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In This Issue...

Commonsense Electronic Discovery Planning

How to Help Your Client Meet Its Electronic Production Obligations

By Elleanor H. Chin and Scott E. Warnick

Picture the following situations:

You are in-house counsel juggling the demands of your business people, multiple litigations at various stages of prosecution, preparation and settlement, and maybe some contract negotiations and a human resource issue or two. Outside counsel on one of your cases calls you up and says, "You know that really elaborate document retention and destruction policy that you put together two years ago to be Sarbanes-Oxley compliant? I want you to stop all of your document destruction immediately, start backing up all of your e-mail servers and hard drives and saving the tapes and oh by the way, I need to meet with your entire IT staff tomorrow".

You say, "but it will cost several hundred thousand dollars just to store that amount of backup tapes, and our systems are going to slow down like crazy. All of this just for a bogus wrongful termination claim from one of the guys in the mailroom?" Counsel assures you it is the only way to avoid severe sanctions.

Or:

You are a litigator handling a newly filed commercial dispute for a client and you have been to a couple of CLEs about electronic discovery. Someone gave you a whole series of the *Zubulake*[1] decisions to read and you are terrified you and your client will be subject to sanctions if you don't do everything possible to provide all the electronic data you can conceivably lay your hands on to

Please continue on page 33

FROM THE EDITOR

PERSONAL CREDIBILITY

BY DENNIS RAWLINSON

It's not unusual for a client or a referral source looking for a trial lawyer to say that he is looking for a lawyer who is "mean, aggressive, and hostile." My personal observation has been that "mean, aggressive, and hostile" lawyers tend to receive the same in kind and usually end up costing their clients substantial amounts in unnecessary attorney fees and ultimately alienate the fact-finder.

Perhaps we sometimes mistake "meanness, aggressiveness, and hostility" for "personal credibility."

There is no question that every client and referral source should be looking for a lawyer who will put his or her "personal credibility" on the line for the client. Such a lawyer unleashes his or her personal belief and conviction to support the client's position.

In a recent seminar given by Wisconsin Federal Appellate Judge Ralph A. Fine, Judge Fine emphasized the importance of the lawyer's personal credibility in a jury trial.

1. The Lawyers Know the Real Truth

Judge Fine explained that jurors are convinced that the lawyers know the "real and whole" truth (regardless of the reality of whether they do or don't) of the case that they bring to trial.

It is not surprising that Judge Fine comes to this conclusion. After all, lawyers spend their time in front of the jury objecting to the introduction of evidence. Obviously, they wouldn't object if the information they were trying to keep out was not important and hurt their case. Based on these objections, the jurors conclude that the lawyers are attempting to keep them from knowing "the real and whole" truth, which the lawyers alone know.

Similarly, lawyers regularly have "secret" conferences with the judge (while the jury is excused) and whispered sidebar conversations with the judge. We all learn at an early age that it is impolite to whisper in the presence of others. Again, the natural conclusion of the jurors is that something is being kept from them. The lawyers know the important facts that the jurors do not.

2. Personal Credibility

Once one concludes that jurors assume that each of us knows the "real and whole" truth, the most effective way to be persuasive is to be zealously committed to one's client's position. Anything less suggests that the lawyer doubts the client's position.

Judge Fine uses a couple of examples to demonstrate when "personal credibility" is present and when it is not.

3. Never Apologize

Judge Fine urges trial lawyers never to apologize for their client's position. Apologies do not curry favor and do not make us likable. Instead they make us look weak and our client's position suspect.

For example, when Marcia Clark prosecuted O.J. Simpson for the murder of Nicole Simpson, she apologized in opening statement for prosecuting a popular high-profile football star. If in fact, as the jury presumes, she knows the "real and whole" truth (namely, that

Please continue on next page

From the Editor

continued from page 2

Simpson had committed the brutal cold-blooded murders), why would she be apologizing?

4. Don't Distance Yourself From the Facts

Similarly, Judge Fine criticized Robert Bennett's recent defense of President Clinton to the charges of Kathleen Willey. In response to some rather graphic allegations by Ms. Willey on the *60 Minutes* television news program concerning improper sexual advances by the President, attorney Bennett was careful not to place his personal belief and conviction on the line. Instead he told the television reporter what he understood to be "President Clinton's version of the facts." Hiding behind what he referred to as his "client's account" of the facts instead of responding clearly and directly that his client was not guilty and he would prove so was fatal to his persuasiveness.

. . . concerning improper sexual advances by the President, attorney Bennett was careful not to place his personal belief and conviction on the line.

5. Credibility Must Be Consistent With the Facts and Common Sense

Needless to say, a lawyer cannot place his unqualified personal belief and commitment behind a client's position unless it is believable. Personal credibility must be consistent with the facts and the jurors' common sense. The lawyer must first analyze the facts and adopt a version of the facts and a theme that is consistent with them and with common sense. Having done so, the lawyer's most persuasive tool for adoption of the lawyer's version of the facts and theme is the lawyer's credibility.

6. Prohibition Against Announcing Personal Belief

It has long been recognized that even in closing argument lawyers are prohibited from announcing their own personal belief concerning the truth or untruth of the facts or witnesses' credibility. *See, e.g., Fowler v. State*, 500 SW2d 643 (Tex Crim App 1973); *People v. Bain*, 489 P2d 564 (Cal 1971). Why? Because it is so powerful. One can demonstrate one's personal belief, however, without announcing it.

One does so not by apologizing for prosecuting O.J. Simpson but by stating unequivocally that "I will prove to you that this man is a murderer." One does so not by hiding behind "the President's version of the facts" but by stating that "the President is innocent of the charges, and when the time is right we will prove it."

7. Conclusion

Next time someone approaches you and tells you that he or she is looking for a trial lawyer who is "mean, aggressive, and hostile," I suggest that you encourage him or her to reconsider. What he or she is really looking for is a trial lawyer who will place his or her own personal credibility on the line to support his or her client. ❐

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Mandamus in Land Use Cases

By Mark J. Fucile

Although most land use permit applications in Oregon are handled exclusively through local government administrative hearings and the Land Use Board of Appeals, Oregon law also gives land use permit applicants a circuit court mandamus remedy if a permit application has been pending without a final decision for more than 120 days in urban areas and 150 days outside urban areas.

This article outlines the development of the land use mandamus remedy, the practical advantages and disadvantages of using this alternative and how these cases are handled in circuit court.

Development of Land Use Mandamus

ORS 215.427 and ORS 227.178 set a 120-day time limit for, respectively, counties and cities to review and decide land use permit applications for property within urban growth boundaries and a 150-day time limit for applications on property outside.[1] The time periods begin at the point an application is deemed "complete." Although ORS 215.427(2) and ORS 227.178(2) contain detailed definitions of the term "complete," it generally means the point that an application has all of the information required for the local government to proceed with its review or 30 days following the submission of the application if the local government has not informed the applicant that additional information is necessary. The time periods may be extended at the request of the applicant under ORS 215.427(4) and ORS 227.178(5). But excluding extensions requested by the applicant, the local government must take "final action" within the respective 120 or 150-day periods after an application is deemed complete. "Final action" under ORS 215.427(1) and ORS 227.178(1) means a decision on the application, including, importantly for the calculation of the 120 or 150-day time limit, the resolution of all appeals at the local (i.e., pre-LUBA) level.[2] If the local government does not meet the relevant time deadline, it must also return a portion of the application fees under a formula set out in, respectively, ORS 215.427(7) for counties and ORS 227.178(8)-(9) for cities.

Since they were adopted as companion statutes in 1983, the land use mandamus provisions now found in ORS 215.429 and 227.179[3] have allowed land use permit applicants to petition the circuit court in the county concerned for a writ of mandamus compelling the county or city involved to approve an application if the local government failed to meet the relevant time limits.[4] Nonetheless, the mandamus remedy was not used frequently until the mid-1990s for two primary reasons.

First, local governments could—and did—obtain waivers of the time limit from applicants. In 1995, however, the Legislature amended the mandamus statutes to generally prohibit local governments from compelling these waivers.[5] Those provisions are now found at, respectively, ORS 215.427(8) for counties and ORS 227.178(10) for cities.

Second, the Oregon Court of Appeals had held that a circuit court lost jurisdiction if the local government took final action while the mandamus action was pending.[6] Given the investment of time and expense often involved in a circuit court case, the practical effect of this decision was to discourage the use of the mandamus remedy because a local government could defeat the mandamus action simply by making a final decision on the application prior to judgment. In 1994, however, the Oregon Supreme

Please continue on next page

Land Use Cases

continued from page 4

Court held in *State ex rel Compass Corp. v. City of Lake Oswego,* 319 Or 537, 878 P2d 403 (1994) (*Compass*), that a city could not divest a circuit court of mandamus jurisdiction (and, by implication, its counterpart dealing with counties) by taking final action on a land use application once the applicant had filed a timely mandamus action. The Legislature later codified this aspect of *Compass* in ORS 215.429(2) for counties and ORS 227.179(2) for cities.

Since *Compass* and the statutory changes of the mid-1990s, mandamus has expanded as a tool for land use lawyers and litigators. Although many counties and cities in response began tracking mandamus time limits more carefully and began requesting voluntary waivers, land use mandamus still provides an important potential remedy to land use applicants.

Practical Advantages and Disadvantages of the Mandamus Remedy

The "political" dynamics of a particular land use application will usually dictate whether an applicant, as a practical matter, should stay within the local government's permit approval system or consider the mandamus remedy. For example, if the local government has indicated that an application will be approved but simply hasn't completed its processing within the time limit, most applicants will wish to stay within the local government's system.[7] In those cases in which the local government does not appear close to taking final action within the deadline, however, mandamus does offer an alternative route.

There are four principal practical advantages from an applicant's perspective in using the mandamus remedy.

First, if successful, this remedy does not just compel the local government to make a decision on the application. Rather, ORS 215.429(5) and ORS 227.179(5) compel the approval of the application. *See Compass, supra,* 319 Or at 544-45. Like a land use approval, the writ may impose conditions. Under ORS 215.429(5) and ORS 227.179(5), however, the conditions must be consistent with the local government's comprehensive plan and land use regulations.

THE "POLITICAL" DYNAMICS OF A PARTICULAR LAND USE APPLICATION WILL USUALLY DICTATE WHETHER AN APPLICANT, AS A PRACTICAL MATTER, SHOULD STAY WITHIN THE LOCAL GOVERNMENT'S PERMIT APPROVAL SYSTEM OR CONSIDER THE MANDAMUS REMEDY.

Second, in contrast to land use proceedings conducted by counties and cities, the burden of proof in a mandamus case is shifted from the applicant to the local government. ORS 215.429(5) and ORS 227.179(5) direct that the court "shall" issue the writ unless the local government proves that approval of the application would violate a substantive provision of its comprehensive plan or land use regulations. *See Compass, supra,* 319 Or at 544-45.

Third, unlike land use proceedings, the court interprets any land use regulations at issue independently rather than according deference to the local government's interpretation. *See State ex rel Coastal Management, Inc. v. Washington County,* 159 Or App 533, 540-42, 979 P2d 300 (1999); *State ex rel Currier v. Clatsop County,* 149 Or App 285, 289-90, 942 P2d 847 (1997).

Fourth, under a related provision governing mandamus actions generally—ORS 34.210(2)—attorney fees are available to a successful applicant at the discretion of the trial court using the standards set out in ORS 20.075.[8] *See generally State ex rel Aspen Group v. Washington County,* 150 Or App 371, 378-380, 946 P2d 347 (1997), *rev denied,* 327 Or 82, 961 P2d 216 (1998), *appeal after remand,* 166 Or App 217, 222-27, 996 P2d 1032 (2000); *accord State ex rel Coastal Management, Inc. v. Washington County, supra,* 159 Or App at 543-52.

There are three primary practical disadvantages to using mandamus in the land use context.

First, moving a land use application to court can sometimes polarize dealings between the local government and the applicant. Therefore, mandamus is often best reserved for situations in which there is already significant friction between the local government and the applicant and, as a result, the applicant is not likely to make much headway by continuing to pursue the development through the usual permitting process.

Second, unless the local trial court is willing to handle a mandamus on an expedited basis, it will follow the same track toward a trial as other civil litigation. Therefore, mandamus is often best suited for situations where the traditional permitting process would also be a comparatively long or "fatal" road.

Third, because most land use applications are handled outside the trial courts, trial judges typically do not deal frequently with the esoteric world of land use and zoning codes. This counsels choosing cases for mandamus relief that are built around a few straightforward issues.

Please continue on next page

Land Use Cases

continued from page 5

How Mandamus Cases Are Handled in Circuit Court

Although the substantive right to the mandamus remedy in land use cases is created by ORS 215.429 and ORS 227.179, the procedural mechanics are largely controlled by ORS 34.105-.240—which govern writs of mandamus generally in circuit court.[9]

Mandamus cases against either a county or a city are begun by filing a petition for an alternative writ of mandamus with the circuit court of the county in which the land use application is pending.[10] The petition generally tracks the language of the statutes and recites the date on which the application was complete, the fact that the local government has not taken final action on the application and that the 120 or 150-day clock has run since the application was complete. The writ is an "alternative" one because it commands the local government to either approve the application involved or, in the alternative, to show cause why it has failed to do so. The petition is usually supported by an affidavit from the applicant or the applicant's attorney authenticating a copy of the application and confirming that the 120 or 150-day period has expired.

In most counties, copies of the petition and supporting affidavit are presented at *ex parte* and, if granted, the judge signs an order directing the clerk to issue the alternative writ. The contents of the writ largely mirror the petition. Typically, the writ is prepared by the applicant's lawyer along with the other initial papers and should be available for the judge's review at *ex parte.* The original writ is then signed by the clerk and returned to the applicant's lawyer for service.

The original writ is served on the local government in the same manner as a summons. Copies of the writ are also served on any other parties to the underlying land use proceeding and the class of nearby property owners who would be entitled to notice in a land use proceeding under ORS 197.763. ORS 215.429(3) and ORS 227.179(3) require that the notice to other parties be served by mail or by hand the same day the petition is filed. The applicant then files a proof of service with the court. Under ORS 34.130(4)(b), motions to intervene by third parties such as neighborhood groups must be filed within 21 days of the filing of the mandamus petition.

MANDAMUS CASES AGAINST EITHER A COUNTY OR A CITY ARE BEGUN BY FILING A PETITION FOR AN ALTERNATIVE WRIT OF MANDAMUS WITH THE CIRCUIT COURT OF THE COUNTY IN WHICH THE LAND USE APPLICATION IS PENDING.

There is no particular response time fixed by either the land use or general mandamus statutes. Rather, the court will normally pick a "return" date (with 30 days being typical) and include it in the writ. The writ is "returned" by the local government by filing the original writ with the court along with a "certificate," which is a statement indicating whether it has or has not approved the application involved. If the local government has approved the application in response to the alternative writ, then the case is over. If not, then the local government must also file an answer stating affirmatively why the approval would violate its comprehensive plan or land use regulations. The local government can also move to dismiss the writ if it fails to meet the statutory prerequisites.

Once the local government has answered, discovery and further motion practice are conducted in the same way as other civil cases.

The trial, too, is conducted in the same manner as other non-jury civil actions—with three main exceptions.

First, in some counties, mandamus cases are handled on the show cause or expedited docket rather than the general trial calendar.

Second, because the local government bears the burden of proving that the proposed development would violate its comprehensive plan or land use regulations, the local government—even though it is the defendant—may essentially proceed first at trial if it has already admitted the background allegations in the alternative writ and the only issues remaining for trial relate to its affirmative defenses. *See generally State ex rel Lowell v. Eads,* 158 Or App 283, 286-87, 974 P2d 692 (1999) (discussing the burden of proof); *see, e.g., State ex rel Forman v. Clackamas County,* 181 Or App 172, 179, 45 P3d 491 (2002).

Third, if the court finds for the applicant, it can attach conditions to the approval that are permitted in the local government's comprehensive plan or land use regulations under ORS 215.429(5) and ORS 227.179(5).

If the applicant prevails at trial, the final judgment is in the form of a "peremptory" writ of mandamus to the local government directing it to approve the application with any conditions the court may have imposed.

