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Accrual of Legal Malpractice Claims: It May Be Sooner Than You Think

By Gary M. Berne and Joshua L. Ross

Gary M. Berne

Joshua L. Ross

It's a rainy Thursday morning in May, and you are meeting with a new client. The worried client tells you that the power company sued him to enforce an easement and that a judge ruled one day short of two years ago that the easement allows the power company to build a power line that will split the family farm in two. The client's lawyer, who drafted the original easement, has filed an appeal but the argument is Monday and the lawyer seems a bit nervous. You read the easement and conclude it is a poorly drafted mess and that the odds on appeal are 50/50. You suggest that there may be a chance to reach a settlement before the appellate court rules.

You check the two year statute of limitations for legal malpractice claims and find that the limitations period is tolled by a discovery rule. The discovery rule applies an objective standard, so the statute of limitations does not begin to run until the injured client knows or should know of "every fact which it would be necessary for the client to prove." *Kaseberg v. Davis Wright Tremaine, LLP,* 351 Or 270, 277-278 (2011). Thus, the issue is whether the client knows or should know each element of the claim. *Id.* at 277. A claim for legal malpractice requires proof of duty, breach, harm, and causation. *See Stevens v. Bispham*, 316 Or 221, 227 (1993). You also find that "the filing of [a] claim against [the client] together with the passage of any arbitrary lengths of time" is generally insufficient to put a client on notice that the claim was caused by the lawyer's negligent advice and that "common sense dictates that a 'later event' (the appearance of [the client's] probable liability) should take place before" the limitations period begins to run. *US Nat. Bank of Oregon v. Davies*, 274 Or 663, 669-670 (1976). *Davies* leads you to conclude that, despite the power company's position and the trial judge's ruling, the pending appeal must be resolved before the limitations period on the malpractice claim begins to run.

You then read *Jaquith v. Ferris*, 297 Or 783, 788 (1984), a case involving a claim against a real estate agent. *Jaquith* holds that, so long as harm already has occurred, "the outcome of the [underlying] dispute is pertinent only to the possibility that [your client's] damages might be mitigated by events subsequent to her discovery of harm." In *Jaquith*, the Court ruled that the statute of limitations was not tolled even while the underlying dispute remained unresolved.

So is the statute of limitations governing your new client's legal malpractice claim ticking? On the one hand, the pending appeal in the easement case may result in your client's victory—a result that would eliminate a claim the client

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has against the lawyer who drafted the easement. On the other hand, the client already has incurred the costs of fighting with the power company. If the easement had been written clearly, the power company never would have had a basis to file a lawsuit or, at the least, the trial judge would have quickly ruled in your client's favor. Therefore, even if the power company and the trial judge ultimately are proven wrong, the client already has been harmed due to the lawyer's poor drafting.

When a legal malpractice claim accrues frequently hinges on (a) determining when the client *actually* suffered harm or damages and (b) determining when the client knew or should have known that it was the attorney's negligence that caused that injury. In some situations, it will be self-evident that a client's malpractice claim has accrued. For example, if an attorney fails to timely file a case and the attorney tells the client that he has lost the ability to sue, the client knows that he has been injured and that the lawyer's negligence caused the injury.

Other situations can be more challenging, particularly where the underlying representation involves a complicated transaction, advice in a specialized area of law, or continued representation by the same lawyer. For instance, what if the easement had been clearly written, but the power company sued anyway? Or what if the easement was drafted incorrectly, but the client might win the case based on a defense such as unclean hands or laches?

Several Oregon cases have considered these questions and are particularly instructive.

In *Davies*, the lawyer advised the client to accept trust funds from a corporation in payment for the client's stock. That was bad advice because the payments were illegal, and, after the transaction was completed, the corporation sued the client. Nearly two years after the lawsuit was filed, the client paid the corporation to settle. Nearly a year and a half after the settlement, and more than three years after the corporation sued the client, the client sued the lawyer for malpractice. On appeal, the Supreme Court found that the client's malpractice case did not accrue when the corporation sued him. Although the client suffered harm once he was required to hire counsel to defend the case, it was not clear at that time that the lawyer's negligent advice caused the harm. After all, the client may have prevailed against the corporation or the corporation's lawsuit may have been frivolous. The Court also noted the inherent difficulties for a client, like the plaintiff in *Davies*, who takes inconsistent positions: accusing the lawyer of malpractice in one case, while at the same time defending the other by claiming his actions based on the lawyer's advice were legal.

In *Kaseberg*, the Oregon Supreme Court reaffirmed *Davies*, holding that there was a genuine issue of material fact as to whether the client knew or should have known that the lawyer was a cause of the damages. The court emphasized that the lawyer's ongoing advice to a client bears on the objective standard applied under the discovery rule. In other words, whether a reasonable person in the client's position would be aware that harm was caused by a lawyer's negligence can be influenced by the fact that the lawyer may be giving the client ongoing assurances that there is nothing wrong, or that any damage that occurred is some other party's fault and can be resolved. The lawyer-client relationship is one of trust and confidence, and it is at least a question of fact whether a client reasonably trusts a lawyer's ongoing assurances and advice and, therefore, cannot be said to have awareness that the lawyer's negligence caused the harm. *See Kaseberg*, 351 Or at 279-280.

In *Guirma v. O'Brien*, 259 Or App 778 (2013), the Court reached a similar conclusion. Guirma hired a lawyer to assist with an adoption. The lawyer drafted a motion requesting service of the adoption petition by publication, along with a supporting affidavit from Guirma. Later, the birth mother moved to set aside the adoption, alleging that the request for service by publication was inappropriate because Guirma knew where the birth mother could be personally served. At a hearing on the motion to set aside the adoption, the trial judge opined that the request for service by publication was inappropriate. Nevertheless, Guirma defeated the birth mother's motion to set aside the adoption at trial and in the Court of Appeals, but the Supreme Court later reversed. Guirma ultimately settled by agreeing to set aside the adoption.

Guirma then sued the adoption lawyer for malpractice. She filed her case within two years of the trial court hearing, at which the judge opined that the request for service by publication was inappropriate, but more than two years after the birth mother filed her request to set aside the adoption. The Court of Appeals found that the malpractice case was timely, noting that a client cannot necessarily be expected to recognize that a lawyer's advice is bad, even after they have been sued, "until there no longer exists a realistic possibility that a court will hold that the advice was good." *Guirma*, 259 Or App at 786 (internal quotation and citation omitted). In *Guirma*, the complaint failed to allege facts that compelled the conclusion that Guirma knew or should have known that the attorney's underlying advice—to request service by publication, supported by an allegedly false affidavit—was bad advice at the time the birth mother moved to set aside the adoption.

But *Jaquith*, although not a legal malpractice case, shows the danger of reading *Davies*, *Kaseberg*, and *Guirma* too broadly. Jaquith's realtor represented to her the fair market value of property. In January 1978, Jaquith signed a sales agreement to sell for that amount. In May 1978, Jaquith discovered that the fair market value was actually much higher and she refused to proceed with the sale. In July 1978 the purchaser sued. Jaquith defended by seeking rescission, claiming the sale did not close as required in the agreement. Although Jaquith prevailed at trial, the Court of Appeals reversed, entering judgment for the purchaser in June 1980. The Supreme Court denied review in September 1980, and Jaquith conveyed the property to the purchaser. In July 1981, Jaquith sued the realtor for professional malpractice.

