cases – less than 75 – dealing with this sort of "deposition abuse" since the adoption of the 1993 amendments. Perhaps that is a testament to how much the amendments and related deposition guidelines and local rules of the courts have influenced attorney conduct at depositions.

The cases demonstrate that litigants are still on occasion encountering attorney (and sometimes party) conduct that clearly violates the requirements of Rule 30, and that almost all courts award sanctions for clear violations that impede the normal litigation process. In only one case that we reviewed did a judge express general reluctance to impose sanctions. *See SS & J Morris, Inc. v. I. Appel Corp.*, 2000 WL 1028680 at *1 (S.D.N.Y. July 26, 2000) ("I do not encourage sanctions motions and I am hesitant to impose sanctions" – but the court imposed sanctions anyway). And, in only one case, *Blumenthal v. Drudge*, 186 F.R.D. 236 (D.D.C. 1999), did the court decline to award sanctions for clear violations. The court indicated its disinclination to "waste its time" on sanctions on that occasion, probably based on the lawyers' mutual poor conduct and cross-fire whining. The court described the papers, correspondence, and deposition excerpts filed as "replete with examples of rudeness, childish bickering, name-calling, personal attacks, petty arguments and allegations of stonewalling and badgering of witnesses." *Id.* at 239. The court admonished the lawyers, however, that sanctions could follow for continued failure to behave professionally. *Id.* at 242 n.5. *Cf. Mruz v. Caring, Inc.*, 166 F. Supp. 2d 61, 71 (D.N.J. 2001) (reversing magistrate judge's ruling revoking *pro hac vice* admission of offending lawyer under court's inherent power, but noting that sanctions available under federal rules were appropriate).

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Deposition Rules

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We reviewed numerous cases involving witnesses, often experts, instructed not to answer relevant questions without the attorney identifying a privilege that may apply. Such instructions unaccompanied by a claim of privilege were a sure-fire way to draw the court's condemnation and sanctions. *See, e.g.*, *Cabana v. Forcier*, 200 F.R.D. 9, 16-18 (D. Mass. 2001) (counsel directed expert witness physician not to testify regarding any disciplinary proceedings or involvement in other litigation based on relevance; motion expenses awarded under Rule 37); *Boyd v. University of Maryland Medical System*, 173 F.R.D. 143, 149 (D. Md. 1997) (counsel instructed client not to answer questions about his criminal convictions and related issues based on asserted inadmissibility; likely sanction of attorney personally paying costs of reconvened deposition); *Shapiro v. Paul Revere Life Ins. Co.*, 1997 WL 601430 (N.D. Cal. Sept. 18, 1997) (sanction of $1500 awarded for motion expense).

As the cases above indicate, sanctions often included motions expenses. However, sanctions sometimes included expenses related to the depositions, and could involve payments from the offending lawyer personally. *E.g.*, *Boyd*, 173 F.R.D. at 149; *Semi-Tech Litigation LLC v. Bankers Trust Co.*, 2004 WL 251017 (S.D.N.Y. Feb. 11, 2004) (expert depositions reopened at plaintiff's expense, plaintiff pays for deposing counsel's travel expenses for reopened deposition and $1,000 for expenses of the motion, and objecting counsel must show cause why he should not be sanctioned personally). In a case where the plaintiff died before he could be re-deposed, the sanction involved limiting evidence. *Howell v. Standard Motor Products, Inc.*, 2001 WL 456241 (N.D. Tex. April 27, 2001) (sanction for improper instruction not to answer questions regarding how he was retaliated against at work was to preclude evidence of retaliation at trial).

Mere identification of privilege as the basis for instructions not to answer, though, may not be enough. In *In re Omeprazole Patent Litigation*, WL 818821 (S.D.N.Y. February 18, 2005), the court ordered a party and its counsel to pay for a portion of the costs of the opponent's motion, although the attorney asserted a privilege applied. The court concluded that the attorney's argument that the expert witness was not required to testify to subject matter he deleted from his expert report "lacked a substantial justification" and so required sanctions under Rule 37. Nevertheless, the court recognized that some leniency should be afforded to counsel when a privilege is asserted, and so did not assess a sanction for the attorney's erroneous instruction not to answer questions concerning discussion between the attorney and expert as to the reasons for the amendment of the expert report. *Id.* at *15.

In evaluating whether it would award sanctions, the Maryland district court in *Boyd* has provided helpful guidance to counsel thinking about the risk in instructing a witness not to answer a question. That court considers five factors in deciding motions for sanctions: 1) the importance of the undisclosed facts to the issues in litigation; 2) the number of times counsel instructed deponent not to answer; 3) whether the questions posed were objectionable; 4) whether it appeared that the instruction was designed for purpose of disrupting the deposition; and 5) whether the attorney who gave the instruction knew such an inquiry would likely be posed and had the ability to seek a protective order beforehand. 173 F.R.D. at 147, 149.

A second common area of conduct drawing sanctions involved attorneys interjecting repeated speaking objections. *E.g.*, *Phinney v. Paulshock*, 181 F.R.D. 185, 206-07 (D.N.H. 1998) (attorney sanctioned for speaking objections, over 50 objections to form which appeared designed to impede the flow of the deposition, and instructions not to answer questions directed to third party witness); *McDonough v. Keniston*, 188 F.R.D. 22 (D.N.H 1998) (proposed sanctions for similar conduct in the form of expenses incurred to take the suspended and the reopened deposition, specifically, the reporter fee, transcription cost, and attorney fees for time at the deposition).

The third common area involving sanctions is the defending attorney's or a party's repeated interruptions of the deposition with unprofessional remarks or other conduct that reduces the ability of the lawyer to take the deposition in an orderly and timely manner. *See, e.g.*, *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 54-58 (S.D.N.Y. 2001) (transcript excerpts show defending attorney's repeated commentary on opposing counsel's questioning technique or *ad hominem* attacks, speaking objections or instructions how to answer, and interruptions to ask his own questions; attorney required to pay transcript cost, attorney fees for deposition time, and $1,500 fine to the district court). A local case involving party misconduct is *Antonino-Garcia v. Shadrin*, 208 F.R.D. 298 (D. Or. 2002) (defendant and her sister interrupted questioning and talked with each other during deposition, despite counsel's requests to stop and warning regarding a motion for sanctions; defendant order to pay attorney fees and reporter appearance and transcript fee for deposition).