An appeal may be taken in the same way as in any other civil case. Because a mandamus ruling is not classified as a "land use decision" under ORS197.015(1)(e)(A), any appeal is to the

Please continue on next page

Land Use Cases

continued from page 6

Court of Appeals rather than to LUBA. Mandamus proceedings are considered an action at law and, therefore, appellate review under ORS 34.240 is not de novo. Rather, an appellate court reviews the trial court's findings to determine if they are supported by the evidence. *See Coastal Management, Inc. v. Washington County, supra,* 159 Or App at 539-40.

Conclusion

Although the mandamus remedy is not appropriate in every situation in which a land use permit application has been pending for more than the applicable 120-day or 150-day time limit, it provides another tool to developers navigating the approval process with local governments.[11] ❐

Endnotes

1 ORS 215.427(1) includes permits for mineral aggregate extraction wherever they are located within the 120-day time limit. ORS 215.427(6) and ORS 227.178(7) exclude comprehensive plan amendments and the adoption of land use regulations from the mandamus remedy. ORS 215.433 [counties] and ORS 227.184 [cities] impose 240-day time limits for supplemental applications submitted following an initial denial of an application by a local government. ORS 215.435 [counties] and ORS 227.182 [cities] impose 90-day time limits for final action on land use applications remanded from LUBA.

2 Decisions that are subject to the mandamus remedy are those "wholly within the authority and control of the governing body" of the respective county or city. *See* ORS 215.427(5)(a) [counties]; ORS 227.178(6)(a) [cities]. The fact that other agencies must approve other elements of an overall project, however, does not excuse the county or city involved from making its decisions within the applicable time periods. *See State ex rel Aspen Group v. Washington County Board of Commissioners,* 150 Or App 371, 374, 946 P2d 347 (1997), *rev denied,* 327 Or 82, 961 P2d 216 (1998), *appeal after remand,* 166 Or App 217, 996 P2d 1032 (2000). Under ORS 215.427(3) [counties] and ORS 227.178(3) [cities], "approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

THE FACT THAT OTHER AGENCIES MUST APPROVE OTHER ELEMENTS OF AN OVERALL PROJECT, HOWEVER, DOES NOT EXCUSE THE COUNTY OR CITY INVOLVED FROM MAKING ITS DECISIONS WITHIN THE APPLICABLE TIME PERIODS.

3 When they were originally enacted, the land use mandamus provisions were at former ORS 215.428(7) and former ORS 227.178(7). In 1999, the Legislature moved the mandamus remedy to, respectively, ORS 215.429 and ORS 227.179. See Or Laws 1999, ch 393, § 2 and ch 533, §§ 6-7 [counties]; Or Laws 1999, ch 533, §§ 8-10 [cities].

4 Under ORS 215.429(4) and ORS 227.179(4), a mandamus cannot be filed within 14 days after a local government makes a preliminary decision on an application as long as a final written decision follows within 14 days after the preliminary decision.

5 *See* Or Laws 1995, ch 812, § 2 [counties], § 3 [cities].

6 *See Edney v. Columbia County Board of Commissioners,* 119 Or App 6, 849 P2d 1125, *aff'd on other grounds,* 318 Or 138, 863 P2d 1259 (1993).

7 As a practical matter any extensions of time accorded a local government should be documented in writing and should not be open-ended.

8 ORS 34.210(2) is a "prevailing party" statute. Attorney fees, therefore, can also be entered against a losing mandamus petitioner.

9 The land use mandamus statutes as enacted originally did not contain a specific link to ORS Chapter 34. *See generally Murphy Citizens Advisory Com. v. Josephine County,* 325 Or 101, 934 P2d 415 (1997). The Legislature amended the land use mandamus statutes to provide that specific link in 1999. *See* Or Laws 1999, ch 533, § 7 [counties], § 10 [cities].

10 ORS 34.160 allows a peremptory writ at the outset: "[w]hen the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus shall be allowed in the first instance; in all other cases, the alternative writ shall be first issued."

11 The author would like to thank Steve Abel, his former land use colleague at Stoel Rives LLP, for his insightful review and comments on the draft of this article.

Ninth Circuit Opinion Highlights Importance of Timely Privilege

By Thomas R. Johnson, Jr. and Stephanie K. Hines

Have you ever failed to send opposing counsel a privilege log along with your response to a Rule 34 request for production of documents? If so, according to the Ninth Circuit's recent opinion in *Burlington Northern and Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, you may have waived the attorney-client privilege. Because the Ninth Circuit's approach may cause some uncertainty in practice, the District of Oregon's Local Rules Advisory Committee has proposed a new rule addressing the Ninth Circuit's holding.

In *Burlington Northern*, the Ninth Circuit upheld a lower court's ruling that a defendant waived the attorney-client privilege when it made a boilerplate assertion of privilege in response to discovery requests and further failed to provide plaintiffs with a privilege log until five months following the issuance of the requests. *Burlington Northern and Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142 (9th Cir. 2005). Indeed, the district court held that the defendant had waived its privilege protection by failing to provide a privilege log at the time it served discovery responses; that is, within the 30-day time period for responding and objecting.

Dismissing the district court's rigid conclusion, the Ninth Circuit attempted to balance the possible contradiction in Federal Rules 34(b) and 26(b)(5). Although Rule 34(b) requires that requests for production be responded to within 30 days of the request, Rule 26(b)(5) requires that parties expressly describe the nature of the documents withheld in order to "enable other parties to assess the applicability of the privilege or protection." In a litigation world with large volumes of documents to review (often in far flung places), not to mention the complexities of electronic discovery, it is no doubt difficult in every case to produce a privilege log within the time limit prescribed by Rule 34(b).

The Ninth Circuit rejected both the practice of boilerplate objections and the district court's per se 30-day waiver rule. Considering its approach to be "middle of the road", the Ninth Circuit set Rule 34's 30-day period as a default guideline for the production of a privilege log specific enough to comply with Rule 26(b)(5) – that is, specific enough to "enable other parties to assess the applicability of the privilege or protection." With the 30-day default guideline in place, the Ninth Circuit left district courts free to make case-by-case timeliness determinations, taking into account the following factors:

(1) the degree to which the objection or assertion of privilege enables the opposing litigant and the court to evaluate whether each of the documents withheld

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Timely Privilege

continued from page 8

is privileged (where a privilege log stated with particularity is presumptively privileged and a set of boilerplate objections is presumptively not);

(2) the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days as a default is sufficient); and

(3) the magnitude of the document production and other particular circumstances that make responding to discovery unusually easy or unusually hard.

Applying this test to the facts at issue, the Ninth Circuit held that waiver occurred where the privilege log was filed five months after the discovery responses were due. The court cautioned that, "in the absence of mitigating considerations, *this fact alone* would immunize the district court's ruling from reversal under the standard just articulated." In addition to timing, the court listed further factors weighing in favor of waiver: the sophistication of the corporate litigant, the production of many of the documents in a prior lawsuit, and that the privilege log produced five months later was insufficient and had been modified after the fact.

The Ninth Circuit's decision has thus far been discussed in a published opinion only by a district court in Florida. *Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g*, Inc., 230 F.R.D. 688 (M.D. Fla. 2005). Agreeing with the Ninth Circuit's analysis, the Florida court held that failure to produce a privilege log until over eight months following the issuance of Rule 34 responses waived any claim of attorney-client privilege or work product. *Id.* at 695-96. The court further applied the Ninth Circuit's test in *Burlington Northern* to a third-party subpoena response, requiring the production of a privilege log within 14 days as a default guideline. *Id.* at 698.

Although the court stated that it was not announcing a per se rule, the Ninth Circuit's requirement of a "holistic reasonable analysis" may be read narrowly in light of both the 30-day presumption of timeliness and the presumption that boilerplate objections are insufficient.

The Ninth Circuit's decision should give litigants reason to be concerned. Although the court stated that it was not announcing a *per se* rule, the Ninth Circuit's requirement of a "holistic reasonable analysis" may be read narrowly in light of both the 30-day presumption of timeliness and the presumption that boilerplate objections are insufficient. As stated in Burlington Northern's petition for review, which was denied, "[t]he Ninth Circuit's decision…sets a trap for unwary litigants (and their counsel), subjecting them to the draconian penalty of wholesale privilege waiver simply because the court, in hindsight, believes that a privilege log could have been produced more expeditiously." 2005 WL 2034944 (Aug. 17, 2005). The trap will remain unless district courts adopt local rules to clarify this issue and alleviate the need to provide a privilege log with document responses.

With an eye toward this uncertainty, the Local Rules Advisory Committee has approved a rule that may alleviate the need to provide a privilege log with FRCP 34 responses. Proposed Local Rule 26.7 provides that a party may preserve applicable privileges by making a timely privilege objection in its Rule 34 responses. The proposed rule requires, however, that the privilege log be provided "within a reasonable time" after service of FRCP 34 responses. Although this local rule will leave the question of "reasonable time" unresolved, it will at least provide some protection to parties in complex cases. The public comment period with respect to this rule closed on January 6, 2006; the District Court may make further changes before forwarding the proposal to the Judicial Council of the United States Court of Appeals for the Ninth Circuit for review and possible approval.

Until the law changes or local rules are adopted, it is advisable for all counsel practicing in the Ninth Circuit to provide a privilege log simultaneously with FRCP 34 responses, obtain a written stipulation or court order authorizing a delay, or create a record as to the reasonableness of any delay past the 30-day period. Failure to do so may result in waiver of any attorney-client privilege over responsive documents. ❐

The Collateral Consequences of a Parallel Investigation, or "Excuse Me, Can I Talk to You, Please?"

By Janet Lee Hoffman and Carrie Menikoff

Introduction

Many litigators may find themselves defending allegations that their client violated an administrative regulatory scheme such as the Securities Exchange Act of 1934, the Clean Water Act, or the federal tax laws. Civil attorneys must consider the possibility that their civil case may involve criminal prosecution since the administrative regulatory schemes include criminal penalties for violations of the same provisions. As a matter of public policy, certain offenses will carry an increased risk of criminal prosecution where there is evidence of falsification of data, concealment of evidence, or repeated violations by the same individual or company. And since the civil authorities can share their findings with the criminal authorities (so long as certain criteria are met), the practitioner will need to assess whether cooperation at an early stage is the imperative to avoid debarment and other serious penalties or whether the value gained by cooperation is outweighed by the risk of disclosing possibly incriminating evidence.

Janet Hoffman

Carrie Menikoff

When representing a client under investigation for such violations, there is often a tension between the natural impulse to cooperate with authorities to avoid litigation or civil penalties and the need to protect oneself by asserting the Fifth Amendment and other constitutional rights. To determine which approach is most advantageous, it is important to understand the risks the client faces should he choose to cooperate with civil authorities without analyzing the ramifications of a potential simultaneous criminal investigation.

Government sources essentially define parallel proceedings as independent, simultaneous investigations, enforcement actions or prosecutions involving allegations and parties that are substantially the same.[1] For example, the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") can simultaneously investigate and prosecute violations of securities law to pursue both civil and criminal penalties. A parallel proceeding is legitimate if it is conducted in good faith.[2] That is to say, the civil and administrative investigation must be justified by genuine civil enforcement case purposes. Put differently, the civil discovery process may not be used as a pretext to gather information for a criminal investigation. Yet even where the civil investigation may have been initiated for a legitimate administrative or regulatory purpose, one must look to the manner in which information is subsequently developed and shared between the two separate agencies to determine whether an otherwise proper parallel proceeding has merged into a single improper prosecution.

In the civil enforcement context alone, the stakes for the individual or corporation under investigation are high. For instance, corporations who do not cooperate may face stiffer penalties.[3] The civil agency can debar individuals or entities to prevent them from receiving federal funds or from bidding on government contracts. For both individuals and corporations, this could mean the loss of livelihood. Succumbing to the coercive force of threatened government sanction, individuals may choose to cooperate fully to avoid the penalties, even though cooperation increases the risk of crimi-

Please continue on next page

Collateral Consequences

continued from page 10

nal prosecution because the individual may (wittingly or unwittingly) disgorge incriminating evidence.

The Coordination between Civil and Criminal Authorities

Practitioners also need to be aware that it is often policy within the federal civil administrative agency to notify the criminal authorities of potential criminal activity. Some agencies will furnish the criminal authorities with pleadings and hearing summaries even before making a criminal referral.[4] After a formal criminal referral has been made, the inter-agency coordination may even increase. For example, some civil investigators are directed to keep the United States Attorney advised on all aspects of the civil case, once a referral has been made.[5]

Significantly, any information obtained as a result of legitimate civil discovery may be--and often will be--shared with criminal enforcement agents. Indeed, federal law enforcement agencies will undertake joint investigations and collaborate when prosecuting civil and criminal violations.[6] As EPA policy states, there is no legal bar to using administrative mechanisms for purposes of investigating suspected criminal matters, so long as the agents do not intentionally mislead a person about the possibility that information gathered will be used in the criminal enforcement context.[7] Notably, however, in any joint investigation, "civil and criminal attorneys must each have a good faith basis for every information-gathering action taken, independent of the investigatory needs of their counterparts."[8]

The civil authorities have expansive investigatory powers. The SEC, for example, may investigate and commence informal or formal enforcement actions. If it undertakes a formal investigation, a Formal Order of Private Investigation is required. Through this formal investigation, it has the power to compel testimony of witnesses and production of documents from anywhere within the United States. Further, according to SEC rules, all documents and information are non-public.[9] Yet SEC rules allow for the sharing of information with other government agencies. This rule is significant because it allows the DOJ to obtain this non-public information. Moreover, it is now common practice for the SEC to coordinate its investigation with the DOJ. SEC staff members are regularly detailed to the Justice Department to assist in criminal investigations and prosecutions of securities violations.[10] Given this close cooperation between federal agencies, parallel proceedings present both the opportunity for the government to conduct efficient investigations and to abuse the investigative process if the rules are not followed.

When a government agency initiates an investigation, the penalties that the government can impose, should it decide to pursue an enforcement action, are sufficiently severe that many defendants have no choice but to yield to the demands of the staff investigators, knowing full well that any information gathered might be shared with other government agencies.[11] Nevertheless, no defendant who is heading toward a criminal trial wants to be unwittingly put in a position of providing testimony in a civil action that will later be used against him in the criminal case. It is important, therefore, to determine the full scope of the investigation facing the defendant before he testifies because a defendant cannot make a full knowing and voluntary waiver of his Fifth Amendment rights if he is misled about the true, dual nature of the investigation or proceeding. As one district court explained, "it is unrealistic to suppose that defendant will be on guard against incriminating himself when he is unaware that criminal proceedings are contemplated."[12]

Although a defendant has a constitutional right not to provide compelled testimony, in the civil arena, assertion of the Fifth Amendment privilege comes at a price.[13] Indeed, the decision to take the fifth in a civil proceeding will not go unpunished. If he invokes his right to be free from providing compelled testimony in the civil action based on the uncertainty of criminal proceedings, the judge or jury is permitted to draw an adverse inference against one who refuses to testify.[14] Moreover, refusing to provide evidence may potentially preclude the defendant from presenting evidence on his behalf.[15] In a civil case, courts have held, the defendants cannot have it both ways. By hiding behind the protections of the Fifth Amendment as to his contentions, the defendant may give up the right to prove them.[16]

Outlining the Contours of Proper Parallel Proceedings

Courts that have considered the constitutional questions raised by simultaneous civil and criminal investigations or proceedings in the enforcement of federal law provide some guidance for practitioners seeking to define the contours of proper or legitimate parallel proceedings. In *United States v. Kordel,* the Supreme Court enunciated some standards for evaluating the propriety of parallel proceedings.[17] Put simply, *Kordel* stated that the government cannot bring a civil action solely to obtain evidence for a criminal prosecution, adding that it may be an abuse of process should the government "fail[] to advise the defendant in its civil proceeding that it contemplates his criminal prosecution."[18] Notably, the Supreme Court acknowledged that where there are parallel proceedings, there may be "special circumstances that might suggest the unconstitutionality or even the impropriety of [the] criminal prosecution."[19] The question that remains after *Kordel* is what are those "special circumstances"?