On appeal, Jaquith argued the cause of action did not accrue until she was forced to convey the property based on the Court of Appeals' June 1980 decision. The Court disagreed and distinguished *Davies* by noting that, in *Davies*, the client could not have been aware of the lawyer's negligence until the underlying lawsuit—the action by the corporation against the client—was resolved. Until that time, there could be no definitive claim of negligence because, if the defendant in the

underlying action (the client) had prevailed, there would have been no claim for malpractice. To the contrary, Jaquith's claim accrued when she learned that the realtor's valuation was incorrect. Although she engaged in litigation with the purchaser—and, indeed, prevailed at the trial court in that case and in doing so would have eliminated much of the damages she may have had against the realtor if the Court of Appeals had not reversed—her victory stemmed from her *defense* that the sale did not timely close. Jaquith knew that the realtor gave her bad advice and that she had been harmed by that advice prior to her refusal to proceed with the sale—indeed, that was the reason she refused to proceed. Moreover, even if Jaquith had prevailed on appeal in the dispute, that victory would have no bearing on the realtor's negligence in providing her the fair market value of the property.

Davies, *Kaseberg,* and *Guirma* stand in part for the proposition that as long as the merits of the dispute underlying the lawyer's malpractice remain unresolved, the malpractice claim does not accrue because a victory in the underlying dispute will prove there was no malpractice. *Jaquith* comes to a different result because there the client's defense in the underlying dispute was an effort to remedy the malpractice—but nonetheless, the litigation with the purchaser, however it resolved, would not exonerate the realtor's initial, negligent, valuation of the property.

The Supreme Court explained this distinction in *Bollam v. Fireman's Fund Ins. Co.*, 302 Or 343 (1986). The Court characterized *Davies* as standing for the proposition that a cause of action for professional negligence cannot accrue until it has been established that the plaintiff's harm was caused by the defendant's negligence. In *Davies*, it was impossible to determine on the facts presented whether the defendant's advice to the plaintiff had been negligent until conclusion of the underlying case. By contrast, the *Bollam* Court noted that in *Jaquith*, the indeterminacy of the extent of damages did not prevent a cause of action from accruing where all other elements of the cause of action have been satisfied.

Magnuson v. Lake, 78 Or App 620 (1986), further highlights why these rules are not necessarily bright lines and why careful review of the facts matters. The Magnusons sold a piece of property and their lawyer helped draft a clause limiting the purchasers' right to use an adjacent parcel. In December 1979, just over two years after the sale, the purchasers brought a declaratory relief action to determine their rights as to the adjacent parcel and, in June 1979, a new lawyer advised the Magnusons that the purchasers would likely prevail. The Magnusons fired their first lawyer and hired the second lawyer to represent them in the declaratory judgment action. In January 1980, the Magnusons filed a complaint against the first lawyer with the PLF and asked the PLF to waive the statute of limitations. The PLF refused to do so. In October 1981, the court entered judgment in favor of the purchasers.

The Magnusons filed a malpractice claim against the first lawyer in July 1983—within two years of entry of the original judgment in favor of the purchasers, but more than two years after they received advice from the second lawyer and more than two years after they complained to the PLF. The Court of Appeals held that the Magnusons were harmed in December 1978 when the purchasers filed their action and that the statute of limitations began to run in June 1979 when they received the opinion of the second lawyer. At that point, according to the Court, they "knew that defendant's negligence" was the "cause of their harm." The Court highlighted that the Magnusons acknowledged that they "knew of the problem" concerning the clause in June 1979 and that acknowledgment was a concession that they also knew of the lawyer's negligence at that time. That was so even though the Magnusons still *could have prevailed* in the purchasers' case until the trial court entered judgment against them.

Frankly, it is not clear why the Court viewed the Magnusons' statement as a concession that the first lawyer had committed malpractice even though, at the time they received the second lawyer's advice, they continued to fight the purchasers' case on the merits, they could have (in theory) won that case, and, presumably, the second lawyer's advice *could have been wrong*. Nonetheless, and although it is not cited in any subsequent Oregon appellate cases and may implicitly have been overruled by *Bollam*, *Magnuson* highlights how a few details may fatally impact this critical evaluation.

From a practical perspective, *Magnuson* and the other authorities demonstrate the importance of early investigation and, if necessary and available, the need for a negotiated tolling agreement. Consider that in *Davies*, *Kaseberg,* and *Guirma*, the trial courts *dismissed* the malpractice claims based on the statute of limitations, all to be eventually reversed. In *Jaquith*, four judges dissented when the Court of Appeals affirmed the trial court's dismissal, and, in *Kaseberg,* the Court of Appeals affirmed the trial court's dismissal without opinion, only to have the Supreme Court reverse.

In many cases, the facts or law will make it difficult if not impossible to evaluate with certainty that "there no longer exists a realistic possibility that a court will hold that the advice was good." *Guirma*, 259 Or App at 786. Is it possible to make a reliable recommendation to your client whether the statute of limitations is tolled because pending litigation may result in a finding that the original lawyer had not made a mistake (*Davies*) or that the statute of limitations is still running because the pending litigation will only determine the amount of the damages or moot the mistake due to a defense (*Jaquith*)? On the other hand, can you comfortably advise a client that, even though the damages may largely be avoided in the pending litigation, the client must, nonetheless, take a contrary position and file a malpractice claim while the litigation that may moot the malpractice claim is still pending? Eliminating the statute of limitations defense early, when possible, is surely the safer route.

Comments From The Editor

"Don't Undermine Your Trial Persuasiveness With Document Admissibility Issues"

By Dennis P. Rawlinson, Miller Nash LLP

Dennis Rawlinson

One of the keys to an effective and persuasive trial presentation is to reduce, if not eliminate, the need to provide a proper foundation for the admissibility of key documents. Particularly in a large document case, one can undermine the effectiveness of the trial presentation by having to ask a series of boring, routine questions, attempting to establish the foundation for admissibility of each document. Moreover, you run the risk of not getting the answers you need, and the document will not be admissible.

In federal court, most admissibility issues are covered by pretrial proceedings. In state court and arbitration, the trial judge or the arbiter often encourages the parties to exchange trial exhibit documents and agree on their admissibility or at least focus on meaningful objections for only a few documents. Experienced trial lawyers are generally willing to stipulate to the admissibility of all but a few of such documents, particularly if they have been marked and discussed during depositions.

But what happens if you have an adversary who is unwilling to stipulate to the admissibility of documents at trial or a multiparty case (when it is difficult from a logistical standpoint to obtain stipulations from all parties on the admissibility of documents)? One solution, of course, is to create the necessary foundation for the admissibility of documents during depositions. This, however, demands a substantial amount of deposition time in an era in which shorter depositions are encouraged (and, in federal court, required). Thus, it is usually not done.

Alternatively, you may want to consider the following suggestions.

1. Thoughtful Requests for Production.

You may want to formulate your requests for production on the basis of the admissibility of the documents to be produced. For instance, your first request for production might request only documents meeting the four-element test of documents produced in the regular course of business (Oregon Evidence Code ("OEC") 803(6)). A request can be fashioned to request documents:

a. That have been sent, received, or generated and maintained in the regular course of business or in the regular course of a regularly conducted activity;

b. For which it is the practice of the producing party to send, receive, or generate and maintain in the regular course of its business or in the course of its regularly conducted activity;

c. That were received, sent, or generated and maintained by someone with personal knowledge of the documents' contents or from information transmitted by a person with personal knowledge of the content of the documents; and

d. That were sent, received, or generated and maintained at or near the time of the information set forth in the documents.

Similarly, the requests for production can request, initially, documents that the adverse party admits are "genuine and authentic" by fashioning a request for production that requests only documents represented by the producing party to have been prepared by the author who wrote them and to be genuine and authentic. The request for production can be followed by a broader request for production that does not require as a precondition that the producing party admit the documents to be authentic.

All documents produced in response to such a request should be Bates-stamp numbered and a record kept that they were produced in response to a request that fulfilled all the requirements of OEC 803(6). A similar strategy can be developed for other exceptions to the hearsay rule, such as past recollection recorded.

Then, just prior to trial, if the adverse party will not agree that the records are admissible under the business-record rule (OEC 803(6)) or the other pertinent rule under which the documents were produced, a motion can be filed with the trial judge in accordance with OEC 104(1) supported by an affidavit asking that the trial court rule in advance that the documents so produced are authentic and are exceptions to the hearsay rule under the exception you set forth in your requests for production.