All of these cases suggest that federal courts take significant Rule 30(d) violations seriously. Attorneys who maintain their own professional conduct in the case and who present courts with such Rule 30(d) violations should be able to obtain sanctions against offending opposing counsel or the opponent or both. ❐

A Primer on the Recognition and Enforcement of U.S. Money Judgments in Germany

By Lew E. Delo of Delo & Bowers, LLP

Introduction

The recognition and enforcement of United States money judgments in foreign countries is a growing area of legal practice and an expanding field of international law. Traditionally, the typical foreign dispute involved a business contract containing an arbitration clause. Because the United States is a party to international arbitration conventions, enforcement of arbitration awards in foreign countries has been a relatively straightforward process.[2]

However, the United States is not a party to any conventions or bilateral treaties with any countries regarding the recognition and enforcement of judicial money judgments from U.S. courts.[3] As a consequence, if a foreign judgment debtor has no assets in the United States, then a holder of a U.S. money judgment must try to collect in a foreign country pursuant to the foreign country's laws.

U.S. counsel have been slow to recognize the import of this fact and to incorporate it into their trial preparation. This has been the case, for example, with plaintiffs who have recently filed claims in U.S. courts against foreign accounting firms, financial institutions, and insurance companies under tort, securities and other legal theories.[4] Most of these U.S. plaintiffs have focused almost exclusively on winning a U.S. judgment, to the exclusion of collection considerations in a foreign jurisdiction.

However, focusing on the elements of U.S. liability is only part of the challenge when suing a foreign defendant. It is essential that the lawyer also focus on the foreign legal requirements for the enforcement of a U.S. money judgment in the defendant's country and possibly in other foreign countries where the defendant has assets. Failure to understand the procedure and substance of the foreign law and to incorporate them into the plaintiff's trial strategy can be fatal to later collecting the U.S. money judgment in a foreign country.

That understanding is best acquired before the lawsuit is filed, not after the plaintiff has prevailed in the United States and is attempting to collect its judgment in a foreign jurisdiction. Understanding the foreign law should be part of the United States litigation planning and strategy from the outset. It should be a consideration in evaluating the costs of the litigation, preparing pleadings, conducting discovery, and trying the case.

By way of example, assume that a would-be U.S. plaintiff is evaluating whether to sue a German company in U.S. District Court in Oregon for breach of contract. The German company

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has no assets in the U.S. Part of the evaluation should be devoted to understanding German law regarding the recognition and enforcement of foreign money judgments. The balance of this article contains a short summary of the procedure and substance of German law on recognizing and enforcing a foreign money judgment in Germany. It illustrates the unusual issues that may arise when attempting to collect a U.S. money judgment in any foreign jurisdiction.

German Enforcement Approaches and General Principle

In Germany there are two approaches available to obtain recognition and enforcement of foreign money judgments:

1. Using multilateral conventions and bilateral treaties.

2. Using the internal laws of Germany, pursuant to the German Code of Civil Procedure, the *Zivilprozessordnung* or ZPO.

Germany is a member of a number of multilateral conventions and bilateral treaties, including: (i) the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, dated September 27, 1968; and (ii) the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 16, 1988.[5] However, as noted above, the United States is not a party to any multilateral conventions or bilateral treaties with any countries, including Germany, regarding the recognition and enforcement of U.S. money judgments. Thus, the plaintiff who prevails in a U.S. court must resort to the internal laws of Germany for the recognition and enforcement of its United States money judgment.[6]

The U.S. creditor must bring a German action on the foreign U.S. judgment, requesting an enforcement order from the appropriate German court. The action must be brought in the proper German jurisdiction, usually where the defendant has its domicile or assets.[7]

Under German law, the German court is not allowed to reexamine the substance of the decision rendered by the United States court, i.e., the case will not be re-litigated on its merits.[8] However, if factual ambiguities and conflicts are alleged by the German defendant in the German court proceedings, then the German court may hear testimony to resolve those ambiguities and conflicts. In addition, the parties may submit expert opinions in an effort to establish their view of foreign law. Thus, dueling experts are not uncommon.

The German court may also obtain its own expert opinions on foreign law, as a matter of right or at the request of a party. German courts usually ask a German Institute to render an opinion. The most prestigious Institute is the *Max Planck Institute for Foreign and International Private Law* in Hamburg, Germany. German Institutes are not simply the equivalent of expert witnesses in the United States. Institutes hold a unique place in German culture and jurisprudence. They are politically neutral and their opinions carry great weight with the courts.

The losing party in German courts must pay all costs and attorney fees. Costs and attorney fees are set by statute, which requires consideration of various factors such as the value of the case, number of hearings, use of experts, and whether evidence is taken.

German Code Requirements For Recognition

Under German law, before a German court will recognize a U.S. money judgment (and declare it enforceable), the following six requirements must be satisfied:[9]

1. The judgment must be final.
2. The United States court must have had jurisdiction.
3. The German defendant must have been properly served.
4. The judgment must have priority over any conflicting judgments.
5. The trial and judgment must not violate German public policy.
6. The United States laws must have recognition and enforcement reciprocity.

The U.S. judgment creditor has the burden of proof on all six requirements. This burden is probably the most compelling reason for plaintiffs' attorneys to understand and make allowance for the law of the foreign jurisdiction in planning for trial in the United States.

1. Final Judgment.

Before a German court will recognize the U.S. money judgment, it must be final and non-appealable.[10] The German statute refers to judgments of a foreign court. However, the term foreign court has been broadly interpreted and includes civil and commercial courts, as well as administrative courts. The term judgment means a decision that resolves a private civil dispute. The foreign judgment need not have the label judgment. Under German law, judgment includes injunctions, decrees of specific performance, declaratory judgments, writs of execution for fixed sums, and default judgments. However, for a default judgment to be recognized, proper service of process must have been accomplished and the defendant must have been afforded sufficient time to respond. The term final means that all litigation (trial and appeal) has been concluded, i.e., the judgment must be *res judicata* under the procedural law of the rendering foreign (U.S.) court, and the only act remaining must be execution on the judgment.

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2. Jurisdiction.

Under German statute, before a U.S. judgment will be recognized, the U.S. court must have been competent, i.e., the court must have had jurisdiction over the dispute.[11] The determination of jurisdiction can be one of the easiest, or one of the most difficult, requirements to satisfy under German law.