Please continue on next page

Collateral Consequences

continued from page 11

Significantly, at the core of the opinion in *Kordel* is the notion that the government must not act in such a manner as to subvert the "fundamental fairness" requirement of the due process clause or depart from the proper standards in the administration of justice. One component of fairness is that individuals have a right to expect candor from the government.

Lower courts examining the propriety of parallel proceedings since *Kordel* have found that it is a "flagrant disregard of individuals' rights" to "deliberately deceive, or even lull" someone into incriminating oneself in the civil context when "activities of a criminal nature are under investigation."[20] In other words, a government agent must not affirmatively mislead the defendant into believing that an investigation is exclusively civil in nature and will not lead to criminal charges.[21] Put simply, they cannot lie about the status of an investigation.[22] Government agents cross this line when they anticipate bringing criminal charges against a subject of a civil investigation, fail to advise individuals that they anticipate their criminal prosecution, and then employ a strategy to conceal the criminal investigation.[23]

More specifically, when staff from the separate civil and criminal agencies (i) meet regularly, (ii) identify targets, (iii) share documents, (iv) cooperate in establishing jurisdiction for false statement cases, (v) discuss information needed for a criminal prosecution, and/or (vi) actively shield their intentions behind the guise of a civil prosecution to obtain evidence not otherwise available through criminal discovery,[24] the government "engages in an obnoxious form of using parallel proceedings."[25] Even in those cases where the civil authorities have initiated a legitimate civil enforcement investigation, a subsequent government prosecution based on deceit or trickery concerning the existence of the criminal proceeding is improper.[26]

Additionally, the government may overstep its bounds when it identifies an individual as a subject or a target of the investigation, yet fails to alert him of the possibility of criminal exposure. Some will argue, however, that a standard, routine warning (given to all witnesses) alerting the defendant that his testimony may be shared with the criminal authorities is sufficient to insulate the government from any challenge as to the propriety of the two investigations. But when the defendant is the subject or target of the investigation such boilerplate warnings may be insufficient. In *United States v. Thayer,* the court found these warnings meaningless when the defendant was unaware that investigators were focusing on his conduct. In this context, "the giving of the warning can not have much significance where the defendant was, so to speak, then within the sights of the Government and did not receive an explanation of the true import of the [ ] inquiry."[27] Put simply, the government's failure to inform the defendant that he is a target or subject of a criminal investigation may depart from the proper standards in the administration of justice and violate defendant's due process rights.[28]

Practice Tips

Where the defendant faces the possibility of providing information in a civil proceeding that could later be used against him in a separate criminal case, the government is in a unique position to obtain potentially incriminating information, which it will make full use of in a criminal prosecution. Therefore, if the client's potential for criminal exposure is significant, it may be in his best interest to invoke his right against self-incrimination. Of course, this decision must be weighed against the impact it will have on the civil matter, such as the likelihood of an adverse inference being drawn against the defendant. The defendant, however, may choose to cooperate because of the preferential treatment he may later receive from the criminal authorities. In the criminal case, the prosecution will likely rely on "cooperating witnesses" and will, therefore, offer the best deals to those individuals who provide meaningful information early in its investigation.

Given the risks flowing from a regulatory investigation, it is incumbent on counsel to make full use of any protections available to the client who faces possible parallel proceedings. One such protection is the proffer agreement. In those cases where counsel is aware of potential criminal liability and civil authorities require that the client provide a statement and produce documents, the practitioner can try to negotiate a proffer agreement that will allow the disclosure of information while at the same time protect against the direct use of his statement as well as the "testimonial" aspect of his document production.[29] In essence, the government agrees to review what the client has to offer on the condition that it will not directly use the client's statements. In the case of a document production, the government agrees that it will not use the act of production to prove that the documents were ever in the client's possession or control. It should be noted that standard proffer agreements allow the government to use derivative evidence and permit use of the prior statement for impeachment purposes.

In summary, simultaneous civil and criminal proceedings pose problems for defendants that a single criminal prosecution does not. Separate civil and criminal government agencies can pool resources, share information, and make joint tactical decisions when investigating violations of federal law. And when done appropriately, they can do all this without compromising an individual's

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continued from page 12

constitutional rights. Therefore, it is up to the practitioner to be alert to the possibility of parallel proceedings and identify all the agencies who may be involved in the matter under investigation. Should the client face dual prosecution, counsel should weigh the risks and benefits of the following options: (i) contacting the criminal authorities to negotiate proffer agreements binding both the civil and criminal authorities; (ii) becoming a cooperating witness; (iii) invoking the Fifth Amendment privilege; or (iv) seeking a stay of civil discovery while the criminal case is pending. With timely knowledge of all the facts and parties involved in the proceedings, counsel can assist the client in adopting an appropriate strategy in the civil case, and if necessary, can approach the criminal authorities early to negotiate a favorable deal. ❐

Endnotes:

1 For purposes of this article, the term "parallel proceedings" refers to all stages of the government agency's case, from the dual investigations through the filing of a civil complaint or criminal indictment.

2 *SEC v. Dresser Indus., Inc.,* 628 F.2d 1368, 1374 (D.C. Cir. 1980) (en banc); *United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1974).

3 *See generally* U.S. Dept. of Justice, Jan. 20, 2003 Memorandum from Deputy Attorney General Larry Thompson, titled "Principles of Federal Prosecution of Business Organizations."

4 U.S. Trustee Manual, Vol. 5: Chapter 5-13.4.2: Parallel Proceedings.

5 *Id.* at Chapter 5-13.4.3.

6 The sharing of information is not automatically a two-way street. Civil authorities are not automatically entitled to obtain grand jury materials. The civil enforcement attorneys must make an application to the court for release of the materials subject to the limitations of Federal Rule of Criminal Procedure 6(e).

7 U.S. Environmental Protection Agency, June 21, 1994 Memorandum from Steven A. Herman on Parallel Proceedings Policy.

8 Environment and Natural Resources Division, Directive 99-21, Integrated Enforcement Policy, Sec. IV(b) <http://www.usdoj.gov/enrd/integrated.htm>.

9 *See* SEC Rules Relating to Investigations, Rule 2.

10 *U.S. Securities and Exchange Commission GPRA: 1999 Annual Performance Report* at 6 <http://www.sec.gov/about/gpra1999-2000.shtml>. The SEC staff will make the non-public information available through a formal order "granting access" to the other agency.

11 The SEC can fine offenders and ban them from participating in the financial services industry altogether or from serving on the board of directors of a publicly traded corporation.

12 *United States v. Rand,* 308 F. Supp. 1231, 1237 (N.D. Ohio 1970).

13 The privilege against self-incrimination is not limited to oral testimony but can also apply to requests for production of documents. An individual can invoke his Fifth Amendment privilege when compelled to turn over documents that are incriminating or that may lead to inculpatory evidence if the act of production itself implies an assertion of fact. *United States v. Hubbell*, 530 U.S. 27 (2000).

14 *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976); *United States v. Solano-Godines,* 120 F.3d 957, 962 (9th Cir. 1997).

15 *SEC v. Benson,* 657 F. Supp. 1122, 1129 (S.D. N.Y. 1987).

16 *Id.*

17 *United States v. Kordel,* 397 U.S. 1 (1970).

18 *Id.* at 11.

19 *Id.*

20 *United States v. Grunewald,* 987 F.2d 531, 534 (8th Cir. 1993).

21 *United States v. Robson,* 477 F.2d 13, 18 (9th Cir. 1973).

22 *SEC v. ESM Government Securities, Inc.,* 645 F.2d 310, 316 (5th Cir. 1981); *United States v. Stringer, et al.,* 408 F. Supp.2d 1083, 2006 WL 44193 (D. Or. Jan. 9, 2006).

23 *Stringer,* n. 22, *supra. See also United States v. Scrushy,* 366 F. Supp.2d 1134, 1140 (N.D. Ala. 2005).

24 *Id.*

25 *United States v. Rand,* 308 F. Supp. 1231, 1234 (N.D. Ohio 1970).

26 *United States v. Tweel,* 550 F.2d 297, 299 (5th Cir. 1977).

27 214 F. Supp. 929 (D. Colo. 1963). *See United States v. Stringer,* n. 22 *supra,* at 1088 (finding such warnings to be inadequate when the civil and criminal agencies actively conceal the existence of the criminal authorities' involvement).

28 *Id.* at 932-33.

29 *See* note 13, *supra.*

"Relevant Background Evidence" Is Swallowing Rule:

Applying FRE 404 in Discrimination Cases

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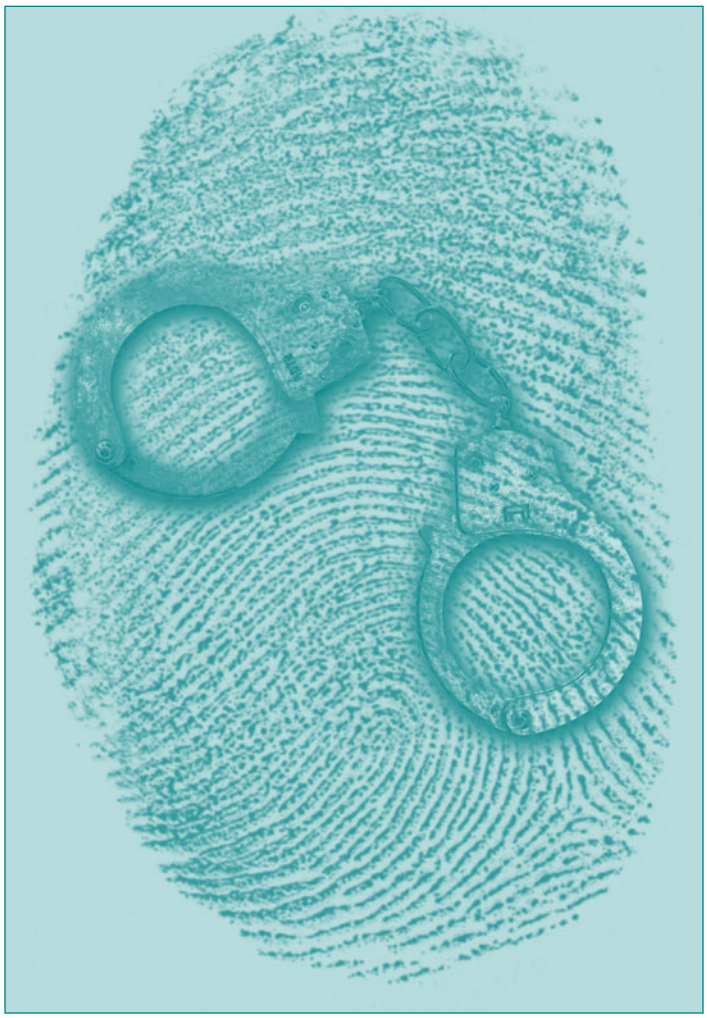
We have long understood the principle of American jurisprudence that "a defendant must be tried for what he did, not who he is."[1] That is the very underpinning of Federal Rule of Evidence 404, which prohibits the introduction of character evidence to prove that a defendant acted in conformity with that character. It is not that character evidence is not probative; to the contrary, this evidence is often weighed too heavily by the jury leading the jury to conclude that once a bad guy, always a bad guy.[2] A defendant should only have to defend the act for which he is accused in the present case and not prior acts for which the plaintiff does not seek to hold the defendant liable. Yet Rule 404 has eroded over time, particularly in employment litigation where courts are allowing character evidence to prove discrimination without so much as a passing reference to the rule.

Nearly twenty-nine years ago, the United States Supreme Court made a statement *in dictum* that has confused lawyers and judges and has undermined the FRE 404 prohibition on introducing propensity evidence. In *United Airlines, Inc. v. Evans,* the Supreme Court considered whether United's seniority policy, which denied seniority credit for a prior period of employment, was discriminatory. When Evans married, she was forced to terminate her initial employment with United because, at the time, United refused to allow flight attendants to be married. When Evans resumed her employment with United, she asked that United credit her with seniority from her initial tenure. To do otherwise, she claimed, would perpetuate past discrimination. In holding that Evans' claim was barred because she did not timely file her discrimination claim when she was forced to resign her initial employment, the Court stated:

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. *It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue,* but separately considered, it is merely an unfortunate event in history which has no present legal consequences."[3]



In the years since the Court decided *Evans,* "relevant background evidence" has become a judicially created primary rule of evidence, pushing FRE 404(b) out of judicial decisions or relegating it to a warped interpretation of "motive, intent or plan." To make matters worse, the Supreme Court has not pro-

Please continue on next page

Relevant Background Evidence

continued from page 14

vided any guidance since *Evans* to help courts draw appropriate boundaries on the admissibility of propensity evidence.

Although the "*Evans* evidence rule" has been applied outside of employment discrimination cases,[4] it is the employment cases that best demonstrate the broad application of this judge-made rule.

1. Exclusion Of Propensity Evidence Under FRE 404

In most instances, character evidence satisfies the threshold for admissibility under FRE 401—it is relevant. However, that conclusion does not answer the question of admissibility. The evidence must still pass muster under FRE 404[5] and 403.[6] The essential purpose of FRE 404 is to prevent reliance on character propensity or prior bad acts to prove an alleged action. The Advisory Committee to FRE 404 concluded that character evidence is of slight probative value and may be very prejudicial.[7] Admission of such evidence presents the danger of shifting the focus to prior conduct or attitudes and away from the main question of the trial.[8] Reliance upon this evidence may "subtly permit the trier of fact to reward the good man and punish the bad man . . . despite what the evidence in the case shows actually happened."[9] Accordingly, FRE 404 simplifies a judge's gate-keeping role by providing a blanket exclusion for character evidence and reducing the amount of evidence subject to Rule 403 balancing.

The first question the court must answer with respect to Rule 404 is whether the proffered evidence is character evidence or evidence of prior conduct intended to show one's character. Courts generally find that character evidence is a "generalized description of one's disposition, or one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness."[10] In the employment discrimination context, the character may be a disposition toward discrimination.[11] In other words, a person's character includes whether the person has a predisposition to dislike, disrespect or mistreat others because of race, gender, age, disability, religion, and the like. Hence, evidence that is offered to prove discriminatory animus is simply character evidence. As an example, in *Gage v. Metropolitan Water Reclamation District of Greater Chicago,* the court allowed the plaintiff to introduce evidence (improperly, we believe) of the supervisor's management philosophy to show that the supervisor had racial animus. Evidence of racial animus, the court held without any analysis of FRE 404, was admissible to prove that the supervisor terminated the plaintiff because of race.[12]

Prior acts of discrimination are also character evidence when introduced under the rubric of "background evidence." As an example, an age discrimination plaintiff may wish to offer evidence that an employer failed to promote another older worker in the past. The purpose of that evidence is to show that the employer has discriminatory animus toward older workers. It would be inadmissible under FRE 404(b) to show that the employer's prior actions proved a certain character trait and that the employer acted in conformity with that character in the particular instance. The plaintiff is offering character evidence to show nothing more or less than that the employer has a propensity to discriminate.

2. "Relevant Background Evidence" Usually Means Propensity Evidence

Prior to 2002, much of the "relevant background evidence" was admissible to show that an employer had engaged in a "continuing violation" or created a hostile work environment.[13] In *National Railroad Passenger Corp. v. Morgan,* the Supreme Court held that the Title VII statute of limitations "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period."[14] Hence, *Morgan* limited the "continuing violation" doctrine to a narrow category of cases. However, this limitation did not result in the exclusion of "relevant background evidence" in claims alleging discrete acts instead of hostile work environment. Justice Thomas, citing to *Evans,* stated that Title VII does not bar employees "from using the prior acts as background evidence in support of a timely claim."[15]

The *Morgan* decision led to circuit courts applying *Evans* in discrimination cases. For example, without so much as a reference to FRE 404, the Ninth Circuit, in *Lyons v. England,*[16] applied the *Evans* rule (actually calling it the "*Evans* rule") to claims alleging discrete acts of discrimination. Prior to *Morgan,* the Ninth Circuit had applied a reasonable-relations test to determine whether evidence was admissible to establish the extent of liability under a continuing violation. After *Morgan,* the Ninth Circuit concluded that this test did not "provide an appropriate means to determine the admissibility of evidence of time-barred acts."[17] Rather than applying the reasonable-relations test, the Ninth Circuit began its analysis with *Evans.* Under *Evans,* the court concluded that "relevant background evidence" must only be "relevant to the ultimate question: whether the defendant intentionally discriminated against the plaintiff because of . . . race," conceding that "this determination will not impose the same limitations on the plaintiff's evidence as were previously imposed under the reasonable-relations test."[18]

Although the plaintiff in *Lyons* was claiming a discrete incident of racial discrimination, he sought to introduce statistical evidence of the employer's pre-statute-of-limitations conduct. The statistical evidence, as applied to a claim of discrete discrimination, was in fact evidence that the employer had a propensity to discriminate. Its only relevance was to suggest that the employer would act in conformity with its prior conduct in this instance. A strict application of FRE 404 would have excluded the evidence.