2. Request for Admission.

Alternatively, or in addition to thoughtfully designed requests for production that seek admissions as to admissibility, pretrial admissibility and authentication can be obtained through requests for admission. Again, the request for admission simply identifies a document that has been produced and asks the requesting party to admit that the elements necessary for an exception to the hearsay rule and admissibility or the elements of authentication are present. If the adverse party refuses to admit what he or she should admit and you are forced to incur attorney fees and time substantiating admissibility, a sanction of attorney fees is available under the request-for-admission rule (*see* ORCP 45 C, 46 A(4)).

Of course, requests for admission under state law are limited to 30 requests (ORCP 45 F). It has been my experience, however, that state-court judges are more than willing to allow you as many requests for admission as you need if their purpose is to encourage a recalcitrant adversary to admit that documents you plan to use at trial are authentic or kept in the regular course of business or constitute past recollection recorded. Trial judges, like good trial lawyers, want the trial to

go smoothly and efficiently and not be repeatedly bogged down by trial-document foundation issues that can and should be worked out in advance.

3. Oregon Evidence Code Section 104.

OEC 104(1) provides in pertinent part:

> "Preliminary questions concerning * * * the admissibility of evidence shall be determined by the court * * *. In making its determination the court is not bound by the rules of evidence except those with respect to privileges."

Based on the foregoing, you can ask a judge to determine the admissibility of trial document exhibits in advance of trial and can substantiate their admissibility by affidavit. For instance, if you have hundreds of photographs that you wish to show at trial by PowerPoint, you can have them authenticated by affidavit and ruled admissible before trial. The same method can be used for certain types of electronic evidence, computer records, and videos. Good trial lawyers try to resolve all these issues with the trial judge in advance of trial.

On the issue of business records, if you have a multiparty case or a particularly recalcitrant adversary who will not admit that records constitute business records (an exception to hearsay under OEC 803(6)), consider filing a pretrial motion with the court, asking: (a) that the parties exchange their trial evidence documents by a particular date, (b) that each side serve on the other side its authentication and admissibility objections, and (c) that to the extent one of the parties, including yourself, raises business-record objections that another party deems frivolous, the court order that party to produce for a pretrial hearing the person most knowledgeable within its organization concerning the business-record requirements for the document so that the adverse party has an opportunity to substantiate the business-record foundation for the document. Of course, neither the court nor the party normally wants to deal with having to produce the authenticating witness, and as a result, this procedure may result in a negotiated stipulation between attorneys of record.

4. Thoughtfulness and Ingenuity.

No doubt many of you have found other methods to be as effective as or more effective than the ones suggested in this column. The point, however, is to deal with authentication and admissibility of trial exhibits, particularly document exhibits, well in advance of trial. Do not hesitate to consider using requests for production, requests for admission, and pretrial motions in accordance with OEC 104 (or its federal counterpart) to resolve these issues in advance of trial so that your trial presentation will be smooth, uninterrupted, and seamless and your persuasiveness will be enhanced.

Litigation Journal Editorial

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Winning the Discovery Battle Without Losing the War

By Ella Wolf, Lane Powell PC[1]

Ella Wolf

The discovery process has evolved to dominate modern civil litigation. Often, in the most expensive and most time-consuming stage of a case, the tactics adopted by counsel during discovery set the tone for the litigation and serve as the impetus – or impediment – to resolution. To some litigators, zealous representation has come to be defined by constant objections to even the most benign discovery request and a general reluctance, if not outright refusal, to produce even clearly discoverable information. This kind of obstructionist conduct can quickly send a case careening off the settlement path and onto a long and expensive road to trial, exhausting the resources of the client and the court alike. But courts have started to strike back, using creative sanctions to deter the use of improper tactics.

On July 28, 2014, U.S. District Judge Mark W. Bennett of the Northern District of Iowa issued a stern, and inventive, warning to litigators that obstructionist discovery tactics will not be tolerated. In *Security National Bank of Sioux City, Iowa v. Abbott Laboratories*, Civ. No. 11-4017, Doc. No. 205 (N.D. Iowa Jul. 28, 2014), Judge Bennett sanctioned defense counsel *sua sponte* for making excessive and unnecessary objections over the course of several depositions. Judge Bennett noted that counsel made hundreds of objections, most of which "completely lacked merit." Instead, counsel used these baseless objections to coach "the witness to give a particular answer or to unnecessarily quibble with the examiner."

Judge Bennett counted 115 instances in which counsel "objected to the 'form' of the examiner's question," without providing a basis for the objection. As Judge Bennett explained, these types of bare-bones objections are effectively meaningless and actually contrary to the spirit of the federal rules. Federal Rule of Civil Procedure 30(c)(2), which governs deposition objections, requires objections to be short and concise, and afford the examiner the opportunity to cure. *See* Fed.R.Civ.P. 30(c)(2), advisory committee notes (1993 amendments). Judge Bennett found that because "they lack specificity, 'form' objections do not allow the examiner to immediately cure the objection. Instead, the examiner must ask the objector to clarify, which takes *more* time and *increases* the amount of objection banter between the lawyers." However, the form objections did not form the basis of Judge Bennett's sanction, because these types of objections are permitted in a minority of jurisdictions. The sanction was, instead, based on counsel's witness coaching and excessive interruptions.

Witness coaching is clearly prohibited under the federal rules. Fed.R.Civ.P. 30(c)(2) (deposition "objection[s] must be stated concisely in a nonargumentative and nonsuggestive manner."); *see also* Oregon District Court Local Rule 30. Despite the prohibition, Judge Bennett found that counsel repeatedly made objections that "prompted witnesses to give particular, desired answers to the examiner's questions." For instance, counsel "regularly objected that questions were 'vague,' called for 'speculation,' were 'ambiguous,' or were hypothetical.' These objections usually followed completely reasonable questions. But after hearing these objections, the witness would usually ask for clarification, or even refuse to answer." Judge Bennett explained that, as a general matter, instructions "to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw, unmitigated coaching and are never appropriate."

Finally, Judge Bennett found that counsel's excessive interruptions were egregious enough on their own to warrant sanctions. Judge Bennett counted close to 500 interruptions by counsel over the course of two depositions, the majority of which were entirely unnecessary. In one transcript, witness counsel's name appeared almost three times per page.

Courts in this circuit have routinely imposed sanctions for similar obstructionist deposition conduct. However, such sanctions have inevitably been in the form of a monetary award. The Ninth Circuit has never been shy about sanctioning counsel for improper discovery tactics. *See, e.g.*, *Morse v. S. Pac. Transp. Co.*, 42 F.3d 1401 (9th Cir. 1994) (imposing sanctions for, among other things, interrupting opposing counsel and raising meritless argumentative objections); *Ritchie v. United States*, 451 F.3d 1019, 1026 (9th Cir. 2006) (imposing sanctions for "unprofessional" deposition conduct).

In contrast, in *Abbott*, Judge Bennett explained that he "was less interested in negatively affecting Counsel's pocketbook than I am in positively affecting Counsel's obstructive deposition practices," and deterring others who may be inclined to act similarly. Judge Bennett explained that he was particularly concerned with the deterrence aspect of the sanction, because "so many litigators are *trained* to make obstructionist objections." To that end, Judge Bennett fashioned a particularly unique sanction, requiring counsel to write and produce a "training video" instructing future lawyers on the holding and rationale of his opinion, and specifically addressing the impropriety of unsubstantiated objections, coaching, and excessive interruptions.

Judge Bennett's opinion stands as a helpful reminder of how to avoid crossing the line from zealous advocacy to obstructionism. First, remember that there is little to be gained by objecting merely for the sake of objecting. Second, always articulate the basis for your objection – if you cannot, it is not an objection worth making. Third, there is a time and place for conferring with a witness and it is never in the middle of the deposition itself. And fourth and finally, while a few improper objections may be excusable, a few hundred never are.

