Oregon State Bar

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Carl Burnham Receives 2008 Owen M. Panner Professionalism Award

By Tim Helfrich

Carl Burnham of Ontario received this year's Owen M. Panner Professionalism Award. Judge Panner presented the award at the annual banquet of the Litigation Institute and Retreat at Skamania Lodge March 7, 2008. Judge Panner expressed particular pleasure on giving the award to an attorney from the farthest reaches of Eastern Oregon.

Carl was joined by his wife, Pat; their children, Carl Jr. and Barbara Smith, and four grandchildren.

Walter Grebe, a friend of Carl's since law school, praised him as someone who "fits the Owen Panner mold perfectly." Grebe recalled Carl's election to the Board of Bar Governors, his service as Vice President and his role in the creation of the Oregon Professional Liability Fund. Carl is a Fellow of the American College of Trial Lawyers and member of the American Board of Trial Advocates. He is a very good trial lawyer who never bends the rules, said Grebe, and "I would trust him with anything."

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FROM THE EDITOR

Direct vs. Cross-Examination: A Study in Contrast

By
Dennis Rawlinson
Miller Nash LLP

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

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

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

1. End strongly, start slowly.

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

In contrast, however, a cross-examination should usually not begin with a "zinger." Why? Because employing an initial "zinger" will alienate the cross-examination witness and make it impossible to draw from that witness helpful points to generally bolster your case (before turning to hostile questions and ending with a "zinger").

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

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

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

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

2. Indirection.

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

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

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Questions that could be asked to set up the indirection:

- You have more than 30 years of experience negotiating contracts, don't you?
- You've been highly successful in negotiating successful contracts over your career?
- You regularly hire lawyers to assist you in reviewing important documents?
- To the extent that you don't review important documents, you have someone on whom you can rely review them?
- You insist that important and crucial points that are discovered in documents are brought to your attention?
- It is this kind of detailed, cautious, and deliberate procedure that has led to your success?

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

3. Details first.

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

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

4. Scatter circumstantial evidence.

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

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

5. Short questions and short answers.

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

In contrast, allowing the adverse witness to launch into long answers and explanations will doom the cross-examination. The questions should be not only short, but also closed-ended to control and limit the adverse witness's response. By inching along and adding only one fact at a time, the examiner can control the adverse witness and give the adverse witness little room for argument and evasion.

6. Attention on the cross-examiner.

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

As with all rules, there are always exceptions. When in doubt, however, we may do well in cross-examination to simply conduct ourselves in a manner opposite to how we conduct ourselves in direct examination. ❒

Federal Arbitration Act Preempts Oregon Legislature's 2007 Amendment to Oregon Arbitration Act

By Caroline Harris Crowne of Tonkon Torp &
Julia E. Markley of Perkins Coie

A. Introduction

In 2007, the Oregon legislature imposed a restriction on certain kinds of arbitration agreements that flies in the face of U.S. Supreme Court case law. ORS 36.620(5), part of Oregon's version of the Revised Uniform Arbitration Act ("OUAA"), now requires that, in order for an arbitration agreement between an employer and employee to be valid, either the employer must give the employee two weeks' notice before the first day of employment that an arbitration agreement is required as a condition of employment or the arbitration agreement must be entered into upon a "subsequent bona fide advancement" of the employee. The U.S. Supreme Court has squarely held, however, that under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), States cannot single out arbitration agreements for restrictions not applicable to contracts generally. Thus, in any arbitration agreement governed by the FAA, the restrictions in ORS 36.620(5) are preempted and inapplicable.

Caroline Crowne

Julia Markley

B. Revised ORS 36.620 Imposes Restrictions on Employer-Employee Arbitration Contracts

ORS 36.620 is the provision of the OUAA that governs the validity of all types of agreements to arbitrate. Tracking section 6 of the Revised Uniform Arbitration Act, ORS 36.620(1) provides that agreements to arbitrate are "valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."

In 2007, the legislature added a new subsection to ORS 36.620 purporting to regulate agreements to arbitrate only in the employment context. New subsection 5 provides:

> A written arbitration agreement entered into between an employer and employee and otherwise valid under subsection (1) of this section is voidable and may not be enforced by a court unless:
>
> (a) The employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee's employment that an arbitration agreement is required as a condition of employment; or
>
> (b) The arbitration agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.

As this article goes to press, there have been no reported decisions construing ORS 36.620(5).