Please continue on next page

Relevant Background Evidence

continued from page 15

Courts have followed *Evans, Morgan,* and *Lyons* to admit evidence of prior acts or character as "relevant background evidence" to prove discrimination. The only limitation that the courts regularly impose is an analysis under FRE 403—weighing the probative value against the prejudicial effect. As an example, in *Pleasants v. Allbaugh*,[19] the court cited to *Morgan* and *Lyons* (among other cases), to conclude that allegations of prior discriminatory acts would be admitted subject to FRE 403. In *Minshall v. McGraw Hill Broadcasting Co.,*[20] the court determined that testimony of three co-workers who claimed that they suffered from age discrimination by a supervisor, other than the one accused of the discriminatory discharge, was "relevant background evidence" to support intentional age discrimination. In *Giannone v. Deutsche Bank Securities, Inc.,*[21] the court admitted evidence that the accused supervisors acted cavalierly to a prior complaint of discrimination. In *Gage v. Metropolitan Water Reclamation District,*[22] the court admitted evidence of the accused discriminator's management philosophy to prove that he acted consistently with that philosophy to terminate the plaintiff because of race. In each of these cases, the courts applied the *Evans* rule without regard to FRE 404. The evidence that these courts admitted was offered to show a disposition toward discrimination or discriminatory animus, or was evidence of a prior alleged wrong. In each case it was offered to suggest that the defendant acted consistently with its character to prove it had discriminated in the present case.

3. Motive, Intent, Plan And Scheme: Aren't We Really Talking About Propensity?

Some courts have recognized that FRE 404 does have a role to play in the decision to admit "relevant background evidence." The majority of those courts justify admissibility by pointing to one of the exceptions in FRE 404(b)—usually motive, intent or plan—with little or no analysis. In *United States v. Morley,* the Third Circuit stated the obvious proposition that an "incantation of the proper uses of [Rule 404(b)] . . . does not magically transform inadmissible evidence into admissible evidence."[23] Although this proposition is self-evident, it appears to be followed more as an exception than the rule.

As an example, in *Dosier v. Miami Valley Broadcasting Corp.,*[24] the Ninth Circuit admitted pre-settlement actions as evidence of a pattern or scheme under FRE 404(b) to prove a post-settlement claim, stating that the pre-settlement actions constituted a continuing pattern of discrimination. The Court did not recognize that it had simply admitted propensity evidence.

In *Manuel v. City of Chicago,*[25] the plaintiff sought to admit testimony of a co-worker who claimed to have observed the plaintiff's supervisor acting in a discriminatory manner toward other employees. The Seventh Circuit concluded that the district court had improperly excluded this evidence because the evidence was admissible to prove intent, citing FRE 404(b). The Court noted that "the jury properly could have considered evidence of discriminatory acts . . . directed at employees other than the plaintiff, as tending to show the existence of racial animus in the present case."[26] It is not hard to see that the court has admitted propensity evidence under the guise of proving intent.

The courts' reliance on the "motive" exception is also often misplaced. In *Heyne v. Caruso*,[27] a *quid pro quo* sex discrimination claim, the Ninth Circuit considered whether evidence that Caruso had sexually harassed other female workers could be offered to prove that he terminated Heyne because she would not yield to his sexual advances. The court concluded that "[t]he sexual harassment of others, if shown to have occurred, is relevant and probative of Caruso's general attitude of disrespect toward his female employees, and his sexual objectification of them. That attitude is relevant to the question of Caruso's motive for discharging Heyne." Proof of Caruso's "general attitude" is a surrogate for general character. Here, the court has sanctioned the use of character evidence to establish Caruso's propensity to treat women badly, and therefore to establish that he must have terminated Heyne for an improper reason.

The court misuses the "motive" exception in this case. Motive evidence must directly relate to the alleged discriminatory act about which the plaintiff complains. As an example, a desire to increase the production line speed may be a motive to replace an older employee with a younger employee. (This evidence may also disprove discrimination since it is production speed, not age, that motivates the termination.) A general discriminatory animus toward older workers is not a motive to terminate one specific employee. It is nothing more than propensity evidence that is prohibited by FRE 404.

What these cases reveal is that in discrimination cases, the line that separates evidence that is not admissible as "proof of character to show actions in conformity therewith" from proof of the exceptions in FRE 404(b) is a very thin one, indeed. It is the rare case that makes this fine distinction accurately. One such case is *Becker v. ARCO Chemical Co.*[28] It did so by conducting a careful and thorough analysis of FRE 404(b). The plaintiff, Becker, sued ARCO, alleging age discrimination. Becker wanted to introduce evidence that in the discharge of another employee, his supervisor had asked him to lie about the quality of the other employee's work in order to justify the employee's termination. Becker contended, and the district court agreed, that this evidence was admissible to show "motive, intent and practice." The district court gave a limiting instruction, stating that the jury could not consider the proffered testimony to prove character.

The Third Circuit concluded that the district court had not

Please continue on next page

Relevant Background Evidence

continued from page 16

properly analyzed FRE 404(b) because it requires a

> "more searching analysis which also focuses on the chain of inferences supporting the proffered theory of logical relevance. . . . Indeed, when a proponent of Rule 404(b) evidence contends that it is both relevant and admissible for a proper purpose [*i.e.,* motive, intent or plan], 'the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.'"[29]

Hence, under the *Becker* analysis, courts must ask the question: is the evidence linked to the ultimate question of discrimination because the alleged discriminator had a propensity to discriminate? We suggest that the true answer to this question is often, but not always, "yes."

4. How Far Does "Relevant Background Evidence" Reach?

It is not clear what limits apply to "relevant background evidence." As one court stated:

> Unfortunately, the Supreme Court [in *Morgan*] failed to provide any guidance on the admission of prior discriminatory acts as "background evidence" in support of timely filed claims. . . . *Morgan* does not discuss how the use of "background evidence" is reconciled with the prohibition against the introduction of prior bad acts into evidence. Furthermore, the Supreme Court failed to indicate whether the plaintiff must demonstrate an independent evidentiary basis to admit such evidence.[30]

What we can tell from the general pattern of cases is that "background evidence" means evidence that will give context to a plaintiff's discrimination claims. When *defendants* wish to offer this type of evidence, it is quickly identified as an attempt to introduce improper character evidence. As an example, in *Broome v. Biondi,*[31] and *Johnson v. Pistilli,*[32] the defendants offered testimony that they routinely interacted with African Americans in a non-discriminatory manner. Those courts immediately recognized the evidence as improper propensity evidence. In *Mathis v. Phillips Chevrolet, Inc.,*[33] the defendant offered evidence that the plaintiff had filed numerous lawsuits against past employers alleging age discrimination. The court closely analyzed the defendant's proffered evidence under FRE 404(b), reversing the district court to hold that the evidence was admissible with an instruction limiting the purpose for which the jury could consider the evidence.

The wide latitude that courts show discrimination plaintiffs may be a result of the courts' recognition that plaintiffs will have difficulty proving discrimination claims without propensity evidence. As one court put it, "[b]ecause in today's politically correct workplace environment, it is rare for a decision-maker to admit that his actions were based on racial animus, a plaintiff in a discrimination case may prevail by constructing a convincing mosaic of circumstantial evidence that allows a jury to infer intentional discrimination by the decision-maker."[34] It is the "relevant background evidence" that fills the canvas with background colors that give meaning to the defendant's conduct in a specific case.

The policy to favor admissibility of "relevant background" evidence, however, clashes with the purposes of FRE 404(b). That clash has caused some commentators to call for reforms to the rule.[35] Absent reform, practitioners are left to struggle with the admissibility of evidence that, at least in part, is offered to show that the "bad actor" acted in conformity with a discriminatory character. Defense counsel's best tool to limit this evidence is to invoke the limitations of FRE 404 and to argue that the court should conduct an exacting analysis of the kind engaged in by the *Becker* court. As one court said, "When the same evidence has legitimate and forbidden uses, when the introduction is valuable yet dangerous, the district court has great discretion in determining whether to admit the evidence."[36] Certainly, the court must evaluate the evidence under FRE 403. In those instances where the court is inclined to allow the evidence because it satisfies one of the exceptions to Rule 404(b), the court should give a limiting instruction to the jury.

CONCLUSION

Since the Supreme Court endorsed the introduction of "relevant background evidence" to establish a context for proving discrimination cases, courts have often failed to apply Rule 404 with intellectual rigor. The result is that plaintiffs are able to offer propensity evidence that an exacting analysis would exclude under Rule 404. Perhaps courts are relaxing their analysis in a recognition that plaintiffs would have difficulty proving that the alleged employment action was taken as a result of discrimination without introducing this evidence. However, absent an amendment to the Rule, defendants should urge the court to apply Rule 404 to achieve its intended result—to hold defendants liable only for what the defendant did, not who he is or what he believes. ❐

Endnotes:

1 *United States v. Hodges,* 770 F.2d 1475, 1479 (9th Cir. 1985); *United States v. McCourt,* 925 F.2d 1229, 1235-36 & n.2 (9th Cir. 1991), *cert denied,* 489 U.S. 1032.

2 *Michelson v. United States,* 335 U.S. 469, 475-76 (1948).

Please continue on next page

Relevant Background Evidence

continued from page 17

3 431 U.S. 553, 558 (1977) (emphasis added).

4 See *Sabatini v. Reinstein,* 2001 WL 872773 (E.D. Pa.) (allowing evidence that the defendant had previously prevented plaintiff from exercising his First Amendment rights, explaining that the situation is analogous to evidence of a defendant's prior discriminatory treatment of plaintiffs in employment discrimination cases).

5 The relevant part of Rule 404 provides: "**(a) Character evidence generally.** Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ."

6 Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

7 FRE 404, Advisory Comm. notes, 1972 Proposed Rules.

8 *Id.*

9 *Id.*

10 22 Charles Alan Wright & Kenneth W. Graham, Jr., Fed. Prac. and Procedure § 5233, at 354 (1978).

11 *Parker v. Burnley,* 693 F. Supp. 1138, 1152 (N.D. Ga. 1988).

12 365 F. Supp.2d 919, 931 (N.D. Ill. 2005).

13 We do not contend in this article that "relevant background evidence" should be excluded in a hostile work environment claim. In those cases, the evidence is not offered to support a conclusion that a specific employment decision was the result of discrimination based on gender, age, race, or disability. It is usually offered to show that the work environment was poisoned by severe and pervasive conduct, often by a number of the employer's agents.

14 536 U.S. 101, 105 (2002).

15 *Id.* at 113.

16 307 F.3d 1092 (9th Cir. 2002) (decided after *Morgan*).

17 *Lyons v. England,* 307 F.3d 1092, 1110 (9th Cir. 2002).

18 *Id.*

19 285 F. Supp. 2d 53 (D.D.C. 2003).

20 323 F.3d 1273 (10th Cir. 2003).

21 2005 WL 3577134 (S.D.N.Y. 2005).

22 365 F. Supp. 2d 919 (N.D. Ill. 2005).

23 *United States v. Morley,* 199 F.3d 129, 133 (3rd Cir. 1999).

24 656 F.2d 1295, 1300-01 (9th Cir. 1981).

25 335 F.3d 592 (7th Cir. 2003).

26 *Manuel,* 335 F.3d at 596, quoting, *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 n. 5 (11th Cir. 1989).

27 69 F.3d 1475, 1480 (9th Cir. 1995).

28 207 F.3d 176 (3rd Cir. 2000).

29 *Id.* at 191 (citing *United States v. Morley,* 199 F3d 129, 133 n.6 (3rd Cir. 1999)).

30 *Dahdal v. Wells Fargo Fin.,* 2005 WL 2008648 at *6 (W.D. Mo. 2005) (citations omitted); *see also McGinest v. GTE Serv. Corp.,* 360 F.3d 1103, 1129 (9th Cir. 2004) (noting that the Supreme Court has failed to provide specific guidance on the sufficient relationship of "background evidence" to the ultimate issues in the case) (O'Scannlain, J., concurring in part and dissenting in part).

31 17 F. Supp. 2d 211 (S.D.N.Y. 1997).

32 1996 WL 587554 (N.D. Ill. 1996).

33 269 F.3d 771, 776 (7th Cir. 2001).

34 *Gage v. Metropolitan Water Reclamation District of Greater Chicago,* 365 F. Supp.2d 919, 931 (N.D. Ill. 2005), quoting *Jordan v. City of Gary,* 396 F.3d 825, 832 (7th Cir. 2005).

35 *See e.g.,* Lisa Marshall, The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits, 114 Yale L.J. 1063 (2005); Thomas J. Leach, "Propensity" Evidence and FRE 404: A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction. 68 Tenn. L. Rev. 825, 826 (2001).

36 *Mathis v. Phillips Chevrolet, Inc.,* 269 F.3d 771, 776-77 (7th Cir. 2001) (quoting *United States v. Beasley,* 809 F.2d 1273, 1278 (7th Cir. 1987)).

Preserving Issues for Appeals in the Ninth and Tenth Circuits

By Charlie Adams

Oregon attorneys increasingly represent clients with regional interest. Those activities often involve matters at issue in states within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. Consequently, the following guide, updated from its October 2003 publication in Volume 22, No. 3 of the Litigation Journal, has been expanded to also now address preservation of issues for appeal in both the Ninth and Tenth Circuits. As one will see from this guide, there are between the two circuits a few significant points of difference concerning preservation requirements.

"If you snooze, you lose."
Don "Big Daddy" Garlits
Professional drag racer

"Ditto!"
Any court of appeals you care to name

I. WHY PRESENTATION OF ERROR IS REQUIRED.

The purposes of requiring that an issue first be raised in the trial court are to give the trial court the opportunity to resolve the matter and avoid error and to develop the record needed to present the issue in context for the appellate court.

Ninth Circuit: *In re Perez*, 30 F.3d 1209, 1213 (9th Cir. 1994).

Tenth Circuit: *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970-71 (10th Cir. 1991).

II. MATTERS THAT CAN BE RAISED ON APPEAL EVEN WHEN NEVER PRESENTED BELOW.

A. Lack of subject-matter jurisdiction may be raised anytime as a matter of right.

Please continue on next page

Preserving Issues for Appeals

continued from page 19

U.S.: *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 278 (1977).

Ninth Circuit: *Accord PCCE, Inc. v. United States*, 159 F.3d 425 (9th Cir. 1998).

Tenth Circuit: *Accord Mascheroni v. Bd. of Regents*, 28 F.3d 1554 (10th Cir. 1994).

Note: Related to that, preemption issues affecting choice of forum (but not choice of law) may be raised for the first time on appeal. *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996).

B. Lack of standing may also be raised for the first time on appeal.

Ninth Circuit: *Maricopa-Stanfield Irr. & Drainage Dist. v. United States*, 158 F.3d 428 (9th Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999).

Tenth Circuit: *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002).

CAVEAT:
While jurisdictional limitations cannot be waived, prudential limitations such as the rule against third-party standing can be deemed waived if not raised in district court. *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487 n.4 (9th Cir. 1995).

C. Abstention, at least when sought based upon *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), may be reviewed for the first time on appeal.

Ninth Circuit: *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1105 (9th Cir. 1998).

Tenth Circuit: *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 706-07 (10th Cir. 1988).

D. When the law changes while an appeal is pending, an argument based on that change may be made for the first time on appeal.

Ninth Circuit: *Melton v. Moore*, 964 F.2d 880, 881 (9th Cir. 1992).

Tenth Circuit: *Gray v. Phillips Petroleum Co.*, 971 F.2d 591, 592 n.3 (10th Cir. 1992).