1. Ella Wolf is an associate at Lane Powell PC, where her practice focuses on commercial litigation.

Ode on PGE: "I didn't ask for it to be over, but then again, I never asked for it to begin"[1]

By Gregory A. Chaimov,
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Gregory A. Chaimov

This article provides the rare opportunity to update guidance I provided over two decades ago in *A Guide to Phrenology: Using Legislative History to Explain "Imperfections on [a Statute's] Head*." I'm not sure which is further out of date: the guidance or my photograph in the June 1994 Litigation Journal.[2]

At the time of the original article, June 1994, the courts, following a line of cases that culminated with *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), generally disdained legislative history. A court would consider the history of adoption of a law by the Legislative Assembly only if the court considered the bare text of the law to be susceptible to more than one interpretation. *PGE*, 317 Or at 611–12.

Then, the courts ticked off the Legislative Assembly.

First, in *Jones v. General Motors Corp.*, 325 Or 404, 415–16, 939 P2d 608 (1997), the Supreme Court declined to consider the history of an amendment to ORCP 47 and went on to hold that the Legislative Assembly intended for the amendment to codify existing case law, making no change in the summary judgment standard. The Court of Appeals, which had considered the legislative history, concluded the opposite: the Legislative Assembly had intended to overrule existing case law and change the summary judgment standard. *Jones v. General Motors Corp.*, 139 Or App 244, 251, 911 P2d 1243 (1996) (*en banc*).

Second, in *Young v. State*, 161 Or App 32, 983 P2d 1044 (1999), the Court of Appeals interpreted a law to grant state agency managers several million dollars in overtime compensation. The law had previously been written to preclude overtime with exceptions for favored employees. Over time,[3] the exceptions came to swallow the rule. In response, the Legislative Assembly reorganized the law so that an entitlement to overtime became the general rule with categories of employees not entitled to overtime listed as exceptions. In the process, the Legislative Assembly forgot to list managers of state agencies among the employees who were not entitled to overtime.

In reaching its decision, the Court of Appeals declined to review the history of the adoption of the law, 161 Or App at 38–39—history that showed the Legislative Assembly did not have the conscious intent to grant overtime to state agency managers. There was no discussion of expanding the employees entitled to overtime and no fiscal impact predicted for the measure, *i.e.*, no more overtime expected to be paid.

It is open to debate whether the court could and would have come to a different decision if the court had considered the legislative history. Then-Judge Landau thought not: "*PGE* cannot be blamed for everything, certainly not for the inability of courts to redraft legislative enactments." 161 Or App at 40. Nevertheless, in the next session, the Legislative Assembly amended ORS 174.020 to require courts to consider any legislative history offered. Or Laws 2001, ch 438, §1; *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009).[4]

A review of appellate court opinions shows that, after the amendment to ORS 174.020, the courts have made much greater use of legislative history than before the amendment. One purpose of this article is to discuss briefly the evidence in the history of adoption that courts now prefer. In other words, now that courts pay more attention to legislative history, to what parts of that history do courts pay attention?[5]

Twenty years ago, in the relatively infrequent instances in which courts considered legislative history, courts were not particularly choosy about whose statements reflected the legislature's intent. In the 1994 article, I concluded that "just about anything found in the Oregon state archives appears to be fair game." I can't say that the requirement to consider legislative history has been the cause but, in the years since then, the courts may have become somewhat less omnivorous. The courts consider many of the same sources as set out in the 1994 article, but take more care to explain why (or why not) the courts credit the sources. The courts take more care to identify whether comments in adoption history can be fairly said to represent the views of the Legislative Assembly—as opposed to representing one voice among many. *E.g., Costco Wholesale Corp. v. City of Beaverton*, 206 Or App 380, 396–98, 136 P3d 1219 (2006) (crediting interpretation of single legislator when history showed opponent of measure shared interpretation); *International Ass'n of Fire Fighters, Local 3564 v. City of Grants Pass*, 262 Or App 657, 662, 326 P3d 1214 (2014) (not crediting legislator's "personal reasons for supporting [a measure]").

For an in-depth discussion of the evidence from legislative process that courts will consider and credit, the reader should explore sections 3.7 – 3.12 of *Interpreting Oregon Laws* (Oregon State Bar 2009). This article updates and adds color to that excellent compendium.

For a case that considered a wide range of legislative communications, the reader should review *State v. Walker*, 356 Or 4, 17–20 (2014), in which the Supreme Court appears to have given greatest credence to the committee and floor statements of an attorney-legislator who took an active interest in the measure, but also considered and credited the comments of proponents and opponents of the measure: the Attorney General, a sheriff's deputy who investigated the crimes the legislation addressed, a professor who was a national expert on the type of law under consideration, and criminal defense lawyers whose clients would be prosecuted under the law.

In addition, in the past six months alone, courts have considered the following sources beyond legislators[6]:

- Staff measure summaries—summaries committee administrators write to provide members a short explanation of

a measure. *State v. Nix*, 355 Or 777, 785 (2014) (summary found not to address issue under consideration).

- Comments at a committee meeting by committee administrators—legislative employees who manage committee operations. *State v. Babson*, 355 Or 383, 397 (2014) (comments found not to address issue under consideration).
- Comments at a committee meeting by attorneys in the Office of Legislative Counsel, which serves as counsel for the Legislative Assembly, with principal duties including the drafting of measures and amendments. *State v. Frier*, ___ Or App ___, ___, slip op at 7 (Aug. 6, 2014) (comments not sufficient to overcome court's reading of text of measure).
- Comments at a committee meeting by Assistants Attorney General on laws the Department of Justice administers. *Ogle v. Nooth*, 355 Or 570, 588 (2014) (crediting comments of Assistant Attorney General on intent of amendments to laws on post-conviction relief).
- Comments at a committee meeting by the heads of state agencies that administer the laws the Legislative Assembly is considering adopting or amending. *Gorin v. Department of Revenue*, 2014 WL 3533946 (Or Tax Magistrate Div July 17, 2014) (crediting answers of director of Department of Revenue to legislator's questions).
- Comments at a committee meeting by members of a "work group" assembled by legislators to try to arrive at consensus on the concept for or language of a measure. *Noble v. Oregon Water Resources Dept.*, 264 Or App 110, 120 (2014) (crediting answers of lobbyist member of work group).
- Comments at a committee meeting by members of the Oregon State Bar who, as part of an OSB task force, promoted the measure under consideration. *Rowlett v. Fagan*, 262 Or App 667, 683-84 (2014) (crediting answers of co-chair of OSB task force); *Kohring v. Ballard*, 355 Or 297, 310 (2014) (crediting comments of law school professor who "represent[ed] the Bar").
- Comments at a committee meeting by representatives of private organizations promoting the measures under consideration. *PIH Beaverton, LLC v. Super One, Inc.*, 355 Or 267, 278 (2014) (crediting comments by counsel for trade organization promoting measure).
- Studies conducted by bodies charged with evaluating and proposing law changes. *Sather v. SAIF Corp.*, 262 Or App 597, 325 P3d 819 (2014) (crediting study submitted by Workers' Compensation Management–Labor Advisory Committee, an advisory committee created by the Legislative Assembly); *Department of Human Services v. S.M.*, 355 Or 241, 252–53, 323 P3d 947 (2014) (crediting report of Oregon Law Commission, a law improvement organization created by the Legislative Assembly).

If the specific sources of comments in an adoption history have not changed that much over the past 20 years, the sources of the sources have. Now, the history of adoption of a measure is at an attorney's fingertips.

On line, one can easily find resources that explain the steps to follow to research the history of the adoption of a law:

https://library.uoregon.edu/sites/default/files/data/law/oregon%20legis%20history%20steps-08.pdf

The history of recent enactments can be found on the Legislative Assembly's web site:

https://www.oregonlegislature.gov/bills_laws

The history of adoption of less recent enactments can be found on the Secretary of State's web site:

http://arcweb.sos.state.or.us/pages/records/legislative/recordsguides/legislative_guide/legal.html

http://sos.oregon.gov/archives/Pages/records/legislative_minutes.aspx

Happy hunting.