The 2007 amendment to ORS 36.620 was part of a bill (SB 248) that imposed these same restrictions—two weeks' notice before the first day of employment or at the time of a subsequent bona fide advancement—on noncompetition agreements between an employer and employee.[1] A noncompetition agreement that does not meet these restrictions is

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voidable. As a whole, SB 248 appears to be an employee-friendly attempt to regulate certain aspects of employment contracts.

C. The U.S. Supreme Court Struck Down Another State Law Restricting Agreements to Arbitrate in *Doctor's Associates, Inc. v. Casarotto*

The U.S. Supreme Court held that the FAA preempted a Montana statute that, like ORS 36.620(5), imposed a restriction on arbitration agreements not applicable to contracts generally. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996), the Court considered a Montana statute that provided: "Notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration."[2] The case involved an arbitration clause in a Subway sandwich shop franchise agreement. Applying this statute, the Montana Supreme Court held that the plaintiff franchisee was not bound to arbitrate with the defendant franchisor because the arbitration clause in their form contract was in ordinary type on the ninth page of the contract.

The U.S. Supreme Court reversed, holding that the Montana statute conflicted with the FAA. Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[3] The Court reasoned that the Montana statute ran afoul of the FAA because it restricted the enforceability of arbitration agreements by creating a special notice requirement not applicable to contracts generally.[4]

Since the Supreme Court's decision in *Casarotto*, lower courts have held that other state laws designed to ensure that the parties have knowingly and voluntarily consented to arbitration are similarly preempted. For example, an Iowa statute that provided generally for the enforcement of agreements to arbitrate made an exception for contracts of adhesion, and the Iowa Supreme Court held that it was preempted by the FAA.[5] A Tennessee statute prohibited the enforcement of arbitration clauses in residential construction contracts unless the clause was separately signed or initialed by the parties, and an appeals court held that the statute was preempted.[6] A Texas law required that arbitration clauses in consumer contracts for $50,000 or less be signed by the consumer's attorney, and a Texas court concluded that the statute was preempted.[7]

Oregon's new restrictions on arbitration clauses in the employment context are indistinguishable from the restrictions in *Casarotto* and these other cases. They are "limitations placed specifically and solely on arbitration provisions."[8] Thus, the amendment to Oregon's arbitration laws is likely preempted by the FAA.

D. The Supremacy of Federal Arbitration Law and the Commerce Clause

The preemption doctrine applied in *Casarotto* dates back to the U.S. Supreme Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). That case involved a franchise agreement for 7-Eleven convenience stores that contained an arbitration clause. The California Supreme Court interpreted the California Franchise Investment Law as barring arbitration of claims made under that statute. In *Southland*, for the first time, the U.S. Supreme Court held that FAA § 2 applies in state courts and preempts contrary state law. Prior to that decision, the FAA had only been applied in federal courts. The underlying rationale of *Southland* is that the FAA creates a national policy favoring arbitration and preempts any state law that applies more stringent enforcement standards to an arbitration agreement than it does to other types of contracts. State courts may invalidate arbitration clauses only "upon such grounds as exist at law or in equity for the revocation of any contract."[9]

The Supreme Court continued to build its FAA preemption doctrine in *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995), in which it held that an Alabama statute making pre-dispute arbitration clauses unenforceable was preempted. The Court focused on the scope of FAA § 2, which applies to arbitration agreements in "any maritime transaction or a contract evidencing a transaction involving commerce." The arbitration clause in *Allied-Bruce* was in a contract between a local franchisee of a multistate pest control company and a homeowner. The Court noted that the franchise was part of a multistate business and that the materials used in performing the pest control services came from outside the state.[10] The Court held that the contract affected interstate commerce, reasoning that Congress intended the FAA to reach the full extent of its power under the Commerce Clause of the U.S. Constitution.[11] The consequence of this holding is that the vast majority of arbitration agreements will be subject to the FAA.