E. In civil as well as criminal cases, when an appellate court applies a new standard of federal law to the parties before it, that new standard must be applied in all cases still open on direct review and as to all courts, regardless of whether such events predate or postdate announcement of the new standard.

U.S.: *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) ("*Jim Beam*")).

Ninth Circuit: *United States v. 20832 Big Rock Drive*, 51 F.3d 1402, 1405-06 (9th Cir. 1995).

Tenth Circuit: *Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 466 (10th Cir. 1988).

F. As a general matter, failure to state a claim cannot be raised for the first time on appeal.

Ninth Circuit: *Simpson v. Providence Wash. Ins. Group*, 608 F.2d 1171, 1174 (9th Cir. 1979).

Tenth Circuit: *Rademacher v. Colo. Ass'n of Soil Conservation Dists. Med. Benefit Plan*, 11 F.3d 1567, 1571 (10th Cir. 1993).

> Such an argument may, however, be heard on a discretionary basis.

Ninth Circuit: *United States v. Caperell*, 938 F.2d 975, 977 (9th Cir. 1991).

Tenth Circuit: *Gregory v. United States/U.S. Bankr. Court*, 942 F.2d 1498, 1500-01 (10th Cir. 1991).

G. Plain error regarding evidence may be raised for the first time on appeal when the error affects substantial rights.

U.S.: Fed. R. Evid. 103(d).

Ninth Circuit: *Small v. Olympic Prefabricators, Inc.*, 588 F.2d 287, 291 (9th Cir. 1978).

Please continue on next page

Preserving Issues for Appeals

continued from page 20

Tenth Circuit: *Sloan v. State Farm Mut. Auto Ins. Co.*, 360 F.3d 1220, 1226 (10th Cir. 2004).

Such review is extraordinarily deferential and is limited to whether there was any evidence to support the jury's verdict, irrespective of its sufficiency. *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996). *But see infra* Section V. E.1 (objections to jury instructions given or refused).

H. Whether to consider other arguments first made on appeal is left primarily to the discretion of the courts of appeal.

U.S.: *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Ninth Circuit: *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1173 (9th Cir. 2001).

Tenth Circuit: *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991).

1. Matters of public importance may also be raised for the first time on appeal.

Ninth Circuit: *Ripplinger v. Collins*, 868 F.2d 1043, 1054 (9th Cir. 1989).

Tenth Circuit: *FDIC v. Ferguson*, 982 F.2d 404, 407 (10th Cir. 1991).

2. Review also is allowed when refusal to review would result in a miscarriage of justice or review is necessary to preserve the integrity of the judicial process.

Ninth Circuit: *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143 (9th Cir. 2000), *cert. denied*, 531 U.S. 1074 (2001).

Tenth Circuit: *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991).

3. Review may be allowed when the appellant had no opportunity to raise its objection below. *In re Novack,* 639 F.2d 1274, 1277 (5th Cir. 1981) (citing Fed. R. Civ. P. 46).

4. Review must be allowed when a new issue arises because of a change in the law.

Ninth Circuit: *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996).

Tenth Circuit: *Ray v. Unum Life Ins. Co. of Am.*, 314 F.3d 482, 487 (10th Cir. 2002).

CAVEAT:
This discretion occasionally has been exercised to refuse to apply a change in the law that occurred while an appeal was pending. *See, e.g., Davis v. Mason County*, 927 F.2d 1473 (9th Cir.), *cert. denied*, 502 U.S. 899 (1991). After the U.S. Supreme Court's decisions in *Jim Beam* and *Harper*, this discretion no longer exists. Appellate courts now must apply a change in the law whenever the case announcing the change applied the change to the parties in that case. *See supra* Section II.C.

5. Appellate courts may review an issue which is purely one of law, and the issue does not depend upon a factual record or the factual record is sufficiently developed.

Ninth Circuit: *United States v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), *cert. denied*, 518 U.S. 1018 (1996).

Tenth Circuit: *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1271 (10th Cir. 2000); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 444-48 (1993).

6. When, however, development of a factual record would be required, a belatedly raised issue will not qualify under the exception for purely legal issues.

Ninth Circuit: *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849, 859 (9th Cir.), *cert. denied*, 513 U.S. 1018 (1994).

Tenth Circuit: *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273 (10th Cir. 2000).

7. When the trial court itself raises and rules sua sponte on an issue of law, the appellant may challenge the ruling on appeal, even if it failed to raise the issue in the trial court.

Please continue on next page

continued from page 21

Tenth Circuit: *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003).

Similarly, a party also may challenge on appeal rulings of the court issued without affording the parties an opportunity to object.

Tenth Circuit: *Silbrico Corp. v. Ortiz*, 878 F.2d 333, 336 & n.1 (10th Cir. 1989).

III. BEFORE TRIAL: PLEADINGS AND MOTIONS

A. Raising an Issue Before Trial May, but Will Not Necessarily, Preserve That Issue for Appeal After Trial Is Held.

1. Effective December 1, 2000, Fed. R. Evid. 103 was amended to provide, in pertinent part, "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

U.S.: Fed. R. Evid. 103(a)(2).

2. If the trial court has not definitively ruled or has declined to rule on a motion in limine, however, the issue raised must be renewed at trial.

Ninth Circuit: *Van Pilon v. Reed*, 799 F.2d 1332, 1340-41 (9th Cir. 1986).

Tenth Circuit: *Black v. M & W Gear Co.*, 269 F.3d 1220, 1230 (10th Cir. 2001).

3. When a trial or post trial motion is otherwise required, a motion in limine will not be adequate if it concerns issues other than those necessary to such trial motions.

Ninth Circuit: *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429-30 (9th Cir. 1986).

Tenth Circuit: *Black v. M & W Gear Co.*, 269 F.3d 1220, 1230-31 (10th Cir. 2001).

4. A general defense in a responsive pleading that a complaint fails to state a claim ordinarily will not preserve specific unarticulated arguments in support of that defense.

Ninth Circuit: *Smeed v. Carpenter*, 274 F.2d 414, 418 (9th Cir. 1960) ("The failure of appellee to bring to the trial court's attention the particulars upon which it relied in its assertion that the complaint failed to state a claim upon which relief could be granted constitutes a waiver of its right to rely on that defense.").

Tenth Circuit: *Rademacher v. Colo. Ass'n of Soil Conservation Dists. Med. Benefit Plan*, 11 F.3d 1567, 1571 (10th Cir. 1993) (merely pleading failure to state claim as affirmative defense is not sufficient).

5. Denial of a motion for summary judgment does not absolve a party from the duty (discussed *infra* Section VI.A) to move for dismissal as a matter of law at the close of the evidence.

Ninth Circuit: *Jones v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir. 2002).

Tenth Circuit: *Wolfgang v. Mid-Am. Motorsports, Inc.*, 111 F.3d 1515, 1521 (10th Cir. 1997) (failure to renew summary judgment argument—when denied based on fact disputes—in Fed. R. Civ. P. 50(a) motion at close of evidence waives issue on appeal).

B. Certain Defenses Are Automatically Waived if Not Made by Motion Before Pleading or in a Responsive Pleading.

1. Lack of jurisdiction over the person. Fed. R. Civ. P. 12(h)(1).
2. Improper venue. *Id.*
3. Insufficiency of process. *Id.*
4. Insufficiency of service of process. *Id.*

C. Other Affirmative Defenses Are Not Automatically Barred but May Be Precluded if Not Raised by Motion or Responsive Pleading or if Leave to Amend Is Denied.

Under Fed. R. Civ. P. 8(c):

Please continue on next page

continued from page 22

1. Accord and satisfaction.
2. Arbitration and award.
3. Assumption of risk.
4. Contributory negligence.
5. Discharge in bankruptcy.
6. Duress.
7. Estoppel.
8. Failure of consideration.
9. Fraud.
10. Illegality.
11. Injury by fellow servant.
12. Laches.
13. License.
14. Payment.
15. Release.
16. Res judicata (claim preclusion and issue preclusion; *but see Clements v. Airport Auth.*, 69 F.3d 321, 330 (9th Cir. 1995)).
17. Statute of frauds.
18. Statute of limitations.
19. Waiver.
20. Any other matter in avoidance or as an affirmative defense.

D. Right to Jury Trial.

1. Generally. A party must request a jury trial within 10 days from the filing of the last pleading concerned with the issues for which a jury trial is sought.

U.S.: Fed. R. Civ. P. 38.

The right to a jury trial is waived if an untimely request is made.

Ninth Circuit: *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985).

Tenth Circuit: *FDIC v. Palermo*, 815 F.2d 1329, 1333-34 (10th Cir. 1987).

2. Removed Cases.

If the state court from which the case was removed requires an express jury demand and the defendant did not answer before removal, Fed. R. Civ. P. 38 applies and a party must demand a jury trial no later than 10 days after the last pleading is filed. If the defendant answered before removal, a party's demand must be made within 10 days after the petition for removal is filed if the party is the petitioner—otherwise, within 10 days after service. A party who has made a jury trial demand before removal need not make another demand after removal. Where, as in Oregon, state court procedure does not require an express demand, no demand is needed after removal unless the court so orders.

U.S.: Fed. R. Civ. P. 81(c).

E. Jury Selection.

A party seeking review of voir dire must make known to the trial court either the action desired or the grounds of objection to the action taken.

U.S.: Fed. R. Civ. P. 47.

Ninth Circuit: *United States v. Blosvern*, 514 F.2d 387, 389 (9th Cir. 1975).

Tenth Circuit: *United States v. Gillis*, 942 F.2d 707, 710-11 (10th Cir. 1991); *cf. Counts v. Burlington N. R.R. Co.*, 952 F.2d 1136 (9th Cir. 1991) (by moving for separate juries at outset of trial, employer preserved objection to use of same jury for bifurcated trial).

CAVEAT:
A *Batson* challenge alleging that exercise of peremptory challenges is discriminatory is not treated as merely a trial objection; rather, such a challenge requires the trial court to conduct a three-step analysis. *Jones v. Gomez*, 66 F.3d 199, 201 (9th Cir. 1995), *cert. denied*, 517 U.S. 1143 (1996). *Batson* challenges may be waived if not asserted before or during voir dire. *United States v. Erwin*, 793 F.2d 656, 667 (5th Cir. 1986).

F. Preservation of Issues Ruled on by Magistrates.

1. If a magistrate's findings and recommendations are on a "[n]on-dispositive matter," a party waives a subsequent challenge to such a ruling if it does not timely file with the district court objections to the magistrate's findings and recommendations.

U.S.: Fed. R. Civ. P. 72(a).

Please continue on next page

continued from page 23

Ninth Circuit: *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1173-74 (9th Cir. 1996).

2. On rulings made on "dispositive" issues, the U.S. Supreme Court has left it to the circuits to fashion their own rules of preservation.

U.S.: *Thomas v. Arn*, 474 U.S. 140, 145-46 & n.4 (1985).

Ninth Circuit: Decisional law is a mess. Some panels hold that failure to object waives challenge on appeal as to a magistrate's recommended findings and conclusions of law. *Palmer v. United States*, 794 F.2d 534, 540 (9th Cir. 1986). Other panels hold that lack of objection waives subsequent challenge on appeal as to a magistrate's findings but not as to conclusions of law. *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454-55 (9th Cir. 1983). Still others have held that failure to object waives challenges as to findings and is "'a factor to be weighed'" in deciding whether a challenge is also waived as to conclusions of law. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998) (citation omitted). Until the Ninth Circuit resolves this conflict by an en banc determination, the only safe course is to assume that one must always object to a magistrate's rulings, whether made on dispositive or nondispositive issues, and whether the magistrate's determination is one of fact or law.

Tenth Circuit: The rule is clear. Failure to make timely objection to a magistrate's findings and recommendations waves appellate review of both factual and legal questions. *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996) (waiver may be excused "when the ends of justice [so] dictate").

IV. BEFORE TRIAL: DEPOSITIONS

A. Objections to Admissibility.

Subject to the provision of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

U.S.: Fed. R. Civ. P. 32(b).
Tenth Circuit: *Reeg v. Shaughnessy*, 570 F.2d 309, 317 (10th Cir. 1978) (recognizing rule)

B. Form of Presentation.

Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or non-stenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

U.S.: Fed. R. Civ. P. 32(c).

C. Effect of Irregularities and Errors in Depositions.

U.S.: Fed. R. Civ. P. 32(c).

1. As to Notice.

All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

U.S.: Fed. R. Civ. P. 32(d)(1).

2. As to Disqualification of Officer.

Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

U.S.: Fed. R. Civ. P. 32(d)(2).

3. As to Taking of Deposition.

a. Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

U.S.: Fed. R. Civ. P. 32(d)(3)(A).

Please continue on next page

continued from page 24

b. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

U.S.: Fed R. Civ. P. 32(d)(3)(B).

Tenth Circuit: *Sims Consolidated, Ltd. v. Irrigation & Pow. Equip., Inc.*, 518 F.2d 413, 417 (10th Cir. 1975) (objections to the manner in which depositions were taken waived by not objecting at the deposition)

c. Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

U.S.: Fed. R. Civ. P. 32(d)(3)(C).

d. As to Completion and Return of Deposition.

Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

U.S.: Fed. R. Civ. P. 32(d)(4).

V. AT TRIAL.

A. Preservation of Error Generally.

1. An appellate court ordinarily will not review an issue not raised or objected to below unless necessary to prevent manifest injustice.

Ninth Circuit: *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 746 (9th Cir. 1996).

Tenth Circuit: *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991).

2. No "bright-line" rule exists to determine whether a matter has been properly raised below. A "'workable standard,'" however, for determining adequate preservation is whether the issue was raised sufficiently for the district court to rule on it.

Ninth Circuit: *Arizona v. Components Inc.*, 66 F.3d 213, 217 (9th Cir. 1995) (citation omitted).

Tenth Circuit: *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991) (preservation hinges on whether "'the district judge was . . . aware of the argument'" (citation omitted)).

3. If a party does not join expressly in an objection or offer of proof made by another, the silent party generally will not be permitted to avail itself of the record made by another.

Ninth Circuit: *Compare United States v. Long*, 706 F.2d 1044, 1052 (9th Cir. 1983) (one defendant could not complain of exclusion of affidavit offered by another defendant), *with United States v. Brown*, 562 F.2d 1144, 1147 n.1 (9th Cir. 1978) (co-defendants allowed to argue error based on another defendant's objection to "other crimes" evidence affecting all co-defendants).

Tenth Circuit: *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1331 (10th Cir. 1984) (when objections by co-defendants were not made on behalf of defendant-appellant, latter could not use such objections on appeal to cure his own failure to object at trial); *see generally* 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence 2d* § 5035 (1977 & Supp. 2004).

4. To comply with the requirement that objection be made at trial, counsel must make clear that he or she believes the judge erred as a matter of law; it is not sufficient that an attorney merely makes a suggestion that the court turns down.

Please continue on next page

Preserving Issues for Appeals

continued from page 25

Ninth Circuit: *United States v. Parsons Corp.*, 1 F.3d 944, 945 (9th Cir. 1993).

5. **The degree of precision required to preserve an issue depends upon the amount of leeway allowed by the trial court.**

U.S.: *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 175 n.22 (1988).

6. **A party cannot on appeal revisit theories that it raised and expressly abandoned in district court.**

Ninth Circuit: *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1283-86 (9th Cir. 1994).

Tenth Circuit: *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990) (when party concedes legal issue at trial, appellate court will not review).

7. **In nonjury cases, the district judge is given great latitude in the admission or exclusion of evidence.**

Tenth Circuit: *Stevens v. Vowell*, 343 F.2d 374, 380 (10th Cir. 1965).

8. **A district judge sitting without a jury has discretion to receive evidence that might be inadmissible in a jury trial.**

Ninth Circuit: *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 620 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

Tenth Circuit: *Stevens v. Vowell*, 343 F.2d 374, 380 (10th Cir. 1965).

B. Admission of Evidence.

1. **A party who neither objects to the admission of evidence nor moves to strike that evidence waives the right to challenge that admission on appeal.**

U.S.: Fed. R. Evid. 103(a).

Ninth Circuit: *Bartleson v. United States*, 96 F.3d 1270, 1277-78 (9th Cir. 1996).