Footnotes

1 Source unknown. Retrieved from http://www.successories.com/iquote/quote/260565/i-didnt-ask-for-it-to-be-over-but-then-again-i-never-asked-for-it-to-begin-for-thats-the-way-it.

2 That's actually not true: it's the photograph.

3 Pun not originally intended but left when discovered.

4 In support of its understanding of the change to ORCP 47, the majority of the en banc Court of Appeals in *Jones* had relied on commentary in the adoption history by Max Williams, 139 Or App at 258–59, who was then counsel to the Senate Committee on Judiciary—a reliance that then-Judge Landau criticized because Williams was "not a member of the legislature." 139 Or App at 272. In one of the ironies with which history sometimes blesses us, Williams not only became a member of the Legislative Assembly but, as Representative Williams, was the chief sponsor of the measure that amended ORS 174.020.

5 It is beyond the intention of this article to evaluate whether increased consideration of legislative history has led to more accurate assessments of the Legislative Assembly's intent.

6 Practice tip: Identify the individual whose comments in the legislative history support your position. *See Washington County Assessor v. Christ Gospel Church of Portland,* ___ Or Tax ___, ___, 2014 WL 3734538, p. 5 (July 29, 2014) (comments of unidentified legislative "witness" found unpersuasive). It would also be helpful to practitioners if courts identified the individual sources of evidence in a history of adoption on which the courts relied. *See Rogue Valley Sewer Services v. City of Phoenix,* 262 Or App 183, 198–99 (2014) (crediting "Minutes" of committee meetings without identifying the specific statements or speakers recorded in the minutes).

Sanctions for Deposition Misconduct – Revisited

By David B. Markowitz and Joseph L. Franco

David B. Markowitz

Joseph L. Franco

Earlier this year, we published an article in the Litigation Journal discussing the increasing use of sanctions to curb deposition misconduct. *See* David B. Markowitz and Joseph L. Franco, *Sanctions for Deposition Misconduct*, Oregon State Bar Lit. J., Vol. 33, No. 1 (2014). After publication of that article, a Federal District Court imposed sanctions, *sua sponte*, upon a partner in a large national law firm for types of conduct that seem almost routine in some jurisdictions. *Sec. Nat'l. Bank of Sioux City Iowa v. Abbott Labs.*, 299 F.R.D. 595 (N.D. Iowa 2014). The Opinion is noteworthy because of the detail and clarity with which the Court analyzed subtle types of misconduct that often go unchecked, and because of the creative sanction imposed. In conjunction with our earlier article on sanctions for deposition misconduct, the *Security National* Opinion may serve as a tool for combatting some of the more insidious types of misconduct, and as a resource for training lawyers of all experience levels.

I. Deposition Misconduct Considered by the Court.

Security National was a complex product liability case, in which the Court reviewed multiple deposition transcripts in ruling on objections to their use at trial. *Id.* at 597. Upon reviewing the transcripts, the Court observed a "serious pattern of obstructive conduct" by a partner at the Jones Day firm, whom the Court referred to throughout the Opinion as "Counsel." *Id.* at 597-598. Based upon the apparent misconduct, the Court issued a *sua sponte* order to show cause why the Court should not sanction Counsel. *Id.* at 598.

Before imposing sanctions, the Court gave due regard to the fact that "sanctions by a federal judge, especially on a lawyer with an outstanding career, like Counsel, should be imposed, if at all, with great hesitation and a full appreciation for how a serious sanction could affect that lawyer's career." *Id.* at 597. In considering whether sanctions were appropriate, the Court evaluated three types of deposition misconduct: 1) numerous attempts to coach witnesses; 2) excessive interruptions and requests for clarification; and 3) excessive use of "form" objections. *Id.* at 598.[1] The Court imposed sanctions for the first two types of misconduct, and found that while the third type was not an independent basis for sanctions, it contributed to the first two types of misconduct.

In imposing sanctions, the Court relied upon Rule 30(d)(2) which provides that a "court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or

frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2). The Court held that an explicit finding of bad faith was unnecessary for the imposition of sanctions pursuant to Rule 30(d)(2). *Id.* at 599-600 *citing GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 196 (E.D. Pa. 2008). The Court also relied upon its inherent authority to impose sanctions for abusive litigation practices. *Id.* at 599.

A. Witness Coaching.

Many practitioners have experienced the frustration of taking a deposition in which it was apparent that the defending lawyer was coaching the witness through meritless or suggestive objections. Of course, it is well established that seeking to influence a witness's answer through suggestive objections is improper. Rule 30(c)(2) requires that "[a]n objection must be stated concisely in a nonargumentative and nonsuggestive manner." Fed. R. Civ. P. 30(c)(2); *see also* ORCP 39D(3). As the Court in *Security National* noted, objections that are argumentative or that suggest an answer to the witness are called "speaking objections," and are improper. *Security National,* 299 F.R.D. at 604 *citing Hall v. Clifton Precision,* 150 F.R.D. 525, 530-531 (E.D. Pa. 1993); *Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010).

The Court found that despite "the Federal Rules' prohibition on witness coaching, Counsel's repeated interjections frequently prompted witnesses to give particular, desired answers to the examiner's questions." *Security National,* 299 F.R.D. at 604. The Court found that Counsel coached witnesses in three primary ways: 1) through frequent "clarification-inducing" objections to proper questions; 2) through commentary about a question at the end of an objection; and 3) by directly coaching the witness to give a particular, substantive answer. *Id.* at 604-607.

1. Clarification-Inducing Objections.

The Court defined a clarification-inducing objection as one that prompted the witness to request that the examiner clarify otherwise cogent questions. *Id.* at 604. The Court noted that Counsel regularly objected to perfectly reasonable questions on grounds that the questions were "vague," "ambiguous," "called for speculation" or were "hypothetical." *Id.* In response, the witness would often ask for clarification or refuse to answer the question:

> Q. Is there—do you believe that there's—if there's any kind of a correlation that could be drawn from OAL environmental samples to the quality of the finished product?
>
> COUNSEL: Objection; vague and ambiguous.
>
> A. That would be speculation.
>
> Q. Well, if there were high numbers of OAL, Eb samples in the factory, wouldn't that be a cause for concern about the microbiological quality of the finished product?
>
> COUNSEL: Object to the form of the question. It's a hypothetical; lacks facts.
>
> A. Yeah, those are hypotheticals.
>
> ***
>
> Q. Would that be a concern of yours?
>
> COUNSEL: Same objection.
>
> A. Not going to answer.
>
> Q. You're not going to answer?
>
> A. Yeah, I mean, it's speculation. It would be guessing.
>
> COUNSEL: You don't have to guess.

Id. While the Court recognized that it was impossible to know what the witness would have said absent the objections, it was "inconceivable that the witnesses deposed in this case would so regularly request clarification were they not tipped-off by Counsel's objections." *Id.*

Counsel's frequent objections to "form" which induced the witness to ask the examiner to "rephrase" as a "Pavlovian" response also attracted the ire of the Court:

> Q. I'm wondering if you could perhaps in a ... little bit less technical language explain to me what they're talking about in that portion of the exhibit.
>
> COUNSEL: Object to the form of the question.
>
> A. So rephrase.
>
> Q. Could you tell me what they're saying here?
>
> COUNSEL: Same objection.
>
> A. Rephrase it again.

Id. at 605.

The Court went on to hold that "[u]nless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The witness—not the lawyer—gets to decide whether he or she understands a particular question." *Id.*

2. Commentary About a Question at the End of an Objection.

The Court also found that Counsel's frequent commentary following an objection was improper. The primary example addressed by the Court was the practice of making an objection and then stating "You can answer if you know." *Id.* at 606.