Whether the U.S. court had the requisite jurisdiction will be determined according to German law under the so-called mirror-image doctrine. Under the mirror-image doctrine, two conditions must be satisfied. First, German law projects its own rules of jurisdiction onto the United States case. If under the facts of the U.S. case, the German court could have assumed jurisdiction (competence) under German law, then the first condition is satisfied. The basic German presumption for this doctrine is that, absent a uniform international standard for jurisdiction, foreign judgments should be subject to the same rules as domestic German judgments. The second condition to be satisfied under the mirror-image doctrine is that the United States law must have the same basis for jurisdiction in the case as found under German law, i.e., United States law must have the mirror-image of the German basis for jurisdiction. The following are some of the German statutory bases for jurisdiction:

Basis	ZPO Section
Domicile or residence	12, 13, 16
Seat of company	17
Place of business	21
Location of personal property	23
Tort (place of effect or occurrence)	32
Acceptance of jurisdiction	39
Contract - jurisdiction by agreement	40
Contract - place of performance	29

It is important to note that Germany does not recognize doing business as a basis for exercising jurisdiction. As mentioned in endnote 3, Germany and most countries consider United States jurisdiction based on long-arm statutes and minimum contacts (such as doing business) to be unfair and a violation of due process.[12]

Fortunately, the U.S. basis of jurisdiction does not have to be an exact image of the German basis. As one can imagine, United States concepts and terms do not always nicely mirror German jurisdictional concepts and terms.

One example of such difficulties is the place-of-contract-performance basis for jurisdiction (ZPO § 29). When a contract requires a German manufacturer to ship F.O.B. Portland, where is the place of performance of the contract - in Portland or Germany? If under Oregon law, the contract's place of performance is in Portland, then an Oregon court would have German subject matter jurisdiction under ZPO § 29. However, under the controlling Oregon law, the UCC does not expressly mention place of performance when defining F.O.B. Instead, the UCC focuses on place of delivery, risk of loss, inspection, acceptance, and rejection. Only after a careful journey through a number of UCC provisions, comments, treatises and expert opinions from scholars can one conclude, for example, that under United States law F.O.B. Portland is a destination contract and Portland is the contract's place of performance.

And that's only the United States' reflection in the mirror-image test. Next, you have to establish that F.O.B. Portland means place of performance under German law. This requires another careful journey through a veritable Black Forest of competing opinions from German scholars and experts, arguing over the effect of whether the terms are capitalized or not, over whether Incoterms (International Chamber of Commerce terms for international business transactions) apply, over whether F.O.B. Portland is a destination or shipment contract term, and the importance of the A. between the letters F.O.B.[13] One German Appeals Court has ruled that F.O.B. Portland is a destination contract under German law, reflecting place of contract performance in Portland.

Another basis for jurisdiction is acceptance of jurisdiction under ZPO § 39. This section relates to consent or submission (other than by contractual agreement) by a defendant to a foreign court's jurisdiction. If the defendant consents or submits to the jurisdiction of the United States court, then the court has jurisdiction under German law.

However, ZPO § 39 contains a trap for the uninformed. Under current German law, the defendant must *expressly consent*. If the defendant does not expressly consent, German law presumes the defendant has objected to the jurisdiction of the foreign court (subject to conduct clearly indicating the defendant has consented to jurisdiction).[14] Of course, the safest approach for the German defendant is to *expressly object* to the jurisdiction of the court. In either case, under German law the defendant can actually appear at trial and defend on the merits, and still challenge the recognition and enforcement of the judgment in Germany based on lack of the U.S. court's jurisdiction!

3. Proper Service.

The defendant must have been properly served, and even if properly served, must have sufficient time to prepare a defense.[15] Service may be accomplished in two fashions. First, the plaintiff may serve the German defendant in Germany, according to the German federal rules of service. Second, service may be made through the procedure provided in the Hague Convention on the *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Service under the Hague Convention is the preferred method. In either method, however, it is recommended that the plaintiff retain local German counsel to assist

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in service of the complaint.

Even though preferred, service under the Hague Convention rules is not always as easy as the Convention makes it appear. There are many traps for the inexperienced in service under the Hague Convention, including translation defects into German, misspellings of defendant's name, incomplete designation of name, missing United States authorizations, and delivery to the wrong German Justice office.[16]

4. Priority of Judgment.

The foreign judgment must have priority over any conflicting German judgments.[17] A prior recognizable foreign judgment has priority over a later foreign judgment. A prior German judgment has priority over a later foreign judgment.[18] And a subsequent German judgment has priority over a prior foreign judgment if the German case was filed and served before the foreign case was filed and served.

5. Compatibility with Basic Principles of German Law.

The foreign judgment must not be contrary to German public policy (A*Ordre Public*).[19] In general, a foreign judgment would not be recognized if it were manifestly immoral or usurious, or fundamentally inconsistent with the German legal and social system. The following are specific examples of foreign private judgments that violate German public policy:

- judgments obtained by fraud
- judgments obtained in violation of due process
- judgments providing for multiple damages
- judgments for punitive damages
- judgments for gambling debts
- judgments in certain product liability cases
- judgments that disregard the German rules on exchange control
- judgments that disregard the German Stock Exchange Act
- judgments providing interest on interest
- judgments based on novel causes of action
- judgments based on U.S. public law [20]

6. Reciprocity.

Finally, for the U.S. money judgment to be recognized in Germany, German money judgments must be equally capable of recognition and enforcement in the U.S. state where the foreign judgment is rendered.[21] Reciprocity is generally not a problem in most jurisdictions in the United States. Most states, including Oregon, have adopted the Uniform Enforcement of Foreign Judgments Act and the Uniform Foreign Money-Judgments Recognitions Act.[22]

Conclusion

The recognition and enforcement of foreign judgments is an expanding field of law, one that is becoming increasingly important for United States companies and citizens doing business on a global scale. Before litigation is commenced against a foreign entity in the United States, it is important to determine the law and procedures that a United States judgment creditor would face in seeking recognition and enforcement of its money judgment in the defendant's country. It is important to develop a trial strategy that maximizes the judgment creditor's chances of successfully obtaining recognition and enforcement of its United States money judgment and minimizes the opposition's defenses against such recognition and enforcement. ❐

(Endnotes)

1. Lew Delo is a partner in Delo & Bowers, LLP. Over the last 20 years, Mr. Delo's practice has included representing domestic and foreign clients in international litigation, including the recognition and enforcement of foreign judgments. He represents domestic and foreign insurance companies, foreign banks and corporations, and foreign accounting firms. He also has acted as special counsel in advising United States plaintiffs and foreign defendants. He is a graduate of Washington State University, University of Washington, and Northwestern School of Law of Lewis and Clark College, and is admitted to practice in Oregon courts, federal district courts, and the United States Tax Court. He is the author of several articles and has lectured on tax and international litigation topics.