Tenth Circuit: *Macsenti v. Becker*, 237 F.3d 1223, 1230-31 (10th Cir. 2001) (finding that motion to strike filed after close of evidence was filed too late).

2. **The objection must be specific: When an objection to admission was made under a particular federal rule of evidence, no issue was preserved for appeal based on a different rule.**

Ninth Circuit: *Morgan v. Woessner*, 997 F.2d 1244, 1260 n.18 (9th Cir. 1993), *cert. dismissed sub nom. Searle v. Morgan*, 510 U.S. 1033 (1994).

Tenth Circuit: *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1331 (10th Cir. 1984) (specific ground for reversal on appeal must be same as that raised at trial).

C. Exclusion of Evidence.

1. **Generally, error cannot be predicated on exclusion of testimony when no offer of proof is made.**

Ninth Circuit: *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001).

Tenth Circuit: *Polys v. Trans-Colo. Airlines, Inc.*, 941 F.2d 1404, 1406-07 (10th Cir. 1991).

Similarly, when evidence could have been admitted but was not offered, there is no issue for appeal.

Ninth Circuit: *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1351 (1987), *modified*, 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989).

2. **A formal offer of proof, however, has not been required when the record showed that the court was nevertheless sufficiently familiar with the issue that it could make an informed evidentiary decision.**

Ninth Circuit: *Heyne v. Caruso*, 69 F.3d 1475, 1481-82 (9th Cir. 1995).

Tenth Circuit: *Polys v. Trans-Colo. Airlines, Inc.*, 941 F.2d 1404, 1407 (10th Cir. 1991).

Please continue on next page

Preserving Issues for Appeals

continued from page 26

D. Misconduct of Counsel or Court.

Lack of a contemporaneous objection or motion for mistrial will preclude challenge on appeal to alleged misconduct.

U.S.: Fed. R. Civ. P. 46.

Ninth Circuit: *Kaiser Steel Corp. v. Frank Coluccio Constr. Co.*, 785 F.2d 656, 658 & n.2 (9th Cir. 1986). *But cf. Noli v. Comm'r*, 860 F.2d 1521, 1527 (9th Cir. 1988) (failure to move for recusal at trial does not, on appeal, preclude raising issue of recusal on basis that judge should have disqualified himself).

Tenth Circuit: *Neu v. Grant*, 548 F.2d 281, 287 (10th Cir. 1977). *But see Ryder v. City of Topeka*, 814 F.2d 1412, 1424 n.25 (10th Cir. 1987) (absent objection, court may exercise discretion to review).

E. Jury Instructions Given.

1. Ninth Circuit: There is no "plain error" exception to the rule that a party may assign as error the giving or refusing of an instruction only if the party objects before the jury retires to consider its verdict. *Hammer v. Gross,* 932 F.2d 842, 847 (9th Cir.) (en banc) ("This court has enjoyed a reputation as the strictest enforcer of Rule 51[.]"), *cert. denied*, 502 U.S. 980 (1991).

2. Tenth Circuit: Only in the event of plain error could objections to instructions warrant reversal when such objections were raised for the first time on appeal. *Ryder v. City of Topeka,* 814 F.2d 1412, 1427-28 (10th Cir 1987).

3. Some circuits strictly construe Fed. R. Civ. P. 51 to require that specific objection be made *after* the jury is instructed but before it begins deliberations. *E.g., Kerr-Selgas v. Am. Airlines, Inc.,* 69 F.3d 1205, 1212-13 (1st Cir. 1995). In these circuits, specific objections made before the jury is charged sometimes have been found to be untimely and thus to not preserve instructional error for appeal. *See generally Crist v. Dickson Welding, Inc.,* 957 F.2d 1281, 1286-87 (5th Cir.) (objection at charge conference does not automatically release counsel from duty to object at close of instructions before jury retires), *cert. denied*, 506 U.S. 864 (1992); *Transnational Corp. v. Rodio & Ursillo, Ltd.,* 920 F.2d 1066, 1069 (1st Cir. 1990).

4. Specific objections have been found timely when made at a charge conference with the court, or in court before instructions are given or even as instructions are being given.

Ninth Circuit: *See, e.g., Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412-13 (9th Cir. 1986).

It nonetheless remains a "'risky business'" not to object after the jury is instructed but before it retires; cautious counsel will therefore renew prior objections at the close of the charge, to be certain the point is preserved. *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987) (citation omitted), *cert. denied*, 485 U.S. 968 (1988).

Tenth Circuit: In *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1515 (10th Cir. 1984), the court summarized *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 26-27 (1962), as holding "when counsel made objections at conference on instructions before charge was given and requested instructions on basis of objections, and after charge counsel was told all prior objections would be preserved, waiver did not occur in light of that assurance and prior objections and requests." The implication is that absent an express post instruction assurance from the court, objections should be specifically stated.

5. Failure to formally object may be disregarded only if the party's position has previously been made clear to the court and it is apparent that further objection would be useless.

Ninth Circuit: *Glover v. BIC Corp.*, 6 F.3d 1318, 1326-27 (9th Cir. 1993).

Tenth Circuit: *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1172 (10th Cir. 2003).

See generally 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 2553 (1995,

Please continue on next page

continued from page 27

Pocket Part 2003 & Supp. 2004). "[A]n objection may be a 'pointless formality' when (1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." *United States v. Payne*, 944 F.2d 1458, 1464 (9th Cir. 1991), *cert. denied*, 503 U.S. 975 (1992).

6. Through pretrial briefs, motions for directed verdict, and examination of witnesses, a party can make "the district court . . . fully aware of [the party's] position in regard to [the requested instructions]."

Ninth Circuit: *Brown v. AVEMCO Inv. Corp.*, 603 F.2d 1367, 1371 (9th Cir. 1979); *Patrick v. Burget*, 800 F.2d 1498, 1508 n.9 (9th Cir. 1986) (arguments were made in pretrial brief and in support of motions for directed verdicts), *rev'd on other grounds*, 486 U.S. 94 (1988); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207 (9th Cir. 1989) (failure to object not fatal when issue was already unequivocally raised in pretrial and trial briefing and motions and had been definitively rejected).

Tenth Circuit: *Asbill v. Hous. Auth. of Choctaw Nation of Okla.*, 726 F.2d 1499, 1502 n.3 (10th Cir. 1984) (party did not object at instruction conference, but court previously had rejected party's position four times before and during trial).

7. While a particular request for an instruction may also serve as an objection to instructions given, a refused request does not automatically serve also as an objection to instructions given.

Ninth Circuit: *Benigni v. City of Hemet*, 879 F.2d 473, 475-76 (9th Cir. 1988).

Tenth Circuit: *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1172 (10th Cir. 2003) (party does not satisfy Fed. R. Civ. P. 51 merely by proposing differing instruction).

The proposed instruction must be sufficiently specific to bring into focus the precise nature of the alleged error.

Ninth Circuit: *Glover v. BIC Corp.*, 6 F.3d 1318, 1327 (9th Cir. 1993); *see also Larson v. Neimi*, 9 F.3d 1397, 1399 (9th Cir. 1993) (party discussed instruction before trial, filed that proposed instruction, and objected at charge conference to omission of proposed instruction).

8. The specificity required in objecting will be considered in context with the leeway allowed or denied by the trial court.

U.S.: *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 175 n.22 (1988).

9. CAVEAT:
A party cannot safely rely on a blanket statement from the trial court that it has automatic exceptions and need not make its record. *See infra* Section III F.3. Neither the parties nor the trial court can circumvent the requirements of Fed. R. Civ. P. 51 that specific objections be made. *McGrath v. Spirito*, 733 F.2d 967, 968-69 (1st Cir. 1984).

10. A party may not state one ground when objecting to an instruction and attempt to invoke another ground on appeal.

Tenth Circuit: *Shamrock Drilling Fluids, Inc. v. Miller*, 32 F.3d 455, 458-59 (10th Cir. 1994).

11. A generalized objection to an instruction is insufficient.

Ninth Circuit: *Inv. Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir. 1975).

Tenth Circuit: *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1288-89 (10th Cir. 1999).

F. Jury Instructions Refused.

1. There is no automatic exception when a request is refused. Instead, the proponent must specifically explain why the instruction is proper and should be given.

U.S.: Fed. R. Civ. P. 51.

Please continue on next page

continued from page 28

Ninth Circuit: *United States v. Span*, 970 F.2d 573, 577 (9th Cir. 1992).

Tenth Circuit: *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1288-89 (10th Cir. 1999).

2. An objection must be made and an explanation given before the jury is instructed and, to be safe, the objection should be renewed after instructions are given but before jury deliberations begin.

Ninth Circuit: *Pooshs v. Fluoroware, Inc.*, No. 94-16588, 1996 WL 195542 (9th Cir. Apr. 22, 1996) (unpublished) (not requiring further objections when court's refusal to give instruction represented final decision).

Tenth Circuit: *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1515 (10th Cir. 1984) (approving in dicta failure to repeat conference objections made before jury was charged when court announced after charge that all prior objections were preserved).

3. Objection to refusal to give a requested instruction is untimely if made for the first time in a motion for new trial.

Ninth Circuit: *United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1184 (9th Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

4. CAVEAT:
If a trial judge gives an "automatic exception" to requested instructions that the court does not give, the party's challenge on appeal to a particular instruction may be foreclosed by Fed. R. Civ. P. 51 when the party did not earlier state specifically why failure to give the instruction would be error. "'This procedure is not even remotely in accord with Rule 51, Fed.R.Civ.P., and really amounts to a general exception to the charge, a procedure which is far from compliance with either the language or the purpose of the rule.'" *Glover v. BIC Corp.*, 6 F.3d 1318, 1326 (9th Cir. 1993) (quoting *St. Paul Fire & Marine Ins. Co. v. Piedmont Natural Gas Co.*, 397 F.2d 263, 264 (4th Cir. 1968)).

If, in the face of an automatic exception, a party previously has made known to the trial court its specific arguments on the particular subject matter of the refused instruction, acquiescence to an automatic exception will not preclude arguing that it was error for the instruction to be refused. *Id.* If, however, a party has not previously made known to the trial court its specific arguments in support of the matters addressed in a requested instruction, acquiescence to an automatic exception will preclude arguing on appeal that it was error not to give a particular instruction.

Ninth Circuit: *Grosvenor Props. Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152 (9th Cir. 1990) (error not preserved when trial court noted that it was unnecessary to repeat previously submitted instructions but when remarks in chambers, discussion of law in pretrial memoranda, and mere submission of proposed instructions did not clearly show that issue was focused before court).

G. Sufficiency of the Evidence.

1. In a case tried to a judge and not a jury, a party is not required to object to a finding in order to later challenge on appeal the sufficiency of the evidence to support that finding.

U.S.: Fed. R. Civ. P. 52(b).

CAVEAT:
If, however, the challenge is not to the sufficiency of the evidence to support a finding, but is instead to some defect in the finding itself, a motion to amend or supplement must first have been made in the trial court.

Ninth Circuit: *Hollinger v. United States*, 651 F.2d 636, 640-41 (9th Cir. 1981) (party could object to sufficiency of evidence but not to lack of specificity in finding when no objections were filed at trial); *Phoenix Eng'g & Supply Inc. v. Universal Elec. Co.*, 104 F.3d 1137, 1140 (9th Cir. 1997) (party could not challenge specificity of findings when no such challenge was made below).

Tenth Circuit: *McMahon v. Caribbean Mills, Inc.*, 332 F2d 641, 643 (10th Cir 1964) (appellant could not claim error in failure of court to make findings on subsidiary facts when no objection made in district court).

2. While counsel *may* move for judgment as a matter of law at the end of a plaintiff's case, counsel in a jury trial *must* move for judgment as a matter of law at the close of all the evidence to preserve insufficiency of the evidence as an issue for appeal.

Please continue on next page

continued from page 29

Ninth Circuit: *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1345-47 (9th Cir. 1986) (recognizing rule, but allowing exception when earlier motion for directed verdict was taken under advisement).

Tenth Circuit: *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634 (10th Cir. 1989).

> Additionally, a motion for judgment as a matter of law preserves for review only the grounds specified at the time, and no others.

Tenth Circuit: *Vanderhurst v. Colo. Mtn. Coll. Dist.*, 208 F.3d 908, 915 (10th Cir. 2000).

3. Additionally, while an appellate court may review a *preverdict* denial of a motion for judgment as a matter of law absent a *postverdict* motion for such judgment, the appellate court can order only a new trial (and not a judgment contrary to the verdict) if it finds that the claim lacked sufficient evidence to go to the jury, but that no postverdict motion was filed for judgment as a matter of law.

U.S.: *Johnson v. N.Y., N.H. & H. R. Co.,* 344 U.S. 48, 54 (1952).

Ninth Circuit: *Desrosiers v. Flight Int'l of Fla. Inc.,* 156 F.3d 952, 956-57 (9th Cir.), cert. dismissed, 525 U.S. 1062 (1998).

Tenth Circuit: *Morrison Knudsen Co. v. Fireman's Fund Ins. Co.,* 175 F.3d 1221, 1226 (10th Cir. 1999).

See generally 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 2537 (1995, Pocket Part 2003 & Supp. 2004); 9 James W. Moore, *Moore's Federal Practice* ¶ 50.05[2] (3d ed. 2004).

4. CAVEAT:

a. Ninth Circuit: More than a preverdict motion for judgment as a matter of law is required to preserve errors of insufficient evidence when there are multiple claims and one or more, but not all, of the claims lack sufficient evidence to support a verdict. In that circumstance, the moving party must also prepare and offer either jury interrogatories or a special verdict that separates the various claims. *Compare McCord v. Maguire*, 873 F.2d 1271, 1274 (request for special verdict necessary to preserve issue of insufficient evidence among multiple claims), *amended*, 885 F.2d 650 (9th Cir. 1989), *with Counts v. Burlington N. R.R. Co.*, 952 F.2d 1136, 1140 (9th Cir. 1991) (no request for special verdict needed when issue is legal error among multiple claims). Even when the issue of insufficient evidence has been preserved by a request for a special verdict, the Ninth Circuit still may in limited circumstances sustain a judgment based on a general verdict by assuming that the verdict is based on the factually sufficient, and not the factually insufficient, claim(s). *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990); *see Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 62 F.3d 280, 285-86 (9th Cir. 1995) (invalidating general verdict).

b. Logically, this practice should apply only when the defect in a claim or claims is factual insufficiency. When the defect is legal error in one or more, but not all, of several claims (*e.g.,* failure to state a claim, erroneous jury instruction, etc.), the U.S. Supreme Court holds that a judgment based on a general verdict must be reversed. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-60 (1993), *enforcing Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962). The Ninth Circuit acknowledges that its unique practice "has been the target of vigorous and persuasive criticism." *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1439 (9th Cir. 1996). The Ninth Circuit nonetheless continues to hold that discretion exists in exceptional cases to sustain a general verdict when one or more, but not all, of the underlying claims were legally erroneous, as distinguished from being factually insufficient. *Kelly v. City of Oakland*, 198 F.3d 779, 785 (9th Cir. 2000); *see, e.g., Counts v. Burlington N. R.R. Co.*, 952 F.2d 1136, 1140 (9th Cir. 1991). *See generally Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 789-92 (9th Cir. 1990) (Kozinski, J., dissenting).

c. Tenth Circuit: With a much more limited "harmless error" exception than developed in the Ninth Circuit, the Tenth Circuit follows the U.S. Supreme Court's holding in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962). In summary, when the court cannot tell which among multiple grounds was the basis for a jury's general verdict, reversal is required if any one of those grounds was legally flawed. *Murphy v. Dyer*, 409 F.2d 747, 748 (10th Cir. 1969).

d. While not as messy as case law in the Ninth Circuit, Tenth Circuit case law also is confused on the scope of the harmless error exception. *See Collis v. Ashland Oil & Ref. Co.*, 722 F.2d 625, 627 (10th Cir. 1983) (applying general rule, without discussion of harmless error exception); *Asbill v. Hous.*

Please continue on next page

continued from page 30

Auth. of Choctaw Nation of Okla., 726 F.2d 1499, 1504 (10th Cir. 1984) (applying general rule, but discussing and justifying harmless error exception); *Smith v. FMC Corp.*, 754 F.2d 873, 877 (10th Cir. 1985) (applying general rule without discussion of harmless error exception); *McMurray v. Deere & Co.*, 858 F.2d 1436, 1444 (10th Cir. 1988) (same). In *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1298-1301 (10th Cir. 1989), the court discussed the issue at length and acknowledged that the "law on this subject is not characterized by any great clarity." *Id*. at 1299. After canvassing the cases supporting both the principle of *Sunkist Growers, Inc.*, 370 U.S. at 29-30, and the harmless error exception, the court stated that it felt itself bound by its two most recent opinions in *Smith* and *McMurray*, "both of which strictly imposed the general rule." *Id*. at 1300. Thus, despite the fact that it appeared "very unlikely that the submission of the instruction on [an invalid] defense 'significantly influenced' the jury or prejudiced [the plaintiff]'s 'substantial rights,'" the court "reluctantly" applied the *Baldwin* principle. *Id*. at 1300-01; *see also id.* at 1301 ("However, because we cannot say with absolute certainty, as required by *McMurray* and *Smith*, that the jury was not influenced by the submission of the abnormal use instruction, we must reverse and remand for a new trial."); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996) ("[W]e have adhered strictly to the general rule and have remanded cases where we could not say 'with absolute certainty' that the jury was not influenced by the submission of the improper or erroneous instruction.").