> Q. Is there any particular reason that that language is stated with respect to powdered infant formula?
>
> COUNSEL: If you know. Don't—if you know.
>
> A. No, I—no, not to my knowledge.
>
> COUNSEL: If you know. I mean, do you know or not know?
>
> A. I don't know.

Id. at 607. The Court concluded that "if you know" at the end

of an objection "not-so-subtly suggests that the witness may not know the answer, inviting the witness to dodge or otherwise qualify a clear question." *Id.*

3. Direct Coaching to Elicit a Particular, Substantive Answer.

The Court also found that at times Counsel directly coached the witness to give a particular, substantive answer. *Id.* at 607. This type of misconduct included giving direct guidance about the answer to the question.

> Q. My question is, was that a test—do you know if that test was performed in Casa Grande or Columbus?
>
> A. I don't.
>
> COUNSEL: Yes, you do. Read it.
>
> A. Yes, the micro—the batch records show finished micro testing were acceptable for the batch in question.

Id. at 608. It seems fairly obvious that this type of interference frustrates the deposition process. The permissible alternative is to clear up the erroneous answer during re-direct examination.

B. Unnecessary Commentary, Clarifications and Objections.

The Court also found that numerous instances of unnecessary commentary, clarifications and objections justified the imposition of sanctions, separate and apart from the issue of witness coaching. *Id.* at 609. For example, in one key deposition, Counsel's name appeared in the transcript 381 times, for an average of almost three times per page of the transcript. *Id.* "The notes accompanying Rule 30 provide that sanctions may be appropriate 'when a deposition is unreasonably prolonged' and that '[t]he making of an excessive number of unnecessary objections may itself constitute sanctionable conduct....'" *Id. citing* Fed. R. Civ. P. 30, advisory committee notes (1993 amendments); and *Craig v. St. Anthony's Med. Ctr.*, 384 Fed. Appx. 531, 533 (8th Cir. 2010). Accordingly, an over-abundance of objections – even if each one arguably is justified in isolation – can result in the imposition of sanctions if, taken together, they unreasonably prolong or otherwise frustrate a deposition.

C. Excessive "Form" Objections.

The Court also considered Counsel's frequent and unjustified use of "form" objections. *Id.* at 600. Although the Court did not impose sanctions on that basis, the Court did find that an objection to "form," without some succinct indication of what is wrong with the form, is not an effective way of preserving an objection for trial. *Id.* at 602-603. The Court also noted that a bare "form" objection does not afford the examiner an opportunity to cure the objection. *Id.* While the Court did not impose sanctions for use of the "form" objection alone, it did find that Counsel's frequent use of bare "form" objections factored into both the witness coaching and excessive interruptions discussed above. *Id.* at 603-604.

II. Creative Sanctions.

Courts have broad discretion to impose a wide variety of sanctions in seeking to curb deposition misconduct. Although monetary sanctions are most common, the Court has considerable discretion in fashioning other appropriate sanctions. "Rule 30(d)(2) does not limit the types of sanctions available; it only requires that the sanctions be 'appropriate.'" *Id.* at 599. Courts similarly have wide latitude to determine what is appropriate when imposing sanctions pursuant to their inherent authority. *Id.*

In *Security National*, the Court imposed one of the most creative sanctions we have seen. Although the Court noted that it would be well within its discretion to award substantial monetary sanctions for Counsel's misconduct, the Court chose not to do so. *Id.* at 609. Instead, the Court imposed the following sanction: "Counsel must write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court." *Id.* at 610. The video would be submitted for approval to the Court. Thereafter Counsel's firm would be required to provide notice of the video to "each lawyer at Counsel's firm – including its branch offices worldwide – who engages in federal or state litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state or federal case in the United States." *Id.* at 610.

The Court chose this particular sanction after recognizing that one of the chief purposes of sanctions is to deter those who might otherwise engage in similar conduct. *Id.* at 609. The Court emphasized the importance of deterrence "given that so many litigators are *trained* to make obstructionist objections." *Id.* According to its website, Counsel's firm has over 2400 lawyers in 41 offices. So if the video is indeed produced and circulated as ordered, it could have a substantial deterrent effect.

Other courts are also resorting to creative remedies for deposition misconduct. A recent example may be found in *MAG Aerospace Indus., Inc. v. B/E Aerospace, Inc.*, No. CV 13-6089 SJO (FFMx) (C.D. Cal. Aug. 28, 2014) (CM/ECF LIVE, Docket Entry No. 134). In *MAG Aerospace*, "[t]he witness started the train wreck of a deposition by asking counsel 'to clarify' what he meant by such obvious words as 'responsibilities' and 'educational background.' Counsel soon hopped on the bandwagon and began interposing inappropriate objections that perfectly clear (albeit broad) questions were 'vague.' Like a tag team, the witness would respond by asking plaintiff's counsel to 'be more precise.' Counsel stepped up the attempt to disrupt any worthwhile examination by continually interposing inappropriate objections, 'cluing' the witness to ask the questions to be rephrased, and wasting everyone's time trying to engage plaintiff's counsel in banter…" *Id.* In addition to requiring the recalcitrant party to pay the examining party's attorney fees, the Court restricted the defending lawyer's ability to make objections unless based upon: "(i) privilege, (ii) the assumption of facts that are, in good faith, disputed, or (iii) mischaracterization of the record." *Id.* The Court further prohibited the defending lawyer from engaging the examining lawyer in any banter, or otherwise interrupting the deposition. *Id.*

III. Conclusion.

As we noted in our article last Spring, Courts are increas-

ingly cracking down on deposition misconduct. *See* David B. Markowitz and Joseph L. Franco, *Sanctions for Deposition Misconduct,* Oregon State Bar Lit. J., Vol. 33, No. 1 (2014). *Security National* is a prime example of this increasing judicial concern about lawyers who behave badly in deposition. The case is a warning to lawyers who engage in subtle, on-the-record witness coaching and impede depositions through improper use of objections. It is also a reminder that examining lawyers need not tolerate this type of conduct.

1. The sanctioned lawyer has appealed the Court's ruling.

Recent Significant Oregon Cases

By Stephen K. Bushong,
Multnomah County Circuit Court

Stephen K. Bushong

Claims and Defenses

Hall v. Dept. of Transportation, 355 Or 503 (2014)

Plaintiffs brought an inverse condemnation action against the Oregon Department of Transportation (ODOT), alleging that ODOT created a nuisance that "blighted" plaintiffs' property by representing that it intended to initiate a condemnation action that would landlock plaintiffs' property. A jury awarded plaintiffs more than $3 million in damages. The Court of Appeals reversed; the Supreme Court affirmed the Court of Appeals. The court explained that a *de facto* taking of private property can arise when the government physically occupies private property or invades a private property right in a way that substantially interferes with the owner's use and enjoyment of the property. Reducing property value by regulating its use or planning for its eventual taking for public use generally does not result in a *de facto* taking, except when (1) a regulation or planning action deprives the owner of all economically viable use of the property; or (2) a physical occupation or invasion of property rights by the government substantially interferes with the owner's use and enjoyment of the property. 355 Or at 522. In this case, plaintiffs failed to prove that ODOT's actions resulted in a *de facto* taking of their property under either theory.

The Foster Group, Inc. v. City of Elgin, Oregon, 264 Or App 424 (2014)

Plaintiff, owner of a mobile home park in the City of Elgin, brought various claims based on a series of alleged wrongful acts by the city. The trial court granted the city's motion for summary judgment, concluding that all claims are barred by the applicable statutes of limitations. The Court of Appeals affirmed on the claims for trespass, negligence, and civil conspiracy, concluding that those claims are barred by the two-year statute of limitations in ORS 30.275(9). The Court of Appeals reversed on the inverse condemnation claim and the claim under 42 USC §1983. The section 1983 claim was based on the city's decision to block access to a road along the property's southern border, a decision that the city made in 2008, less than two years before plaintiff filed this action. The inverse condemnation claim was not barred by the six-year statute of limitations in ORS 12.080(3) because the claim was based on the city's physical occupation of plaintiffs' property in 2004, less than six years before plaintiff filed this action.