Some arbitration clauses in employment agreements may nevertheless fall outside the reach of the FAA. Forty years before *Allied-Bruce*, the U.S. Supreme Court held in *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956), that an employment agreement with an arbitration clause did not involve interstate commerce. Without providing any factual detail, the Court observed that there was no showing that the employee "while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce."[12] To the extent that an em-

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ployment agreement in Oregon does not "affect" interstate commerce, then an arbitration clause in that agreement would not be governed by the FAA. In light of *Allied-Blue* and current interpretations of the Commerce Clause, however, most Oregon employment agreements will involve interstate commerce. Additionally, the FAA expressly excludes from its coverage contracts of employment for workers engaged in foreign or interstate transportation.[13] The restrictions in ORS 36.620 on arbitration agreements in the employment setting therefore remain in force in these limited categories of cases.[14]

It should be noted that while the preemptive effect of FAA § 2 is well established, it is less clear whether other sections of the FAA preempt state arbitration laws. The FAA deals with a number of procedural issues such as motions to compel arbitration and stay court action, the power of arbitrators to issue subpoenas, and petitions to enforce, modify, or vacate arbitral awards. In a recent decision dealing with the grounds for judicial review of arbitral awards, the U.S. Supreme Court commented that its interpretation of sections 10 and 11 of the FAA may not preclude state courts from allowing different standards of review under state arbitration law: "The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."[15]

The Ninth Circuit has taken an aggressive view of FAA preemption in some cases. For example, in *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001), the Ninth Circuit considered a franchise agreement with an arbitration clause that provided for a particular venue. California law prohibited out-of-state venue clauses in franchise agreements. The Ninth Circuit held that the state law was preempted by the FAA because the state law applied to a limited category of contracts—franchise agreements—and therefore was not a state law applicable to "any contract" under 9 U.S.C. § 2.[16]

Following the Ninth Circuit's reasoning, the District Court for the Northern District of California concluded that state laws regulating arbitration are entirely preempted because they apply specifically to arbitration agreements, not all contracts; such laws would only have force if parties chose to be bound by them in their agreements.[17]

There are signs, however, that the Ninth Circuit may be moderating its view. In a case decided this year, *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008), the court considered a class action waiver in an arbitration clause. Under Washington law the waiver was unconscionable, making the arbitration clause unenforceable. The Ninth Circuit held that the FAA did not preempt Washington law in this case, explaining that the FAA requires that states put arbitration and other forms of dispute resolution on an "equal footing."[18] Giving effect to a class action waiver in an arbitration clause, when such a waiver would not be enforceable in a contract without an arbitration clause, would contravene the FAA. "The FAA proscribes states from giving arbitration special treatment, whether it be positive or negative."[19]

E. Is There Any Role Left for State Arbitration Law?

The preemptive scope of the FAA is broad, but there is still a place for Oregon and other states' arbitration laws. Examples include: (1) where state arbitration law acts as a "gap-filler" to the FAA; (2) where the FAA provides rules for federal courts without preempting different state court rules; and (3) where parties expressly contract for state law to apply.

First, Oregon and other states' arbitration laws can complement the FAA on aspects of arbitration on which the FAA is silent. The model Revised Uniform Arbitration Act, much of which Oregon has adopted as the OUAA, is intended to do just that. For example, the OUAA has several provisions specific to arbitration procedure.[20] The OUAA also has several provisions governing arbitrator ethics.[21]

Second, as noted earlier, the U.S. Supreme Court has not ruled yet on whether sections of the FAA other than section 2 preempt contrary state law. Some courts have held that on matters of court procedure, the FAA does not preempt state law.[22] The Oregon Court of Appeals took a stand on this issue in *Bush v. Paragon Property, Inc.*, 165 Or. App. 700, 702-10, 997 P.2d 882 (2000) (en banc), holding that the appeal provisions of FAA § 16 do not apply in Oregon state court. Oregon subsequently adopted the Revised Uniform Arbitration Act, bringing Oregon law into alignment with FAA § 16. Nevertheless, *Bush* proclaims an important role for the OUAA in state court actions relating to arbitration agreements. "Congress cannot, in the exercise of an Article I power, interfere with the authority of states to determine the structure of their own political systems."[23]

Finally, several U.S. Supreme Court cases state that parties might be able to contract around FAA preemption by providing that state law will apply.[24] A run-of-the-mill Oregon choice-of-law clause will not be enough to invoke the OUAA over the FAA.[25] A party that wants to contract out of the FAA must be explicit in choosing Oregon arbitration law. And even that may not be enough to invoke substantive portions of Oregon arbitration law.[26]

What is clear, however, is that for agreements subject to the FAA, new ORS 36.620(5) is not likely to survive a preemption challenge. ❐

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Endnotes

1 *See* ORS 653.295 (codifying that portion of SB 248).

2 517 U.S. at 684.

3 9 U.S.C. § 2.