2. The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958; entered into force in the United States in 1970) and the Organization of American States Inter-American Convention on International Commercial Arbitration (Panama City, 1975).

3. Although there are many reasons for the absence of multilateral conventions and bilateral treaties with the United States on the recognition and enforcement of money judgments, two of the principal reasons are: (i) U.S. money judgments are perceived by most countries as excessive and a violation of public policy; and (ii) the U.S. concept of extraterritorial jurisdiction

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(long-arm statutes and minimum contacts) is perceived as unfair and a violation of due process.

4. See, for example, the United States litigations arising out of the collapse of Enron, WorldCom, Global Crossings and Italy's Parmalat, as well as the recent tax shelter litigation against the accounting firm KPMG LLP, the U.S. member firm of KPMG International.

5. Pursuant to the Amsterdam Treaty, on March 1, 2002, the European Union codified the Brussels Convention as a European Union regulation, which gives the Brussels Convention the same force in EU countries that a federal statute has in the United States.

6. Unfortunately, there is no German equivalent to the American principle of international comity or the English doctrine of obligation for the recognition and enforcement of foreign judgments. Recognition and enforcement of foreign judgments in Germany are controlled by international conventions, treaties, and German federal statutes.

7. ZPO § 722.

8. ZPO § 723 (1).

9. ZPO §§ 723 (2) and 328. Technically, ZPO § 723 (2) requires the judgment creditor to establish that the foreign judgment is final and does not violate ZPO § 328, which lists five exceptions to the enforcement of a foreign judgment.

10. ZPO § 723 (2).

11. ZPO § 328 (1)1.

12. See Bernstein, *Prozessuale Risiken im Handel mit den USA* (Procedural Risks in Trading with the USA), selected questions on ZPO § 328, p 75 et seq., 1978. It is noteworthy, however, that one appeals court in Germany found that doing business in the United States, along with other factual considerations, was sufficient to satisfy German law that a contract was in the United States. For a number of years, the United States and other countries have been trying to resolve these disputes and agree on common bases for jurisdiction (both in the United States and through the Hague), but progress has been slow.

13. The meaning of F.O.B. Portland is the central factual and legal issue in *American Insurance Company v Keramchieme GmbH*, a case brought (and still pending) in German courts to obtain recognition and enforcement of a United States money judgment rendered by the U.S. District Court of Oregon in 1987.

14. The law in the United States is the opposite regarding acceptance of the court's jurisdiction. If the defendant does not expressly object in a special appearance to the jurisdiction of the court, then the defendant has waived its right to contest jurisdiction, i.e., it has consented to jurisdiction. See, e.g., ORCP 21 G(1)-(2) and FRCP 12(h)(1).

15. ZPO § 328 (1) 2.

16. For inexperienced plaintiff's counsel, these problems can be a never-ending nightmare. In one case brought in California against a former foreign affiliate of an international accounting firm, such problems delayed plaintiff's service for almost two years.

17. ZPO § 328 (1) 3.

18. This provision can be a very effective shield for a German defendant against a foreign money judgment. The German defendant, even though defending in the United States, could bring the equivalent of a declaratory action (on one or more limited issues in the case) in Germany under ZPO § 256 and start a race to final judgment.

19. ZPO § 328 (1) 4.

20. In general, outside of the United States, only governments can bring actions to enforce public laws. However in the United States, many public laws, such as anti-trust and product liability laws, also give private citizens the right to bring lawsuits and be awarded damages. Germany, along with other countries, believes that only government, and not private persons or entities, should be able to obtain and enforce judgments based on public law. The same rationale is used for holding that individuals and private entities cannot enforce judgments for punitive damages. The enforcement of public laws and punitive damages is the exclusive province of government.

21. ZPO § 328 (1) 5.

22. See, e.g., ORS Chapter 24. However, one well-respected German authority, Professor Doctor Rolf A. Schütze, has recently changed his position on the reciprocity issue. He now argues that there is no reciprocity between Germany and the United States for money judgments less than approximately $250,000, because the U.S. approach to awarding attorney fees violates German public policy. German law awards attorney fees to the prevailing party, does not allow contingency fees, and sets fees by statute; U.S. law may or may not award such fees to the prevailing party (depending on the provisions of the contract or a statute), allows contingency fees, and allows a court to set the amount of the fees. As a result, he argues, in the United States the entire German money judgment could be consumed by the cost of paying attorney fees to collect it. Hence, as a practical matter, there is no reciprocity. His change in position may be influenced by the fact that he represents a German company contesting payment of a substantial U.S. money judgment in German courts. To date, the author knows of one German appeals court that has rejected Professor Doctor Schütze's new position and knows of no German court that has adopted it.

Ninth Circuit Establishes Guidelines for Interlocutory Appeals of Class Certification Orders

By Steve D. Larson and David F. Rees

Federal Rule of Civil Procedure 23(f), which became effective in 1998, allows federal courts of appeal to permit a discretionary interlocutory review of an order of a district court granting or denying class action certification. Rule 23(f) provides no standards for determining when the appellate court should exercise its discretion to grant review. The drafters envisioned that "the courts of appeal will develop standards for granting review that reflect the changing areas of uncertainty in class litigation." *See* Advisory Committee Notes to Rule 23(f). Appellate courts in other circuits had examined the appropriate scope of Rule 23(f), but until recently, the Ninth U.S. Circuit Court of Appeals had not.

In *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005), a unanimous panel of the Court set forth the criteria the Ninth Circuit will consider in evaluating whether to grant a petition seeking interlocutory review under Rule 23(f). Given the recent enactment of the Class Action Fairness Act, class action lawyers will increasingly find themselves prosecuting and defending class actions in federal courts, so this new law may be particularly important. *See* 28 U.S.C. § 1332(d).