Heller v. BNSF Railway Co., 264 Or App 247 (2014)

Plaintiff brought negligence and strict liability claims under the Federal Employer's Liability Act (FELA), alleging that his hearing loss and bilateral tinnitus was caused by his exposure to work-related noise. The trial court granted defendant's motion for summary judgment, concluding that the claims were barred by the three-year limitations period in FELA, 45 USC §56. The Court of Appeals affirmed. The court first concluded the trial court did not abuse its discretion in striking plaintiff's late-filed ORCP 47 E affidavit because (1) plaintiff did not offer a reasonable explanation for his failure to timely file the affidavit; and (2) the trial court is not required to "identify prejudice to the opposing party before refusing to consider a late-filed affidavit on summary judgment[.]" 264 Or App at 253. The court also concluded that plaintiff failed to produce evidence of specific facts sufficient to create a genuine issue of material fact after defendant presented deposition testimony establishing that plaintiff "knew before 2007 that the cause of his worsening hearing injuries was work related." *Id.* at 258.

Baker v. Croslin, 264 Or App 196 (2014)

Plaintiff brought a wrongful death action after her husband was accidentally shot and killed by a friend—defendant Smith—while watching a basketball game at defendant Croslin's house. Plaintiff alleged, among other things, that Croslin negligently served Smith alcohol while he was visibly intoxicated. The trial court granted Croslin's motion for summary judgment, concluding that there was insufficient evidence to permit a factfinder to find that Croslin "served or provided" alcohol to Smith while he was visibly intoxicated as required by ORS 471.565. The Court of Appeals reversed. The court explained that, although the statute does not define what it means for a social host to have "served or provided" alcohol to a guest, the key factor in making that assessment is "the amount of control that the defendant had over the alcohol that was supplied to the visibly-intoxicated guest." 264 Or App at 199. Here, the summary judgment record "would permit a reasonable factfinder to infer that defendant had control over the alcohol supply from which Smith consumed at least one drink while visibly intoxicated and, therefore, that defendant 'served or provided' alcohol to Smith while Smith was visibly intoxicated." *Id.* at 204.

Chapman v. Mayfield, 263 Or App 528 (2014)

Defendant Mayfield went on a drinking binge, stopping at an Eagles Lodge (where he was served whiskey and beer), before visiting the Gresham Players Club, where he shot and injured plaintiffs. The trial court granted summary judgment in favor of the Eagles Lodge, concluding that plaintiffs

had not presented evidence sufficient to create a factual dispute as to whether Mayfield's act of shooting plaintiffs was the foreseeable result of the Eagles Lodge's act of serving him alcohol while he was visibly intoxicated. The Court of Appeals affirmed. The court explained that, under Oregon law, "a tavern owner that negligently serves alcohol to a visibly intoxicated person may be liable for injuries to a third party resulting from the visibly intoxicated person's violent conduct, if it was foreseeable that serving the person would create an unreasonable risk of violent conduct." 263 Or App at 531. Under *Moore v. Willis*, 307 Or 254 (1988), and *Hawkins v. Conklin*, 307 Or 262 (1988), the "fact that someone is visibly intoxicated, standing alone, does not make it foreseeable that serving alcohol to the person created an unreasonable risk that the person will become violent." *Id.* (quoting *Moore*, 308 Or at 260). Here, "plaintiffs' evidence was insufficient to establish that defendant knew or should have known that serving Mayfield while he was visibly intoxicated created an unreasonable risk that Mayfield would act violently." *Id.* at 538. Judge Egan dissented, pointing out that *Moore* and *Hawkins* were decided in 1988, "the endpoint of Oregon's era of oblivion to the dangers of overconsumption of alcohol." *Id.* at 541, Egan, J., dissenting. In Judge Egan's view, "it is fair to say that, in Oregon today, the fact that someone is visibly intoxicated ordinarily will make it foreseeable to a professional alcohol server that serving that person more alcohol creates an unreasonable risk that that person will become violent." *Id.* at 544.

Chernaik v. Kitzhaber, 263 Or App 463 (2014)

Plaintiffs sued the State of Oregon and Governor Kitzhaber, seeking a declaration that defendants violated their duties to uphold the public trust and protect the State's atmosphere, water, land, fishery, and wildlife resources from the impacts of climate change. The trial court granted defendants' motion to dismiss, concluding that it lacked subject matter jurisdiction to grant the relief requested. The Court of Appeals reversed. The court explained that, under the Uniform Declaratory Judgments Act, "a court has broad authority to declare rights, status, and other legal relations between the parties whether those claimed legal relations are based on a written provision found in a constitution or statute or, instead, derive from some other source of law." 263 Or App at 473. To the extent the trial court's ruling "could be read as a rejection of plaintiffs' theory that a public trust doctrine exists and imposes affirmative obligations on defendants to protect the state's natural resources from adverse effects of climate change," the trial court erred because "that was a ruling on the *merits* of plaintiffs' theory." *Id.* at 475 (emphasis in original). The Court of Appeals, expressing no opinion as to the merits of plaintiffs' allegations, concluded that plaintiffs are entitled to a judicial declaration of whether the atmosphere and other natural resources are trust resources "that the State of Oregon, as trustee, has a fiduciary obligation to protect from the impacts of climate change[.]" *Id.* at 481.

Safeco Ins. Co. v. Masood, 264 Or App 173 (2014)

Amerivest Financial LLC v. Malouf, 263 Or App 327 (2014)

In *Safeco*, the Court of Appeals held that, after filing a claim of loss, an insured may not "condition compliance with an insurer's information requests by requiring the insurer to execute a confidentiality agreement that imposes limitations on the insurer's use of the insured's personal information." 264 Or App at 174. In *Amerivest*, the Court of Appeals held that an investment program and individual senior life policy settlements did not constitute investment contracts and, therefore, were not securities under Oregon law. The court explained that an "investment contract" under ORS 59.015(1)(a) "exists if there is (1) an investment of money; (2) in a common enterprise; (3) with the expectation of profit; (4) to be made through the management and control of others." 263 Or App at 336-37. The fourth element was not met in this case because "the expected profits for Amerivest were to result from the management and control of Amerivest's own officer, and not others." *Id.* at 341-42.

Procedure

Crimson Trace Corp. v. Davis Wright Tremaine LLP, 355 Or 476 (2014)

Plaintiff in a legal malpractice case moved to compel production of communications between the lawyers who represented plaintiff in the underlying litigation and lawyers in the firm's "Quality Assurance Committee." The Supreme Court held that (1) "the trial court correctly determined that the attorney-client privilege as defined in OEC 503 applies to communications between lawyers in a firm and in-house counsel" (355 Or at 478); and (2) the trial court erred in relying on a common law "fiduciary exception" in ordering the firm to produce those communications. *Id.* at 501. The Supreme Court explained that "OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege. Insofar as that list does not include a 'fiduciary exception,' that exception does not exist in Oregon[.]" *Id.*

Longo v. Premo, 355 Or 525 (2014)

Brumwell v. Premo, 355 Or 543 (2014)

In *Longo* and *Brumwell*, the Supreme Court issued peremptory writs of mandamus requiring trial courts to enter protective orders to prevent the state from disclosing privileged information obtained in the course of defending claims of ineffective assistance of counsel in post-conviction proceedings. The trial courts had declined to enter protective orders based on OEC 503(4)(c), the breach-of-duty exception to the privilege. The Supreme Court construed the rule "to be a limited exception permitting disclosures of confidential information only as reasonably necessary for a lawyer to defend against allegations of breach of duty." *Longo*, 355 Or at 539. In these proceedings, "that exception applies only during the pendency of the post-conviction case, including appeal, and only as is reasonably necessary to defend against petitioner's specific allegations of breach of duty." *Id.*

Nationwide Ins. Co. of America v. Tri-Met, 264 Or App 714 (2014)

Plaintiff sued Tri-Met to recover the cost of repairing its insured's car, alleging that the car was damaged when it was hit by TriMet's negligently-operated bus. The trial court granted

TriMet's motion to dismiss, concluding that plaintiff was not the real party in interest, and the complaint did not state a claim for negligence because it did not allege that plaintiff, rather than plaintiff's insured, had been injured by TriMet's negligence. The Court of Appeals reversed, concluding that (1) plaintiff was subrogated to its insured's claim, making it a real party in interest under Oregon law (264 Or App at 716); and (2) "if plaintiff is subrogated to its insured's claim against defendant—as the complaint alleges—then the complaint does state a claim for negligence by plaintiff against defendant as a result of that subrogation." *Id.* at 718.