4 *Casarotto*, 517 U.S. at 688.

5 *Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816, 818 (Iowa 2002).

6 *Hubert v. Turnberry Homes, LLC*, No. M2005-00955-COA-R3-CV, 2006 WL 2843449, at *6 (Tenn. Ct. App. Oct. 4, 2006).

7 *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 721 (Tex. App. 1997).

8 517 U.S. at 688.

9 9 U.S.C. § 2.

10 513 U.S. at 282

11 *Id.* at 273-74.

12 350 U.S. at 201.

13 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001).

14 Arbitration of disputes arising under collective bargaining agreements is governed by a different federal law, the 1947 Taft-Hartley Act (29 U.S.C. §§ 141-197). *Textile Workers Union v. Lincoln Mill.*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957).

15 *Hall Street Assocs. L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (U.S. 2008).

16 *See also Ting v. AT&T*, 319 F.3d 1126, 1147-48 (9th Cir. 2003) (holding that California Consumer Legal Remedies Act's statute of limitations and prohibition on waiver of class action right were preempted by FAA § 2 because they applied to consumer contracts and rental agreements, not all contracts).

17 *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1112-15, *order amended*, 260 F. Supp. 2d 979 (N.D. Cal. 2003) (arbitration disclosure and disqualification standards preempted); *but cf. Jevne v. Superior Court*, 6 Cal. Rptr. 3d 542, 547-48, 551-52 (Cal. Ct. App. 2003) (holding that same standards were *not* preempted), *aff'd*, 28 Cal. Rptr. 3d 685 (Cal. 2005).

18 *Id.* at 1222.

19 *Id.*

20 *See, e.g.*, ORS 36.630 (authorizing arbitrator to order provisional remedies); ORS 36.635 (providing procedure for initiation of arbitration); ORS 36.640 (providing procedure for consolidation of separate arbitration proceedings); ORS 36.690 (authorizing arbitration to modify or correct award).

21 *See, e.g.*, ORS 36.650 (requiring arbitrators to make certain disclosures to parties); ORS 36.660 (providing for arbitrator immunity).

22 *Gueyffier v. Ann Summers, Ltd.*, 50 Cal. Rptr. 3d 294, 300 (Cal. App. 2006), *rev. granted* 150 P.3d 693, 53 Cal. Rptr. 3d 802 (2007) (FAA § 10 does not preempt California vacatur standards); *Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846-47 (Ky. 1984) (time limit for motion to vacate under FAA § 12 does not apply in state court); *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 629 (Md. 2001) (state appellate procedure not preempted by FAA § 16).

23 148 Or. App. at 707.

24 *Hall Street*, 128 S. Ct. at 1405-06; *Volt Info. Scs., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

25 *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (despite contractual provision that entire agreement shall be governed by New York law, FAA preempted New York rule prohibiting arbitrators from awarding punitive damages).

26 *See Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 341 Or. 321, 330-31, 142 P.3d 1044 (2006) (holding that contract clause providing that Oregon arbitration law applied to "any arbitration hearings" failed to invoke Oregon substantive law on arbitration).

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Managing Editor
Dennis P. Rawlinson
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Oregon Condemnation Procedure *Revisited*

By Mark J. Fucile
Fucile & Reising LLP

Condemnation procedure in Oregon varies significantly in key respects from other civil actions.[1] At the same time, for many years following the adoption of the General Condemnation Procedure Act in 1971[2] condemnation procedure was static. The past decade, however, has seen major changes in several central elements of condemnation procedure. This article outlines the unique facets of condemnation cases from the prefiling stage through trial and highlights the recent changes for the general practitioner who handles an occasional condemnation case.

There are two principal statutory sources of condemnation procedure applicable to public agencies[3] in Oregon.

The first is ORS Chapter 35, which creates the basic procedural framework governing condemnation cases. It is important to note at the outset that ORS Chapter 35 governs *direct* condemnation actions—where the government acts affirmatively under the power of eminent domain to acquire property. *Inverse* condemnation, by contrast, occurs when the government has taken property without invoking the power of eminent domain and the property owner affected brings an action against the government to recover compensation. Inverse condemnation actions in state court are governed solely by the Oregon Rules of Civil Procedure and not the specialized procedures applicable to direct condemnations. *See generally Suess Builders v. City of Beaverton*, 294 Or 254, 656 P2d 306 (1982) (discussing inverse condemnation procedure); *accord Butchart v. Baker County*, 214 Or App 61, 75-76, 166 P3d 537 (2007).