In *Chamberlan,* the plaintiffs sought to certify a class action against Ford Motor Company under the California Consumer Legal Remedies Act, California Civil Code § 1750, *et seq.* Plaintiffs alleged that Ford knowingly manufactured, sold and distributed automobiles containing defective plastic intake manifolds, which failed shortly after the manufacturer's warranty expired. Plaintiff alleged that Ford was aware of the defect and concealed it, and that its limited recall campaign improperly excluded the majority of affected cars. The plaintiffs in *Chamberlan* sought damages and injunctive relief in the form of a complete notification and recall campaign, among other things. *See* 402 F.3d at 955-56 (discussing background facts of case). The U.S. District Court for the Northern District of California certified a class consisting of "all consumers residing in California who currently own, or paid to repair or replace, the plastic intake manifold on any of the following cars: 1996-2001 Model Year Mercury Marquis, 1998-2001 Model Year Ford Mustangs, 2002 Model Year Ford Explorers, 1996-2001 Model Year Ford Crown Victorias, or 1996-2001 Lincoln Towncars." *Id.* at 956.

Ford filed a motion for permission to file a discretionary, interlocutory appeal under 23(f) within ten days, as required by the rule. Ford argued that the class certification order was improper because individual issues of fact (such as which type of vehicle claimant owned, when that vehicle was produced, and what each individual buyer's expectations were regarding the durability of the intake manifold) predominated over the common issues regarding the alleged product defect. Ford also argued that the Ninth Circuit should review the class certification order immediately because otherwise the order would sound the "death knell" of the litigation by placing irresistible pressure on Ford to settle, rather than risking huge liability.

In addressing Ford's petition, the *Chamberlan* court began by setting forth

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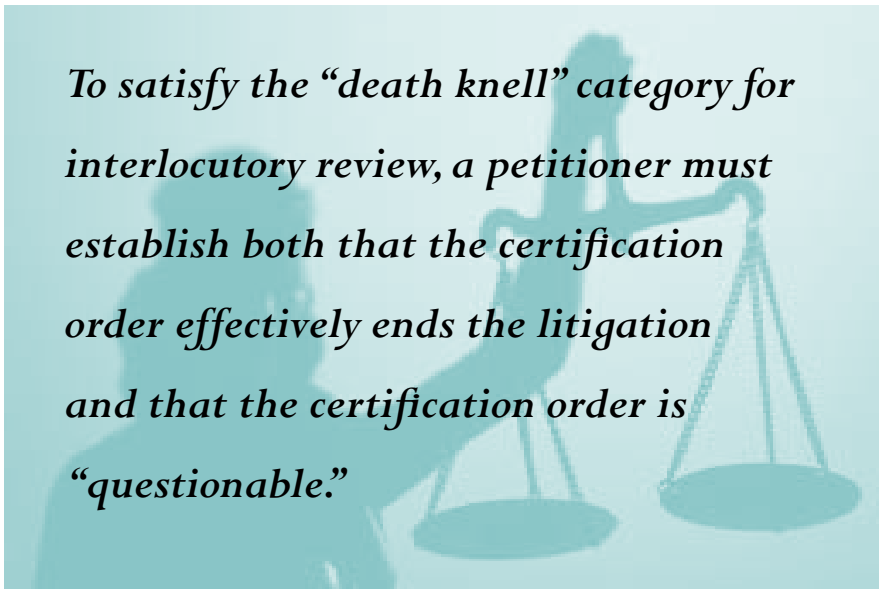
the purposes of Rule 23(f) review. The court noted that "first, the rule provides a mechanism through which appellate courts, in the interest of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritless claim or defense before trial." *Chamberlan*, 402 F.3d at 958-59, *quoting Waste Mgm't Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000). And second, "the rule furnishes an avenue, if the need is sufficiently acute, whereby the court of appeals can take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of law." *Id*.



Building on a solid foundation of case law from sister circuits, the Ninth Circuit set forth its guidelines for when Rule 23(f) review should be accepted. As with all of the circuits that have addressed such review, this Court held that interlocutory review of class certification orders "should be granted sparingly." *Chamberlan*, 402 F.3d at 959. Such appeals are disfavored as they "add to the heavy workload of the appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Id*.

The *Chamberlan* court articulated the following three categories of cases where Rule 23(f) review of a certification order may be appropriate:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

402 F.3d at 959. Although the Court stated that the categories are to be used as guidelines, it made clear that a case warranting review ordinarily "must come within one or more of the specified categories." *Id*. at 960.

The Death Knell Category

To satisfy the "death knell" category for interlocutory review, a petitioner must establish both that the certification order effectively ends the litigation and that the certification order is "questionable." *Chamberlan*, 402 F.3d at 959. The first of these two requirements necessitates a showing that either: (1) the certification order certifying a class will place irresistible pressure on a defendant to settle, regardless of the merits of the claims, because the potential liability threatens to overwhelm the defendants' resources; or (2) a certification order denying a motion for class certification will force the plaintiffs to abandon their claims as pursuing the individual claims to judgment makes no economic sense. *See Id.* at 957.

The *Chamberlan* Court established that merely asserting "death knell" circumstances without factual support is not enough. The Court stated: "Significantly, Ford's claims [of death knell circumstances] are conclusory and are not backed up by declarations, documents, or other evidence demonstrating potential liability or financial condition." *Id.* at 960. Specifically, the *Chamberlan* court noted that Ford made no showing that its potential liability in the class action would force a company of its size to settle or that it lacked the resources to defend the case through trial and appeal without risking ruinous liability. *Id.* The court concluded that "the potential recovery here may be 'unpleasant to a behemoth' company, but it is hardly terminal. . . . [T]he impact of the class certification alone does not support an appeal." Id. (*quoting Mowbray,* 208 F.3d at 294).

Because Ford did not make the required showing of death knell circumstances, the Chamberlan court did not address whether the district court's certification order was "questionable." See 402 F.3d at 960-61. However, other circuits have held that to establish that a district court's class certification or-

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der is "questionable" requires a showing of a likelihood of success in overturning the order. *Blair v. Equifax Check Services, Inc.*, 181 F3d 832, 835 (7th Cir. 1999); *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000). Moreover, other circuits have held that, in evaluating the district court's certification order, the reviewing court should "tak[e] into account the discretion the district judge possesses in implementing Rule 23 and the correspondingly deferential standard of appellate review.'" *Blair*, 181 F.3d at 835; *In re Delta Airlines*, 310 F.3d 953, 960 (6th Cir. 2002).