H. Flaws in the Form of Verdict.

Absent a specific objection made before submission to the jury, an appellate court will not consider a defect in the form of, or questions contained in, a verdict.

Ninth Circuit: *United States v. Parsons Corp.*, 1 F.3d 944, 945 (9th Cir. 1993).

VI. AFTER VERDICT OR DECISION.

A. Sufficiency of the Evidence.

1. In a jury trial, a postverdict motion for judgment as a matter of law is absolutely essential to preserve on appeal the option of having judgment entered in a client's favor.

U.S.: *Johnson v. N.Y., N.H. & H.R. Co.*, 344 U.S. 48, 54 (1952).

Ninth Circuit: *Desrosiers v. Flight Int'l of Fla. Inc.*, 156 F.3d 952, 956 (9th Cir. 1998) (no discretion to grant judgment as matter of law when no such motion was made during trial or through postverdict motion).

Tenth Circuit: *See supra* Section V.G.2. *But see Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 610-11, 616 (5th Cir. 1996).

2. In a trial to a judge, a party is not required to object to a finding in order to later challenge on appeal the sufficiency of the evidence to support that finding. *See supra* Section V.G.1.

U.S.: Fed. R. Civ. P. 52(b).

B. Flaws in the Verdict Announced.

1. Whether objection to an announced verdict on grounds of inconsistency, ambiguity, or confusion must be made before discharge of the jury depends on the form of verdict used:

a. General Verdict.

Objections to inconsistent findings within a general verdict are waived if not made before discharge of the jury.

Ninth Circuit: *Philippine Nat'l Oil Co. v. Garrett Corp.*, 724 F.2d 803, 806 (9th Cir. 1984).

Tenth Circuit: *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1421-22 (10th Cir. 1986).

b. General Verdict with Interrogatories.

Ninth Circuit: When a jury's answers to written interrogatories are consistent with each other, but are inconsistent with a general verdict, preserving that issue does not require an immediate objection and motion for resubmission before the jury is discharged. A motion for judgment as a matter of law or, in the alternative, new trial is sufficient. Fed. R. Civ. P. 49(b); *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1354-56 (9th Cir. 1987). *But see Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995). Similarly, when the answers to the interrogatories are inconsistent with each other and one or more is also inconsistent with a general verdict, objection may be timely made by post trial motion. Fed. R. Civ. P. 49(b).

Please continue on next page

continued from page 31

Tenth Circuit: A party waives the right to challenge inconsistencies on appeal when the party fails to object before discharge of the jury to interrogatory answers that are inconsistent with the general verdict. *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1421-24 (10th Cir. 1986). Absent objection, only the trial court sua sponte, and not the parties by post trial motion, may compel a new trial. *Id*. at 1423. *But see Jarvis v. Commercial Union Assurance Cos.*, 823 F.2d 392, 396 (10th Cir. 1987) (insured did not waive challenge to inconsistency between general verdict and written interrogatory by failing to raise objection before jury was discharged, when district court did not inform attorneys of perceived inconsistency and sent jury back to deliberate without conferring with attorneys so that they could suggest curative instructions, when court orally disclosed to attorneys substance of jury's note stating that special interrogatory form was filled out correctly, and when court summarily declared conflict resolved after jury returned).

c. Special Verdict.

Ninth Circuit: When special verdicts are allegedly inconsistent, objections need not be made before discharge of jury, but may be raised by post trial motion. Fed. R. Civ. P. 49(a); *Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987).

Tenth Circuit: *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 851-52 (10th Cir. 2000) (although party waives claim of inconsistent verdicts based on general jury verdict if claim is not timely raised, this rule does not apply to special verdicts; with special verdicts, party is not required to object to inconsistency before jury is discharged in order to preserve that issue for subsequent motion before district court). However, an objection must be made while still in district court. *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1556 (10th Cir. 1989) (ordinarily, appellate court will not consider error in special verdict form when no objection was made in district court).

2. Once the jury is discharged, it is too late to demand a poll of the jury.

Ninth Circuit: *United States v. Boone*, 951 F.2d 1526, 1531 (9th Cir. 1991).

Tenth Circuit: *Baker v. Sherwood Constr. Co.*, 409 F.2d 194, 195 (10th Cir. 1969).

C. Defects in Findings.

If the deficiency in a finding is on grounds other than sufficiency of evidence (*e.g.,* lack of specificity, form, etc.), timely objection must be made in the trial court to preserve the objection.

Ninth Circuit: *Hollinger v. United States*, 651 F.2d 636, 640-41 (9th Cir. 1981).

Tenth Circuit: *McMahon v. Caribbean Mills, Inc.*, 332 F2d 641, 643 (10th Cir 1964).

D. Evidentiary Errors or Legal Errors Previously Raised.

No postjudgment or postverdict motion is required to preserve for appeal evidentiary or other legal objections or exceptions previously made.

Ninth Circuit: *United States v. Hayashi*, 282 F.2d 599, 601 (9th Cir. 1960).

Tenth Circuit: *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1246 (10th Cir. 1999).

11 Charles A. Wright et al., *Federal Practice and Procedure: Civil 2d* § 2818 (1995). *But see supra* Section V.A (sufficiency of evidence).

E. Loss of Right to Appellate Review Through Acceptance of Benefits.

Acceptance of the benefits of a judgment, or compliance with a decree when no stay was sought, can cause an appeal to be dismissed.

Ninth Circuit: *W. Addition Cmty. Org. v. Alioto*, 514 F.2d 542, 544 (9th Cir.), *cert. denied*, 423 U.S. 1014 (1975); *Christian Sci. Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, 1017, *modified*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

Tenth Circuit: *Luther v. United States*, 225 F.2d 495, 497-98 (10th Cir. 1954).

The general rule, however, is that an appeal will not be dismissed for mootness unless the parties intended to settle, or unless it is not possible to take any effective action to undo the results of compliance. *See generally* 13A Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters 2d* § 3533.2 (1984 & Supp. 2004). ❐

Commonsense Electronic Planning

continued from page 1

opposing counsel. You call your client and say "I need all the documents, including electronic data, e-mails, backup e-mails and hard drive search results that you can get together from your people so we can produce them in discovery. To make things easier, I'd like to talk with your IT director about doing some searches in your system and how you manage the data."

Your client says "sure, sure" and you wait hopefully. Eventually you receive about 1000 pages of various printouts, desk files and the like. You review and produce them, but you never do get the number for the IT director. Two weeks before discovery closes, you call your client again, and finally get on a call with the IT director, who says, "Yeah, we can get you a bunch of the stuff you want, but a lot of it was deleted in our automatic document destruction cycle." A few days later you get about 20 CDs of raw e-mails and server files, some of which are duplicative, but many of which you have never seen before, may be responsive and which you have to process, review for privilege and produce in the rapidly closing window of time for fact discovery.

Clearly being the attorney in either of these positions will be very frustrating. Part of the evolving challenge of electronic discovery, which has been a very hot topic in the last few years, is the simple fact of getting used to this new dimension of discovery, and developing effective ways to communicate about it with our clients, either in-house business people, or in-house attorneys.

Many of us have seen primers about electronic discovery, ranging from "what is metadata,[2] and what does it mean for my discovery obligations" to "how to pick an electronic discovery vendor" to "the *Zubulake* decisions and what they mean for you." At the end of the day, however, electronic discovery is strategically no different than any other form of discovery: it requires planning ahead and timely, meaningful effort put into communicating about the requirements. Counsel must work very closely with the client to make sure all discoverable data is preserved and collected. This obligation should not be taken lightly. We have all been admonished not to fax discovery requests to our clients at the last minute with a request to "read these and give me anything you have that is responsive". That admonition is especially applicable to electronic discovery.

There is reason to be concerned about electronic discovery obligations and potential sanctions. The sanctions for failing to comply with these obligations can be severe. Of course courts have dealt the harshest sanctions to those who have purposely destroyed discoverable data:

- *Zubulake v. UBS Warburg LLC,* 94 FEP Cases 1 (S.D.N.Y. 2003) – The court sanctioned defendant's willful destruction of relevant e-mails by requiring it to pay for additional discovery and deciding to give the jury an adverse instruction that would allow it to infer that the evidence destroyed would have been unfavorable to defendant.

- *U.S. v. Philip Morris USA Inc.,* 2004 U.S. Dist. LEXIS 13580 (D.D.C. July 21, 2004) – The court sanctioned defendant's willful destruction of relevant e-mails by fining the defendant $2.75 million.

- *Electronic Funds Solutions v. Murphy,* 2005 Cal. App. LEXIS 1910 (Cal. App. 4th Dist. Dec. 14, 2005) – The court acknowledged that while the trial court's award for damages was improper, its default judgment order was a proper sanction against defendants for the intentional destruction of data on the hard drives of several computers.

But sanctions for minor and unintentional violations can also have devastating consequences:

- *Mosaid Technologies Inc. v. Samsung Electronics Co., Ltd.,* 2004 U.S. Dist. LEXIS 23596 (D.N.J. July 7, 2004) – The court sanctioned the defendant for failing to prevent its system from automatically purging potentially relevant e-mails after the lawsuit was filed. The court ordered that the jury be given an adverse inference instruction so that it could assume that the deleted electronic information would be harmful to the defendant.

- *Lexis-Nexis v. Beer,* 41 F.Supp. 2d 950 (D. Minn. 1999) – The court was unsure whether relevant electronic data was lost when defendant made a copy of a discoverable database and then deleted the original version. Nevertheless, the court concluded that defendant's action, and its delay in providing additional electronic discovery, set off a "high-tech wild goose chase" that unnecessarily increased the time and expense of discovery. The court therefore imposed monetary sanctions.

Please continue on next page

Commonsense Electronic Planning

continued from page 33

- *Thompson v. United States HUD,* 219 F.R.D. 93 (D. Md. 2003) – The defendant claimed that it just "discovered" more than 80,000 e-mails on the eve of trial. The Court prohibited the defendant from introducing information from these e-mails and defendant's counsel was prohibited from using any of these e-mails to refresh a witness's recollection or to prepare a witness for trial. Plaintiffs, however, were permitted the use of these e-mails and were invited to seek recovery of the costs of reviewing these e-mails.

The most effective way to ensure compliance with the discovery rules and avoid sanctions is to develop an electronic discovery plan. Ideally such a plan will be developed before any lawsuit is filed, but if this cannot be done, the plan should be fully developed and in place as early in the litigation process as possible. An electronic discovery plan that is implemented early and consistently throughout the discovery process will ensure that all responsive data is saved, collected, and produced in a timely and efficient manner. Moreover, a well-documented plan will go a long way in convincing a court that all reasonable steps were taken to comply with a party's discovery obligations.

The components of an effective electronic discovery plan are as follows:

- A current inventory of all sources, collections, and locations of electronic data and all individuals who have access to such data. This inventory should include a list of all third parties such as contractors or vendors that also possess the client's data.
- An understanding of the client's electronic storage, backup, and purging policies and how these processes can be temporarily suspended.
- An identified group of individuals who will serve as an electronic discovery response team. This team should include, at a minimum and to the extent they exist, a member or two from senior management, a representative from the information technology department, a representative from the records management department, a representative from the legal department, and outside counsel.
- A means of quickly identifying, preserving, and collecting all potentially discoverable data.
- A means of quickly and effectively communicating the preservation and collection obligations to all responsible employees. The notice should adequately describe the types and locations of the information to be preserved and collected without overwhelming the employees with too much detail.
- A method for ensuring compliance with the preservation and collection obligations.
- A method for maintaining and monitoring compliance with these obligations throughout the litigation.
- A method for thoroughly documenting and recording the process of identifying, preserving, collecting, and producing the electronic discovery. Tracking the chain of custody of the electronic information is particularly important.
- The identification of the individual who can serve as the client's 30(b)(6) deposition witness on electronic data storage issues, if called. This individual should be involved, to the extent possible, in all of the data preservation and collection efforts.

As soon as litigation appears imminent or as soon as possible after a lawsuit is filed counsel should meet with his or her client to review and implement this electronic discovery plan. Convening the electronic discovery response team will be a critical initial step in this process. The team should collectively take responsibility for ensuring the plan is fully and consistently implemented. The key issues to manage are document retention, knowledgeable personnel, and information volume.

In the area of document retention, the first example at the beginning of this article – the request by counsel to stop "all" document retention and beginning to save it – may not be reasonable. Even a medium sized corporation can generate hundreds of thousands of e-mail messages a day, plus thousands of spreadsheets, word processing documents, images and specialized data, depending on the nature of the business. Even in the case of a broad reaching suit such as a securities class action, not all of them will be relevant and the practical consequences of requiring every e-mail housed in a backup server to be downloaded, saved and stored in readable format would be economically crippling.

Please continue on next page

Commonsense Electronic Planning

continued from page 34

As a general matter courts recognize that discovery has practical limits, both logistically and economically. The goal for a party should be to make reasonable, good faith efforts to locate, preserve and produce what is relevant. Following a sound electronic discovery plan will go a long way in demonstrating such a good faith effort. A court will take much less kindly to a perceived inattention to discovery obligations than to a good faith effort that may have produced spotty results. *See e.g., Zubulake v. UBS Warburg LLC,* No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 18771, at *12 (S.D.N.Y. Oct. 22, 2003) (a party does not need to produce "every shred of paper, every e-mail or electronic document, and every back-up tape."); *Wiginton v. CB Richard Ellis, Inc.,* No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128, at **12-13 (N.D. Ill. Oct. 24, 2003) ("A party does not have to go to extraordinary measures" to produce all responsive electronic material, nor does it need to "preserve every scrap of paper in its business") (citations omitted); *Alexander v. FBI,* 188 F.R.D. 111, 117 (D.D.C. 1998) (limiting electronic discovery to "targeted and appropriately worded searches of backed-up and archived e-mail and deleted hard-drives for a limited number of individuals"). Therefore, the outside counsel is not offering particularly productive advice when they simply tell their client to cease document destruction. The more practical advice is to get your client's attention as early as possible in the litigation, either at the demand or filing stage, and cast a wide but realistic net of names and departments who are likely to have discoverable material and begin a focused search for documents and identify documents that can be segregated and provided to counsel for review on a rolling basis, even before a discovery request is served.

This brings us to the issue of Information Technology (IT) departments and personnel. Digging around in the virtual warren of a business' computer network is a job that most of us did not go to law school to do. It is better done by someone who is paid to understand how an e-mail server works. Law firms and businesses have a wide range of staffing in their IT groups. If possible, an electronic discovery team should include representation from both in-house business IT personnel and either a law firm or vendor litigation IT specialist. Not all firms or practitioners have either the need or resources to have a litigation technology specialist, but vendors can be engaged on a project by project basis to offer a wide variety of support in this regard, and even to provide training to litigators outside of the active litigation context.