The second is the portion of the federal Uniform Relocation Assistance and Real Property Acquisition Policy Act dealing with land acquisition, which is found at 42 USC §§ 4651-52[4] and which has been adopted as "guidance" for Oregon public agencies in their property acquisitions by ORS 35.510(3).[5] Neither the federal nor the state land acquisition policy provisions, however, create rights enforceable against a public agency in a condemnation action. *See State Dept. of Trans. v. Hewett Professional Group*, 321 Or 118, 129, 895 P2d 755 (1995).

Prefiling Procedure

When it becomes apparent during the planning of a public project that an agency will need to acquire property for the project, the public agency involved will typically commission a survey to create a specific legal description, possibly an environmental assessment and a title search to identify the owner and other interest holders.

The Legislature in 2003 adopted a significant clarification to a public agency's ability to temporarily enter property during the prefiling phase to perform both surveys and environmental testing. Although some agencies had at least survey rights before the change, the ability to conduct invasive environmental testing under the prior survey and inspection provisions was less clear. Because a property's environmental condition is relevant to compensation under Oregon

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substantive valuation law (*see ODOT v. Hughes*, 162 Or App 414, 419-20, 986 P2d 700 (1999)) and might affect an agency's decision even to proceed with an acquisition, the Legislature created an expedited procedure, codified at ORS 35.220, for agencies to conduct testing with a property owner's consent or over the property owner's objection with a court order.[6] ORS 35.220 also creates a compensation mechanism to reimburse an owner for physical damage to the property caused by the testing or other substantial interference with the owner's use of the property. Compensable damage under ORS 35.220(3)(a) also includes "any damage attributable to the diffusion of hazardous substances found on the property[.]"

After the property needed has been identified and the owner located, the public agency must satisfy a number of procedural prerequisites before it can file a condemnation complaint.

First, under ORS 35.235(1)-(2) and *Highway Com. v. Hurliman*, 230 Or 98, 113, 368 P2d 724 (1962), the public agency's governing body must adopt a resolution or ordinance authorizing the acquisition of the property concerned before moving forward with a condemnation action. The resolution must declare generally that there is a need to acquire the property involved for a public project that the public agency is authorized to carry out. The public agency's resolution is "presumptive evidence of the public necessity of the proposed use, that the property is necessary therefor and that the proposed use, improvement or project is planned or located in a manner which will be most compatible with the greatest public good and the least private injury." ORS 35.235(2). The public agency need not, however, have obtained all of the necessary land use permits required for the project before adopting its resolution or moving forward with condemnation. *See ODOT v. Schrock Farms*, 140 Or App 140, 144-46, 914 P2d 1116, *rev den*, 324 Or 176 (1996); *Powder Valley Water Control District v. Hart Estate Investment Company*, 146 Or App 327, 332, 932 P2d 101 (1997).

After the property needed has been identified and the owner located, the public agency must satisfy a number of procedural prerequisites before it can file a condemnation complaint.

Second, under ORS 35.346(2), the public agency must appraise the property it plans to acquire before beginning negotiations with the owner. Under ORS 35.346(3), the public agency's appraiser must generally inspect the property and must provide the owner with at least 15 days' advance written notice of the inspection and the opportunity to accompany the appraiser on the inspection.

Third, under ORS 35.235(1), the public agency must attempt to acquire the property through negotiations before pursuing litigation. *See generally State Hwy. Comm. v. Freeman*, 11 Or App 513, 519-20, 504 P2d 133 (1972). ORS 35.346(2), in turn, generally prevents an agency from offering the property owner anything less than the agency's appraised value.

Fourth, ORS 35.346(1) requires the public agency to make a written offer to the property owner at least 40 days before filing a condemnation complaint. *See also Urban Renewal Agency v. Caughell*, 35 Or App 145, 148, 581 P2d 98 (1978) (noting that the offer under ORS 35.346(1) is a condition precedent to filing a condemnation complaint); *Dept. of Trans. v. Pilothouse 60 LLC*, ___ Or App ___, ___ P3d ___, 2008 WL 2120529 at *5 (May 21, 2008).[7] Under ORS 35.346(2), the public agency's initial written offer must be "accompanied by any written appraisal upon which the condemner relied in establishing the amount of compensation offered" if the amount involved is $20,000 or more. If it is less, then the agency is simply required to provide the owner with a written explanation of how it arrived at the compensation offered. In either event, the public agency must leave the initial written offer open for at least 40 days under ORS 35.346(4).[8]

Initial Pleadings and Early Possession

Under ORS 35.245(1), all condemnation actions—regardless of the amount involved—are generally handled in circuit court. If the amount involved is $20,000 or less, however, the owner may elect to have the compensation determined by court-sponsored binding arbitration under ORS 35.346(6)(a)-(b). If the amount at issue is between $20,000 and $50,000, then the owner may elect court-sponsored nonbinding arbitration under ORS 35.346(6)(c).