Addressing Ford's petition regarding the unsettled questions of law category, the court rejected Ford's argument that its petition raised unsettled questions of law because there was a split between the circuits as to whether class certification required a "cursory analysis" or "rigorous review."

Unsettled Fundamental Issue of Law Category

To satisfy the unsettled question of law criterion, a Rule 23(f) petitioner must establish that the requested appeal would enable the circuit court to settle a novel and fundamental question of law that: (1) relates to class actions; (2) is important both to this lawsuit and generally; and (3) is likely to evade end-of-the-case review. *Chamberlan*, 402 F.3d at 959.

Addressing Ford's petition regarding the unsettled questions of law category, the court rejected Ford's argument that its petition raised unsettled questions of law because there was a split between the circuits as to whether class certification required a "cursory analysis" or "rigorous review." *Chamberlan,* 402 F.3d at 961 *(citing Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (1998) (upholding certification of a national class against an auto manufacturer), and *Valentino v. Carter-Wallace Inc.*, 97 F.3d 1227 (1996) (remanding so that the district court could provide further details justifying its decision). The *Chamberlan* court declined to find any such conflict or unsettled question of law, and it reconciled these cases by explaining that they rested on different facts: *Hanlon* entailed plain issues and analytical framework, while *Valentino* required "deeper probing." 402 F.3d at 961.

The Manifest Error Category

Departing slightly from the Seventh and First Circuits, the *Chamberlan* court held that a showing that a district court's class certification order is "manifestly erroneous" alone suffices for immediate review under Rule 23(f), even if there are no other factors present. 402 F.3d at 959. The court stated: "We see no reason for a party to endure the costs of litigation when a certification decision is erroneous and inevitably will be overturned." *Id.*

To establish "manifest error," the *Chamberlan* court held:

> The error in the district court's decision must be significant; bare assertions of error will not suffice. Any error must be truly "manifest," meaning easily ascertainable from the petition itself. If it is not, then consideration of the petition will devolve into a time consuming consideration of the merits, and that delay could detract from planning for the trial in the district court.

402 F.3d at 959. The court went on to state that it would be "difficult to show that a class certification order is manifestly erroneous unless the district court applies an incorrect Rule 23 standard or ignores a directly controlling case." *Id.* at 962.

The *Chamberlan* court rejected Ford's argument that the district court's decision was manifestly erroneous because it egregiously dispensed in a single sentence with the "predominance" requirement that common issues of law and fact must predominate over individual ones. The court found that "the [common] issues were readily apparent," and that the district court affirmatively found that a common nucleus of facts and potential legal remedies dominate this litigation, such as whether Ford had a duty to disclose its knowledge and failed to do so.

Application of *Chamberlan* and Rule 23(f)

The *Chamberlan* decision is important for lawyers who work on class actions because the Ninth Circuit has set a fairly high standard for obtaining interlocutory permission to appeal. The court made it clear that it will continue to defer to the district court's discretion and broad authority in analyzing and deciding class certification issues.[1]

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Interlocutory Appeals

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This Ninth Circuit ruling recently came into play into a case pending in the Federal District Court of Oregon. In *Ashby, et al. v. Farmers Insurance Company of Oregon*, USDC Case No. CV 01-1446 BR, Judge Brown certified a class of automobile and property insurance policyholders of Farmers Insurance Company of Oregon ("FICO") who suffered the "adverse action" of having their insurance premiums increased based on their consumer credit report, but allegedly did not receive a proper notice of this "adverse action" as required by the Fair Credit Reporting Act. *See* 15 U.S.C. § 1681m(a). FICO petitioned for permissive appeal under F.R.C.P. 23(f).[2] FICO argued that (1) the class certification decision sounded the "death-knell" for the case because FICO will be forced to settle regardless of the merits; (2) several of the district court's rulings were erroneous; and (3) the case presented several novel questions of law.

While the petition was pending, the *Chamberlan* decision was handed down. The panel handling the petition in the *Ashby* case asked for supplemental briefing in light of the new Ninth Circuit standards set forth in *Chamberlan.* In response, plaintiffs filed a supplemental opposition pointing out that FICO provided nothing more than a conclusory "estimate" of its exposure and failed to submit any competent evidence establishing either its exposure or its inability to defend itself on the merits through trial and appeal without risking ruinous liability. Plaintiffs also argued that the class action issues involved were routine and involved the district court's proper exercise of discretion based on the factual record before it, and thus FICO failed to identify any unsettled and fundamental issue of law important to both this case and the class action jurisprudence generally, that is likely to invade into the case review. Finally, plaintiffs argued that there was no "manifest error" as Judge Brown's opinion carefully applied the law to the facts, and addressed the proper controlling precedents and rules in certifying the class.

The Ninth Circuit, in a one-sentence order, stated as follows:

> The court, in its discretion, denies the petition for permission to appeal the district court's October 18, 2004 order granting class action certification. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005).

Although the *Chamberlan* court set forth new law in establishing the Ninth Circuit's standard for applying Rule 23(f), the decision largely echoes a long-standing policy of deference to district courts in class action matters. The *Chamberlan* decision emphasizes the importance of class certification issues at the trial level, as these issues often involve evaluations of complicated factual records and the exercise of discretion by trial court judges. The Chamberlan court stated:

> When considering whether to allow interlocutory appeals, we will avoid "both micromanagement of complex class actions as they evolve in the district court and inhibition of the district court's willingness to revise the class certification for fear of triggering another round of appellate review." *In re Lorazepam,* 289 F.3d at 105. **We underscore that the decision to permit interlocutory appeal is, at bottom, a discretionary one**.

402 F.3d at 960 (emphasis added). Thus, although Rule 23(f) provides a limited avenue for interlocutory appeals of class certification orders, the critical battle for class certification, which often makes or breaks a high stakes lawsuit, will continue to be won or lost primarily in the trial courts. ❐

(Footnotes)

1 The holding in *Chamberlan* did not directly address the situation where plaintiff was denied the petition for class certification. The Advisory Committee Notes to Rule 23(f) suggest that a 23(f) petition may be warranted where "the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the cost of litigation." It would appear that class actions more often than not present class representatives who cannot proceed to trial on an individual claim, and therefore may have a basis for seeking immediate appellate review. However, plaintiffs pursuing such interlocutory review should submit evidence, such as affidavits, documents or declarations establishing that, absent class certification, the case cannot proceed to judgment on the merits because the costs of litigation would be too high.