Greenwood Products v. Greenwood Forest Products, 264 Or App 1 (2014)

*Union Lumber Co. v. Miller, 2*63 Or App 619 (2014)

PGE v. Ebasco Services, Inc., 263 Or App 53 (2014)

In *Greenwood,* the Court of Appeals held that, under ORCP 64 B(4), defendants were entitled to a new trial on their breach of contract claim based on newly-discovered evidence. The evidence, consisting of a post-trial affidavit of a key witness, presented "qualitatively different information" than evidence previously available; defendants could not with reasonable diligence have discovered the information at the time of trial; and the evidence, if believed, would probably change the result. 264 Or App at 20-22. In *Union Lumber*, the Court of Appeals held that the trial court erred in denying defendants' motion to set aside a judgment entered after an arbitration conducted without defendants' presence. The court concluded that "the failures by the arbitrator and plaintiff's counsel to serve defendants with documents related to the arbitration and the judgment in the manner required by law were the type of mistakes under ORCP 71 B that required the court to set the judgment aside[.]" 263 Or App at 625. In *PGE,* the Court of Appeals held that the trial court did not err in denying defendant's motion to set aside a judgment entered on the original complaint where plaintiff had filed, but had not served, an amended complaint. The court rejected the argument that plaintiff had abandoned the original complaint by filing an amended pleading, concluding that "the original complaint was not superseded as to defendant." 263 Or App at 70.

Alfieri v. Solomon, 263 Or App 492 (2014)

The trial court granted defendant's ORCP 21 E motion to strike allegations in plaintiff's legal malpractice complaint relating to defendant's actions during and immediately after mediation in the underlying litigation, concluding that the allegations involved "mediation communications" that were confidential and inadmissible under ORS 36.222(1). The Court of Appeals reversed in part. The court concluded that communications during the mediation and the post-mediation conference occurred in connection with the mediation process and, as such, were confidential. The trial court erred, however, in striking allegations relating to plaintiff's communications with defendant after he signed a settlement agreement following the mediation. The Court of Appeals explained that, although the communications "have some connection to the mediation because they concerned the settlement agreement, those communications occurred outside the mediation process and thus are not subject to the blanket nondisclosure rule in ORS 36.220(1)." 263 Or App at 502.

Miller v. American Family Mutual Ins. Co., 262 Or App 730 (2014)

Plaintiff sued his automobile insurer to recover personal injury protection (PIP) and uninsured motorist (UIM) benefits after he was injured in an accident. Defendant paid nonsurgical medical expenses related to the accident but refused to pay any expenses related to spinal surgery, contending that those expenses were not necessary and related to the accident. Defendant then served an offer of judgment under ORCP 54 E for the balance of the PIP policy limits, reserving its right to litigate the UIM claim. Plaintiff accepted the offer, and then contended at trial on the UIM claim that the accepted offer of judgment precluded the insurer from contending that the surgery was not necessary and related to the accident. The trial court agreed; the Court of Appeals reversed. The court explained that "an offer of judgment is in the nature of a contract between the parties, and courts must adhere to the terms of the offer and enter judgment in accordance with the parties' agreement." 262 Or App at 740. Here, under the terms of the offer, "plaintiff was entitled only to a judgment on plaintiff's claim for PIP benefits[.]" *Id.* Even if acceptance of the offer "had determined issues common to the PIP and UIM claims, the offer of judgment would still not have issue-preclusive effect because plaintiff's PIP and UIM claims were litigated in a single lawsuit." *Id.* at 741.

Miscellaneous

Sea River Properties, LLC v. Parks, 355 Or 831 (2014)

The parties in this case each claimed title to 40 acres of land on the central Oregon coast created when the ocean and wind deposited sand and silt onto the upland south of a jetty the United States government built on the Nehalem River. The trial court held that plaintiff originally acquired title under the law of accretion, but that defendant subsequently acquired the property through adverse possession. The Supreme Court reversed. The court agreed with the trial court that plaintiff's predecessors in interest acquired title under the law of accretion, holding that (1) "in Oregon, land formed by accretion to upland belongs to the owner of the upland where the accretion began (355 Or at 854); and (2) the doctrine of "lateral accretion," even if recognized in Oregon, does not apply in this case. *Id.* But, the court continued, "defendant's use of plaintiff's property does not establish, by clear and convincing evidence, actual, continuous, and exclusive use of that property for a 10-year period" as required to acquire title through adverse possession. *Id.* at 864.

Rains v. Stayton Builders Mart, Inc., 264 Or App 636 (2014)

Plaintiff Kevin Rains (Kevin) was seriously injured when a board on which he was standing broke, causing him to fall 16 feet to the ground. He brought claims for negligence and strict products liability. Kevin's wife, Mitzi, brought a loss of con-

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sortium claim. The jury found in plaintiffs' favor and awarded Kevin more than $5 million in economic damages and more than $3 million in noneconomic damages; the jury awarded Mitzi more than $1 million in noneconomic damages. The Court of Appeals, applying *Klutschkowski v. PeaceHealth*, 354 Or 150 (2013), held that the trial court erred in declining to apply the statutory cap in ORS 31.710 to the noneconomic damage award on Kevin's strict liability claim. The court explained that, "in 1857, there was no common-law tradition with respect to a strict products liability claim that could provide the basis for a conclusion that the legislature is prohibited by Article I, section 17, from altering the measure of damages available for such an action." 264 Or at 663. The court further concluded that loss of consortium "was recognized in 1857, and that is enough under our controlling precedent to conclude that Article I, section 17, prohibits the application of ORS 31.710(1) to Mitzi's loss of consortium claim." *Id.* at 666.

Northwest Natural Gas Co. v. City of Gresham,
264 Or App 34 (2014)

City of Eugene v. Comcast of Oregon II, Inc.,
263 Or App 116 (2014)

In *Northwest Natural Gas*, the Court of Appeals held that a city resolution increasing utility license fees from five percent to seven percent of gross revenue was not preempted by ORS 221.450. The court concluded that a utility license is a "franchise," so plaintiffs were "not operating 'without a franchise from the city' as that phrase is used in the statute." 264 Or App at 37. In *City of Eugene*, the Court of Appeals held that (1) Comcast's cable modem service was a "transmission for hire of data" within the meaning of the city's ordinance, thereby subjecting Comcast to registration and license fees under the ordinance; (2) the federal Internet Tax Freedom Act (ITFA) bars enforcement of the registration fee because that fee is a tax on internet access that was not generally imposed and enforced before October 1, 1998; (3) ITFA does not bar enforcement of the license fee because that fee is not a tax under ITFA; and (4) the trial court erred in concluding that the city's enforcement of the license fee violated Article I, section 32 of the Oregon Constitution and the Equal Protection Clause because "Comcast's proof was not, on this record, enough to demonstrate the 'intentional and systematic pattern of discrimination' that is necessary under those constitutional provisions." 263 Or App at 149.

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