Venue under ORS 35.245(1) lies in the county where the property—or the greatest portion of it—is located.

ORS 35.245 and ORS 35.255 outline the elements the public agency must include in its complaint. The express statutory requirements include only a description of the property, a statement of ownership, the amount alleged to be the value of the property taken and any associated severance damages to the defendant's remaining property from the taking. *See generally Powder Valley Wa-*

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ter Control District v. Hart Estate Investment Company, 146 Or App at 330-32. In practice, however, public agencies usually also include a general description of the project for which the property is being acquired, the statutory authority for the taking, a reference to the condemnation resolution and an allegation that the agency has attempted to negotiate with the owner before filing the complaint. ORS 35.245(2) permits the public agency to join any person claiming an interest in the property as a defendant.

Of special note, in 1997 the Legislature amended ORS 35.346 to make it very difficult to reduce the agency's allegation of the compensation by later amendment of the complaint.[9] Under ORS 35.346(2), any such amendment must be by court order entered not later than 60 days before trial. Further, the court must find by clear and convincing evidence that the appraisal upon which the agency's original offer was based "was the result of a mistake of material fact that was not known and could not reasonably have been known at the time of the original appraisal or was based on a mistake of law." *Id.*

ORS 35.295 governs the matters that must be included in a defendant's response. If a defendant has a legal defense to the taking, it must be raised by either a motion to dismiss or an affirmative defense. Defenses to the taking, which in practice are rare, usually focus on defects in the public agency's prefiling procedures or the public agency's need for the property. On this last point, a property owner challenging a public agency's need for the property must show that the agency abused its discretion. *See generally Wiard Memorial Park Dist. v. Wiard Community Pool*, 183 Or App 448, 452-58, 52 P3d 1080, *rev den*, 335 Or 114 (2002) (discussing the abuse of discretion standard in condemnation); *accord Emerald PUD v. PacifiCorp*, 100 Or App 79, 83-87, 784 P2d 1112, *on reh'g*, 101 Or App 48, 788 P2d 1034, *rev den*, 310 Or 121 (1990). Measure 39, adopted by the voters in 2006 and codified as to condemnation authority at 35.015, also imposes substantive limitations on the acquisition of some forms of property for subsequent conveyance to other private parties. The defendant's answer must also allege the value of the property being taken and any associated damages to the defendant's remaining property as a result of the taking.

Defenses to the taking, which in practice are rare, usually focus on defects in the public agency's prefiling procedures or the public agency's need for the property.

If applicable, a property owner may also bring related counterclaims against the public agency within the context of the condemnation case. *See State ex rel Nagel v. Crookham*, 297 Or 20, 22-24, 680 P2d 652 (1984). In *Nagel*, for example, the property owners asserted by way of a counterclaim that the value of their property had been diminished—or "blighted"—by the eight-year delay between the time that the public agency had initially announced its project and the point the agency actually filed its condemnation action.

In many instances, a public agency may wish to obtain possession of the property before the eventual trial on valuation so that its project can go forward in the interim. If so, it must deposit the alleged value of the property into the court under ORS 35.265. In 2005, the Legislature adopted a significant clarification on the method for acquiring early or "immediate" possession. ORS 35.265 is silent on whether simply depositing the alleged value of the property was, in and of itself, sufficient to entitle the public agency to possession without a court order, and practices varied among agencies in this regard.[10] Under the change enacted in 2005 and codified at ORS 35.352,[11] a public agency is now permitted to simply serve a notice on the defendants of its intent to take immediate possession (subject to the deposit requirement). At that point, the defendants have 10 days to file a written objection. The grounds for objection, however, are narrow: (1) whether the condemnation is "legal"; and (2) whether the agency has "acted in bad faith, engaged in fraud or engaged in an abuse of discretion under a delegated authority." If no objection is made, the public agency can simply apply for an order granting possession. If an objection is made, the court is to consider it "expeditiously." In either event, a defendant is not precluded from asserting legal defenses to the taking in its answer for separate resolution by the court under ORS 35.295. If early possession is sought and allowed, the property owner may withdraw the public agency's deposit under ORS 35.285 without prejudice to any later argument the owner may make on value.