2 FICO did not seek court permission to file a Rule 23(f) petition, but it had moved the district court for immediate stay pending adjudication of the petition. Whether or not to grant the stay is discretionary with both the trial court and appellate court. Fed. R. Civ. P. 23(f). Judge Brown did not stay the case.

Update: Oregon Adopts a Dentist-Patient Privilege

By Scott J. Kaplan

In the May 2003 *Litigation Journal*, in an article entitled "The Need for a Dentist-Patient Privilege in Oregon,"[1] I pointed out the incongruity in Oregon's Rules of Evidence that health care providers from naturopaths to clinical social workers were protected by some variant of the physician-patient privilege, but that no privilege existed protecting from discovery confidential communications between dentists and patients. The article concluded that "the absence of dentist-patient privilege in the OEC is a flaw that the legislature can and should remedy." Such is the influence of this publication that the legislature took heed. On June 29, 2005, the Governor signed SB 332, authored by the Senate Committee on the Judiciary, which amended ORS 40.235 (Rule 504-1) to add dentists to the definition of a "physician" under Rule 504-1(c). Section 2 of the bill provides that the amendment is effective for confidential communications made on or after its effective date. Thus, as of January 1, 2006, confidential communications between dentists and patients will be protected to the same extent as confidential communications between patients and other health care practitioners.

Rule 504-1, as amended, will read in relevant part:

(1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except:

(A) Persons present to further the interest of the patient in the consultation, examination or interview;

(B) Persons reasonably necessary for the transmission of the communication; or

(C) Persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a physician.

(c) "Physician" means a person authorized and licensed or certified to practice medicine *or dentistry* in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a physical condition. "Physician" includes licensed or certified naturopathic and chiropractic physicians *and dentists*.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

* * * *

Oregon joins at least eight other states in expressly adopting a dentist-patient privilege.[2] And by doing so, Oregon corrects, in the age of HIPAA, confidentiality of HIV information and concerns about genetic privacy, an anachronistic differentiation between the legal status of the dentist-patient relationship and the physician-patient relationship. ❐

(Footnotes)

1 22 *Litigation Journal,* No. 1 (OSB May 2003).

2 A dentist-patient privilege exists in at least the following jurisdictions: Michigan (Mich. Comp. Laws Ann. § 333.16648 (West 2001)), Minnesota (Minn. Stat. Ann. § 595.02 (West 2000)), Missouri (Mo. Ann. Stat § 491.060(5) (West 1996)), Mississippi (Miss. Code Ann. § 13-1-21 (1999)), Ohio (Ohio Rev. Code Ann. § 2317.02(B)(1) (West 2002)), New York (N.Y. Civ. Prac. Act § 353), and Vermont (Vt. Evid. Code § 503).

Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

I. Claims for Relief.

A. Constitutional Claims.

A state wildlife regulation that prevented a landowner from logging part of its property did not amount to an unconstitutional "taking" of property without just compensation, the Supreme Court held in *Coast Range Conifers v. Board of Forestry*, 339 Or. 136 (2005). The Court of Appeals had determined that depriving plaintiff of all economically viable use of nine acres of a 40-acre parcel resulted in a taking of part of the property. The Supreme Court reversed, holding that "the correct test is more comprehensive than the Court of Appeals perceived[.]" *Id*. at 139. Under the correct test, a court must consider the landowner's "ability to use the whole parcel that he or she owns in determining whether the property retains any economically viable use." *Id*. at 150.

Denying marriage to same-sex couples did not violate Article I, section 20 of the Oregon Constitution in light of the enactment of Ballot Measure 36, the Supreme Court held in *Li v. State of Oregon*, 338 Or. 376 (2005). The Court also held that marriage licenses issued to same-sex couples in Multnomah County before Measure 36's effective date "were issued without authority and were void at the time that they were issued." *Id*. at 398. In *McFadden v. Dryvit Systems, Inc.*, 338 Or. 528 (2005), the Supreme Court held that ORS 30.905—which revives certain product liability causes of action dismissed on statute of limitations grounds—does not violate the Separation of Powers provisions of the Oregon Constitution.

B. Contract Claims.

In *Kelly v. Olinger Travel Homes, Inc.*, 200 Or. App. 635 (2005), the Court of Appeals held that damages for a breach of warranty arising out of the sale of a motorhome were "not available to buyers who have revoked acceptance." *Id*. at 644. In *Aero Sales, Inc. v. City of Salem*, 200 Or. App. 194 (2005), the Court of Appeals held that a claim for reformation of a lease failed because plaintiff did not establish by clear and convincing evidence that "the parties had an antecedent agreement that was omitted from the contract, i.e., an agreement to include something in *that specific contract* that was omitted." *Id*. at 203 (emphasis in original).

C. Other Claims.

Plaintiffs failed to state a claim of assumpsit based on an alleged violation of a restrictive covenant that prohibited interference with the visibility of their land, the Court of Appeals held in *Jantzen Beach Assoc. v. Jantzen Dynamic Corp.*, 200 Or. App. 457 (2005). Assumpsit, the court explained, generally provides a remedy in the absence of an express or implied contract where the law creates an obligation to pay in order to avoid unjust enrichment. *Id*. at 462-63, citing *Davis v. Tyee Industries, Inc.*, 295 Or. 467, 469-70 (1983). Here, the court concluded that assumpsit will not lie "[w]here there is mere use of a property interest without the appropriation of tangible property during the trespass[.]" *Id*. at 465.