The instinct to talk to the client IT department is always a good one, but from the perspective of the in-house personnel, from the in-house counsel to the IT personnel themselves, this request coming from an outside attorney can be both peculiar and intrusive. However, IT personnel in the discovery context are a combination of records custodian, expert and vendor. It makes sense to cultivate a connection between outside counsel and the business IT group as soon as possible as part of the electronic discovery plan, and communicate clearly with the client why it is necessary. In-house counsel are typically extremely cost conscious and outside counsel talking to the IT staff may not look, at first glance, like what a litigator billing at top dollar should be doing. However, at the end of the day, it saves time and money for counsel to get first-hand information on the type of documents available. Moreover, as more cases are showing, counsel has an obligation to personally see that reasonable efforts are made to locate and produce responsive material in all existing formats and failure to do so subjects both the party and counsel to sanctions. *See e.g., Zubulake v. UBS Warburg LLC,* No. 02 Civ. 1243, 2004 U.S. Dist. LEXIS 13574, at **31-44 (S.D.N.Y. July 20, 2004) (discussion of the counsel's duties, as apart from the client's duties, regarding electronic discovery collection and preservation).

Analogizing IT personnel to a record custodian or expert makes the need for access to IT personnel more like requests that business people, attorney and non-attorneys alike, understand. Likewise, most people would not expect attorneys to do a high volume of, for example, photocopying. It is part of outside counsel's job to understand what the IT department has access to, and how best to reach and process large volumes of that data. It is also part of outside counsel's job to develop cost-effective solutions to duplication problems, and bring in an appropriate vendor to duplicate the information. A well thought out and timely implemented electronic discovery plan accomplishes all of these goals.

Outside counsel should also be very familiar with the client's document retention and destruction policy as well as the client's computer and data systems. This knowledge is indispensable in assisting the client through the electronic discovery process. The more outside counsel understands the client's use of electronic data, the better he or she will be able to ensure that the client's discovery obligations are adequately met. There are some key steps outside counsel can take to ensure his or her client complies with its discovery obligations and avoids some of the most common pitfalls:

- Work with the client to collect all potentially relevant data

Please continue on next page

Commonsense Electronic Planning

continued from page 35

at once and early in the litigation process. This will require that outside counsel has a solid understanding of the client's electronic data systems and can anticipate what information will be relevant and requested by opposing counsel. Going back to the client several times to collect more and more data as the discovery requests arrive will only make the data collection more inefficient, more costly, more disruptive to the client's business, and increase the likelihood that some responsive data will be missed.

- If possible, do not rely on the client to collect the data. Clients will not always have a full appreciation for the demands of discovery. They will often neglect to search every location, fail to produce multiple versions of similar data, and make overly narrow judgments regarding which data is relevant or responsive. Try to arrange for an attorney and a member of the client's IT department to work together to collect the electronic information from each location and custodian.

- Have an attorney or paralegal develop a document collection and production log for each type of electronic material collected. Ideally these logs will include checklists to ensure that all responsible custodians of the data are contacted and all responsive data is collected and reviewed.

- Don't neglect to search non-traditional sources of electronic data such as instant messaging programs, to the extent this data is saved; voice mail systems; cell phones; pagers; home and personal computers; and PDAs.

- Many businesses also have specialized software programs for billing, collections, incident management and recording or inventory tracking. Data from these sources is also discoverable and arrangements should be made to determine the form in which it is most easily made available in discovery.

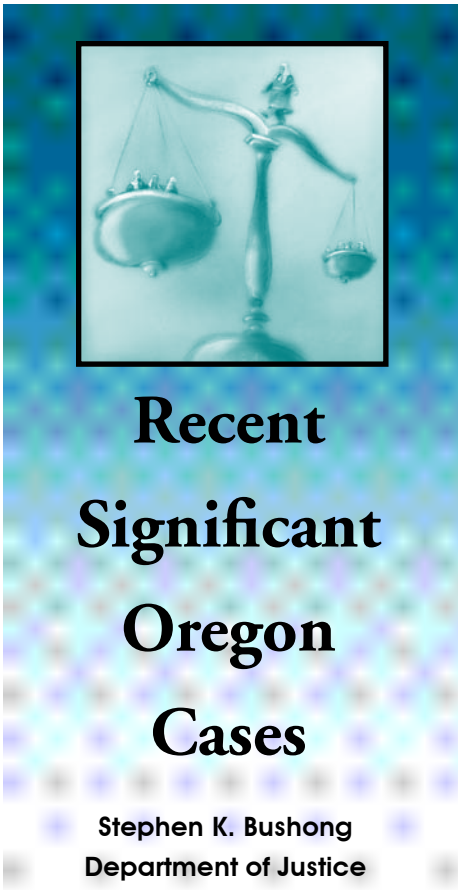
- Schedule data update meetings at regular intervals where outside counsel checks back with the client to collect any recently generated responsive data. Continuous and active communication with the client is critical.

Electronic discovery can be a daunting challenge. The sheer number of electronic documents in today's business world places a tremendous burden on litigators in the discovery process. Electronic data can also provide unique risks for inadvertent disclosure of privilege material, privilege review, and redaction. These challenges, however, can be greatly reduced if counsel takes a proactive approach and meets with his or her client early in the litigation process to develop a reasonable and effective electronic discovery plan. A sound discovery plan implemented with foresight and consistency is the best way to ensure that counsel and the client meet their electronic discovery obligations. ❐

Endnotes:

1 *Zubulake v. UBS Warburg LLC,* 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y., July 20, 2004), sometimes called "*Zubulake V,*" is the last of a series of decisions involving a discovery dispute, setting discovery standards for bearing costs of retrieving data and ultimately sanctioning defendant and reprimanding counsel for failure to preserve stored electronic data. This group of decisions forms some of the leading federal authority on the reach of electronic discovery.

2 Metadata generally refers to the "background" electronic information about electronically created and stored documents (the vast majority of all documents created today), such as when it was created, whether it was copied from another document, who the editors and typists on the document were, when it was last edited or printed, and where it resides on a server. ❐



Recent Significant Oregon Cases

Stephen K. Bushong
Department of Justice

I. Claims for Relief.

A. Negligence

Instructing the jury in a premises liability case with a comparative negligence defense "is difficult," the Court of Appeals acknowledged in *Maas v. Willer*, 203 Or App 124, 134 (2005), but not impossible. Plaintiff argued that the instruction defining a dangerous condition as one that "cannot be encountered with reasonable safety, even if the danger is known and appreciated" required the jury to "determine the fault of one party by reference to the actions of the other party," thus suggesting that plaintiff's negligence would be a complete bar to recovery. *Id.* at 130-131. The Court of Appeals disagreed, concluding that the difficulty can be overcome "by giving separate instructions on comparative fault and the definition of unreasonable risk of harm." *Id*.

The trial court erred in failing to grant defendant's motion for a directed verdict on a negligence claim seeking only economic damages, the Court of Appeals held in *Indian Creek Development Co. v. City of Hood River*, 203 Or App 231 (2005), because there was no evidence to support a conclusion that defendant "had a special relationship with plaintiff or owed it a duty to avoid causing it economic loss." *Id.* at 239. The jury had awarded the plaintiff developer $385,000, finding that it was prevented from selling its property by the City of Hood River's negligence in failing to advise prospective purchasers that an intersection had to be improved before the subdivision could be developed. Plaintiff argued that it had a "special relationship" with the City by virtue of the land use planning process, certain planning documents, and the municipal code. The court disagreed, finding nothing in the code or planning regulations that could establish that the City "would act in the economic interests of plaintiff when reviewing applications for subsequent development of the subdivided property." *Id.* at 236.

Summary judgment was improperly granted to the defendant on a negligence claim arising out of a fatal auto accident, the Court of Appeals held in *McDonald v. Sarriugarte*, 202 Or App 702 (2005). In that case, a six-year old girl and her mother were killed when the mother drove her Jaguar off a road and into the Willamette River. The girl's estate alleged that defendant's Toyota Spyder had been "racing" with the Jaguar at the time of the accident. The trial court concluded that there was no genuine issue of material fact as to causation, in part because it deemed inadmissible an eyewitness's "speculation" that the cars had been racing. The Court of Appeals disagreed, concluding that a reasonable factfinder could infer that the cars were racing from the evidence that "two high-performance automobiles were traveling in close proximity to each other at 80 miles per hour on a curving rural road, one automobile having just overtaken the other." *Id.* at 707.

In *Moe v. Eugene Zurbrugg Construction Co.*, 202 Or App 577 (2005), the Court of Appeals affirmed the denial of a defendant's motion for directed verdict on a negligence claim. Plaintiff was injured when he fell from a scaffold while installing ceiling tiles in a bowling alley. Moe alleged that the scaffold slipped on a wood "floor" that had been incorrectly installed in violation of the building code. There was no evidence that Larry or Curly were at fault. Defendant Park Lanes argued that the code's wood floor rule did not apply because "bowling alleys are alleys, not floors." *Id.* at 591. The Court of Appeals disagreed, noting that "[t]hough one is generally discouraged from walking on waxed bowling alleys, it seems clear that, if one had to, one would walk on the alley, not the concrete below. The bowling alley is a floor." *Id.*

Please continue on next page

continued from page 37

B. Other claims.

The trial court improperly "weighed" the evidence in granting defendant's motion for directed verdict on a claim for intentional interference with economic relations, the Court of Appeals held in *Douglas Medical Center v. Mercy Medical Center*, 203 Or App 619 (2006), but the court found that "the result nonetheless was correct because plaintiffs failed to adduce sufficient evidence to present a jury question as to either 'improper purpose' or 'improper means.'" *Id.* at 638. The evidence that defendant Mercy Medical Center (Mercy) acted with an improper purpose in its attempt to drive its only competitor out of business was insufficient to permit a jury to infer that Mercy's conduct "was motivated by any purpose other than a competitive purpose—much less that Mercy acted *solely* from such an improper noncompetitive purpose, *e.g.,* the satisfaction of Mercy's spite or ill will." *Id.* at 632 (emphasis in original; internal quotation marks omitted). The court also rejected plaintiffs' theory that it had established "improper means" because Mercy "used the fruits of prior improper conduct in order to subsequently interfere with a competitor's relationships with its partner and existing or prospective 'customers.'" *Id.* at 636. The court explained that "[w]here the actual acts of interference were not themselves improper, a defendant's antecedent conduct, however wrongful or unlawful, cannot constitute actionable 'improper means.'" *Id.* at 638.

An agreement not to compete was enforceable under ORS 653.295 where the plaintiff began a new employment relationship as a consultant after he retired from his original job, the Court of Appeals held in *McGee v. Coe Manufacturing Co.*, 203 Or App 10 (2005), because the consulting position counted as plaintiff's "initial employment" within the meaning of the statute. Terminating an employee "because his complaints are irritating or because they might disrupt the structure of a hierarchical workplace" did not violate Oregon's Whistleblower Law, the Court of Appeals held in *Bjurstrom v. Oregon Lottery,* 202 Or App 162, 175 (2005), "unless the complaints disclose what are reasonably believed to be unlawful practices or policies, mismanagement, gross waste of funds or abuse of authority, or substantial and specific danger to public health and safety." *Id.* In *Goddard v. Farmers Ins. Co.*, 202 Or App 79 (2005), the Court of Appeals held that (1) a "pooling agreement" among related insurance companies was admissible in an action against an insurer for bad faith refusal to settle a claim within policy limits; and (2) a $20 million punitive damages award was constitutionally excessive.

II. Procedure.

In *Burden v. Copco Refrigeration, Inc.*, 339 Or 388 (2005), the Supreme Court held that (1) the plaintiff has the burden of producing "jurisdictional facts" relating to sufficiency of service of process; (2) the certificate of service filed by plaintiff is ordinarily sufficient to meet her burden, though the defendant may introduce evidence to rebut the facts recited in the certificate; and (3) ORCP 21 C authorized the trial court to resolve a motion to dismiss for insufficiency of service on the day of trial, rather than requiring the defendant to wait until trial to present evidence on that issue. In *Freeman v. Stuart*, 203 Or App 191 (2005), the Court of Appeals concluded that the denial of summary judgment based on insufficiency of service is not reviewable on appeal, because (1) the denial of a summary judgment motion is not reviewable on appeal unless rested on a "purely legal" contention; and (2) adequacy of service was not "purely legal" because that issue "cannot be answered except by reference to predicate facts." *Id.* at 194.

The trial court erred in denying defendant's motion for directed verdict on a negligence claim, the Court of Appeals held in *Pinkerton v. Tri-Met,* 203 Or App 525 (2005), because "plaintiff's medical situation was so complicated as to require expert testimony on the issue of causation[.]" *Id*. at 534. A directed verdict was improper where resolution of the case depended on "weighing of conflicting evidence and an evaluation of witness credibility." *Fang v. Li*, 203 Or App 481, 485 (2005). When the court serves as the finder of fact, the party with the burden of persuasion is not required to move for directed verdict or make a similar motion in order to preserve its claim that it was entitled to prevail as a matter of law. *Peiffer v. Hoyt*, 339 Or 649 (2005). A "regulatory takings" claim was not ripe until "a final determination of all permissible uses of the property is made by the proper regulatory entity[.]" *Murray v. State of Oregon*, 203 Or App 377, 390 (2005). A trial court lacks jurisdiction to address a claim for attorney fees asserted after the underlying dispute became moot. *Crandon Capital Partners v. Shelk*, 202 Or App 537 (2005). Sending a demand letter by first class mail to the restaurant where plaintiff slipped and fell was insufficient to comply with the pre-litigation demand requirement of ORS 20.080, the Court of Appeals held in *Woods v. Carl Karcher Enterprises, Inc.*, 202 Or App 372 (2005), so a request for attorney fees was properly denied.

III.Miscellaneous.

ORS 31.175, which precludes uninsured drivers from recovering noneconomic damages for injuries sustained in an auto accident, does not deprive them of a remedy in violation of Article I, section 10 of the Oregon Constitution, nor does it deprive them of a right to have a jury decide their entitlement to noneconomic damages in violation of Article I, section 17. *Lawson v. Hoke*, 339

Please continue on next page

Recent Significant Cases

continued from page 38

Or 253 (2005). Oregon's "flat fee" highway tax, available to trucks hauling logs and other commodities as an alternative to the "weight/mile" tax that is paid by most trucks, does not violate the Commerce Clause. *American Trucking Assns., Inc. v. State of Oregon*, 339 Or 554 (2005). In *State v. Ciancanelli*, 339 Or 282 (2005), the Supreme Court adhered to the test adopted in *State v. Robertson*, 293 Or 402 (1982), in determining that live public sex shows involve free expression rights protected by Article I, section 8 of the Oregon Constitution. In *City of Nyssa v. Dufloth/Smith*, 339 Or 330 (2005), the Supreme Court held that a local ordinance requiring dancers to remain at least four feet away from the patrons of a nude dancing club restrained the dancers' freedom of expression in violation of Article I, section 8.

And in *Carey v. Lincoln Loan Co.*, 203 Or App 399 (2005), the Court of Appeals confirmed the validity of its own existence. Lincoln Loan argued that the Court of Appeals "has no legal existence" (*Id.* at 401) because (1) it was created by the legislature pursuant to Article VII (Amended) of the Oregon Constitution; and (2) that amendment is not part of the constitution because the procedures that led to its adoption in 1910 did not comply with the Oregon Constitution. Specifically, Lincoln Loan contended that F.W. Benson, who canvassed the votes in the1910 election as Secretary of State, and then proclaimed the election results as Governor, "was legally neither the Governor nor the Secretary of State." *Id.* at 403. The Court of Appeals found that Lincoln Loan "may be correct as to Benson's status *de jure*," but it concluded that Benson's actions were nonetheless valid as both Secretary of State and Governor *de facto*. *Id.* at 404. The court also found that the 1910 initiative petition proposing the adoption of Article VII (Amended) did not violate the "full text" or "separate vote" requirements of the Oregon Constitution. ❐

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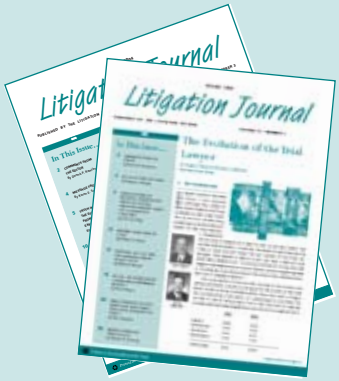

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