Discovery

Discovery in condemnation cases is, at one and the same time, more confined than a typical commercial case and more expansive.

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It is more confined in the sense that the focus of most condemnation cases (absent a challenge to the taking itself) is solely on valuation. Discovery, therefore, typically involves an investigation of the possible uses of the property, the owner's plans for the property, any environmental or other permitting issues affecting the property and past sales or efforts to sell the property. Under a limited exception to OEC 701, a noncorporate owner of property can generally offer an opinion on the property's value. *Highway Com. v. Assembly of God*, 230 Or 167, 177, 368 P2d 937 (1962); *Dept. of Transportation v. El Dorado Properties*, 157 Or App 624, 636-38, 971 P2d 481 (1998); *see also Northwest Natural Gas Co. v. Shirazi*, 214 Or App 113, 120, 162 P3d 367, *rev den*, 343 Or 223 (2007) (allowing an owner of a nearby parcel to testify about the value of his property). Public agencies, therefore, often take property owners' depositions on this point.

Discovery is more expansive than in a typical commercial case because the parties are now required to exchange appraisal reports before trial. Until 1997, there was generally no expert discovery in Oregon condemnation cases—just as in other civil cases. *See Brink v. Multnomah County*, 224 Or 507, 516-18, 356 P2d 536 (1960) (cloaking appraisal reports within the attorney-client privilege); *City of Portland v. Nudelman*, 45 Or App 425, 432-34, 608 P2d 1190, *rev den*, 289 Or 275 (1980) (noting that the work product rule would protect appraisal reports prepared in anticipation of litigation). Because expert appraisal testimony is usually *the* key element of a condemnation trial, the limitation on expert discovery gave the phrase "trial by ambush" real meaning in a condemnation case.

In 1997, however, the Legislature brought expert discovery to Oregon condemnation cases.[12] Under revisions to ORS 35.346, the parties to a condemnation case are now required to disclose appraisal reports at three distinct points:

Discovery is more expansive than in a typical commercial case because the parties are now required to exchange appraisal reports before trial.

- As noted earlier, the public agency's prelitigation offer in acquisitions valued at $20,000 or more must be accompanied under ORS 35.346(2) by the appraisal report upon which the agency based its offer.
- If the property owner rejects the agency's offer and the acquisition moves into litigation, the property owner must provide the agency with its appraisal report at least 60 days before trial or arbitration under ORS 35.346(4).
- If a case proceeds to trial, ORS 35.346(5)(b) requires each side to provide the other with all other appraisal reports obtained "as part of the condemnation action"—whether they will be used at trial or not.

The penalty under ORS 35.346(5)(a) for the failure to follow these exchange requirements is that the appraisal involved cannot be used at trial. In *Dept. of Trans. v. Stallcup*, 341 Or 93, 138 P3d 9 (2006), the Supreme Court held that the appraisal exchange requirement only applies to completed reports, not drafts. However, under ORS 35.346(8), if an appraisal "relies on a written report, opinion or estimate of a person who is not an appraiser, a copy of the written report, opinion or estimate must be provided with the appraisal" and if an appraisal "relies on an unwritten report, opinion or estimate of a person who is not an appraiser, the party providing the appraisal must also provide the name and address of the person who provided the unwritten report, opinion or estimate."

Trial

Several facets of condemnation procedure vary significantly from other civil cases at trial.

First, ORS 35.235 and the Court of Appeals' decision in *Emerald PUD v. PacifiCorp*, 100 Or App 79, in effect bifurcate the trial if the defendant challenges the public agency's right to take the property concerned. In that event, the trial court determines the issue of the right to take in a preliminary evidentiary proceeding. As noted earlier, under ORS 35.352(6) this preliminary hearing may—but not necessarily—coincide with any hearing on early possession. If the public agency prevails on the right to take, then the question of value is reserved for the jury under ORS 35.305(1).

Second, under ORS 35.305(2), neither party bears the burden of proof on the issue of value. *See Unified Sewerage Agency v. Duyck*, 33 Or App 375, 378, 576 P2d 816 (1978).