The Court of Appeals affirmed a damage award on a claim for negligent infliction of emotional distress in *Shin v. Sunriver Preparatory School, Inc.*, 199 Or. App. 352 (2005). The plaintiff in that case was born and raised in Korea; as a high school sophomore, she enrolled in Sunriver Prep. Plaintiff lived in a teacher's home under the terms of a "Homestay Agreement." During her stay, plaintiff disclosed to the teacher that her father had beaten and sexually abused her and other members of her family for many years. The father then came to visit plaintiff over spring break; he raped her on the three occasions they were left alone together. School officials and others attempted to investigate and arrange for counseling; they obtained releases from plaintiff's mother, authorizing the counselors to fully disclose to the school all the information they received about plaintiff. When plaintiff's mother later retracted the releases, the school informed her that plaintiff would be expelled from Sunriver Prep. Plaintiff sued, asserting (among other things) a claim for negligent infliction of emotional distress (NIED) "for the school's expulsion of plaintiff in a manner that defendant knew or should have known would, and did, cause plaintiff grave mental distress." *Id*. at 364. The jury found for plaintiff.

Sunriver Prep argued on appeal that the NIED claim "was inadequate as a matter of law because plaintiff does not claim

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a physical injury and has not asserted that the school's actions affected any other legally-protected interest." *Id*. at 365. The Court of Appeals disagreed, finding that (1) "[c]ertain types of special relationships in which one party owes the other a heightened duty of care * * * give rise to a legally-protected interest sufficient to support the imposition of liability for purely emotional harm" (*id.*); and (2) "the relationship between an international homestay student and a school, under the circumstances presented here, gave rise to such a heightened duty on the part of the school to protect the student from emotional harm and that the student's legally-protected interest is sufficiently important to support the imposition of liability for negligently causing emotional harm." *Id*. at 365-66.

II. Defenses.

The immunity provided by the Public Use of Lands Act, ORS 105.672 to 105.700—which shields landowners from liability for personal injuries that arise out of the use of land for recreational purposes—barred plaintiff's negligence claim in *Schlesinger v. City of Portland*, 200 Or. App. 593 (2005). The Court of Appeals rejected plaintiff's argument that giving the city the benefit of this immunity would deprive plaintiff of a remedy in violation of Article I, section 10 of the Oregon Constitution. *Id*. at 599.

A breach of warranty claim based on an allegedly defective wood preservative was barred by the four-year statute of limitations in ORS 72.7250, the Court of Appeals held in *Permapost Products Co. v. Osmose, Inc.*, 200 Or. App. 699 (2005). The court rejected plaintiff's argument that defendant's fraudulent concealment tolled the statute of limitations because plaintiff failed to plead fraudulent concealment in reply to the statute of limitations defense in defendant's answer. *Id*. at 703.

In *Meoli v. Brown*, 200 Or. App. 44 (2005), the Court of Appeals held that a negligence claim was barred by the statute of limitations, and that "advance payments" made by defendant's insurer to plaintiff's medical providers "were not the sort of payments that toll a statute of limitations." *Id*. at 46. The court explained that (1) advance payments that toll the statute "are payments for damages the liability for which ultimately depends on a determination of fault" (*id*. at 49); and (2) the payments here were made pursuant to a policy provision that required such payments regardless of fault. *Id*. at 50.

In *Hayes Oyster Co. v. Dulcich*, 199 Or. App. 43 (2005), the Court of Appeals held that issue preclusion did not prevent plaintiff from recovering punitive damages on a claim that defendant had converted more than 300,000 cubic feet of oyster shells. In an earlier phase of the case, a jury returned a verdict against three other defendants for compensatory—but not punitive—damages based on the oyster shell conversion. The court explained that issue preclusion "does not apply to claims within the same case." *Id*. at 50. The "law of the case" doctrine did not apply, either, because that doctrine only operates "to preclude parties from revisiting issues that have been fully considered by an appellate court in the same proceeding." *Id*. at 54.

The statute of frauds barred a claim to enforce an alleged oral agreement to allow defendant to occupy a Lake Oswego house during his lifetime, the Court of Appeals held in *Mukai Living Trust v. Lopez*, 199 Or. App. 341 (2005). The court rejected defendant's argument that the oral agreement was enforceable under the doctrines of part performance or equitable estoppel because there was no evidence in the summary judgment record "from which a rational juror could find that the parties entered into an agreement with terms so precise that neither party could reasonably misunderstand them, * * * or that defendant's alleged acts of part performance could be explained only by the existence of a contract giving him a life's estate." *Id*. at 345 (citation and internal quotes omitted).

III. Procedure.

A judgment entered in a class action brought under the federal Fair Labor Standards Act (FLSA) did not have preclusive effect in a subsequent action brought by a class member to recover unpaid overtime and termination wages under Oregon's wage and hour laws, the Court of Appeals held in *Aguirre v. Albertson's, Inc.*, 201 Or. App. 31 (2005). The court concluded that defendant "waived its claim preclusion defense by acquiescing in plaintiff's simultaneous—albeit unwitting—pursuit of her claims in multiple actions." *Id*. at 56-57.

An amended complaint naming the correct defendant may relate back to the date of the original complaint if the newly named defendant had notice of the action but was not served before the statute of limitations expired. *McLain v. Maletis Beverage*, 200 Or. App. 374 (2005). A notice of appeal mailed to the wrong address and then forwarded by the post office was insufficient to vest jurisdiction in the Court of Appeals, the Supreme Court held in *McCall v. Kulongoski*, ___ Or. ___ (Aug. 18, 2005), where the notice was not actually received until 32 days after entry of the judgment. An arbitrator—not the court—must decide whether a party has met the preconditions to arbitrability under the Federal Arbitration Act, notwithstanding a contractual choice of law provision specifying that Oregon law applies. *Industrial Matrix Joint Venture v. Pope & Talbot*, 200 Or. App. 248 (2005). Petitioners seeking judicial review of an agency order were not entitled to a contested case administrative hearing, but they were entitled to present evidence in the circuit court,

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Recent Significant Oregon Cases

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the Court of Appeals held in *G.A.S.P. v. Environmental Quality Commission*, 198 Or. App. 182 (2005). This included "evidence that was not available at the time that EQC entered its order." *Id*. at 196.

In *Baughman v. Pina*, 200 Or. App. 15 (2005), the Court of Appeals held that the testimony of an expert that plaintiff's injuries were solely the result of an automobile accident was sufficient evidence of causation to create an issue of fact for the jury even though the expert failed to explain how he arrived at that opinion. *Mark Nelson Oil Products, Inc. v. Grim Logging, Inc.*, 199 Or. App. 73 (2005), had a fairy tale ending for the defendant: the Court of Appeals held that the assignment of the underlying contract materially increased his risk as guarantor and, therefore, it operated to discharge him from liability as a matter of law. ❐

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