Third, because neither party bears the burden of proof on value, the defendant can elect under ORS 35.305(1)

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to proceed first with the presentation of evidence during the valuation phase and can present both opening statement and closing argument first as well. This election, however, must be made at least seven days prior to trial.

Fourth, ORS 35.315 permits either side to request a jury view of the property involved. If requested, the view is mandatory. The jury view typically follows opening statements.

Fifth, ORS 35.346(7)(a) provides for a defendant's recovery of both attorney and expert witness fees (including appraisal costs) if the amount awarded at trial exceeds the public agency's initial written offer. Litigation cost recovery under ORS 35.346(7)(a) is not reciprocal; rather, it only runs in favor of a prevailing property owner. Litigation cost recovery in condemnation was altered in a major way by Measure 39, adopted by the voters in 2006 now codified as to fee awards at ORS 35.346(7)(a). Before that change, the trigger for fee recovery was whether the jury awarded the property owner more than the public agency's highest written offer made at least 30 days before trial. *See* 2007 Or Laws, ch 1, § 4(7)(a). Again before the change in 2006, initial offers were typically less than "30-day" offers for a variety of reasons, including the fact that they were made without the benefit of seeing the property owner's appraisal and were not influenced by the dynamics of a looming trial date. As noted, Measure 39 moved the trigger for litigation cost recovery from near the end of the condemnation process to the beginning. It is not yet possible to accurately gauge the ultimate practical impact of this amendment, but ironically this change returns the cost recovery mechanism to what it was for the state's principal condemner, the State Highway Commission (which is the predecessor to today's Department of Transportation), before the General Condemnation Procedure Act was adopted in 1971. *See Highway Comm. v. Helliwell*, 225 Or 588, 590, 358 P2d 719 (1961) (interpreting former ORS 366.380(9)); *Highway Comm. v. Lytle*, 234 Or 188, 190, 380 P2d 811 (1963) (same).

As noted, Measure 39 moved the trigger for litigation cost recovery from near the end of the condemnation process to the beginning.

Finally, once the jury has determined the overall compensation the public agency must pay as a result of the taking, any disputes among the defendants concerning their respective shares of the overall award are determined by the court in a supplemental proceeding under ORS 35.285(1). *See Dept. of Transportation v. Weston Investment Co.*, 134 Or App 467, 473-75, 896 P2d 3 (1995). ❒

Endnotes

1 Federal condemnation procedure is regulated by Federal Rule of Civil Procedure 71.1.

2 1971 Or Laws, ch 741.

3 Some private corporations, such as utilities and railroads, have also been given condemnation authority by statute. The procedures applicable to private condemners are generally similar to, but not precisely the same as, those governing public condemners. *See, e.g.,* ORS 35.235(3) (effect of condemnation resolutions) and ORS 35.275 (early possession requirements). Except as noted, this article focuses on procedures applicable to public condemners.

4 The federal statutes are supplemented by corresponding regulations at 49 CFR § 24.101, *et seq*.

5 ORS 35.510(3) was formerly found at ORS 281.060(3). The Legislature in 2003 incorporated several sections of ORS Chapter 281, which dealt with other facets of governmental property acquisition, into ORS Chapter 35. *See* 2003 Or Laws, ch 534, § 1.

6 2003 Or Laws, ch 477, § 2.

7 Owners and others having possessory interests in the property involved may also be eligible for relocation benefits and other related assistance under 42 USC § 4601, *et seq.*, and ORS 35.500, *et seq*.

8 ORS Chapter 35 formerly contained a "20-day" pre-filing offer requirement. *See* 2003 Or Laws, ch 476, § 1. The Court of Appeals held in *Urban Renewal Agency of Salem v. Caughell*, 35 Or App at 148 that the "20-day offer" requirement was waived if the property owner did not object in the initial response. Since 1978, however, the Legislature also added a requirement that a public agency generally provide an appraisal along with its initial written offer. *See* 1997 Or Laws, ch 797, § 1, codified at ORS 35.346(2). *Caughell*'s conclusion that the prefiling offer requirement is waived if not raised in the initial response has not been revisited since the Legislature revised both the timing and content of the initial offer. *Pilothouse 60* does not address this issue as the property owners raised the lack of an offer in their answer, which led to the dismissal of the state's action.

9 See 1997 Or Laws, ch 797 § 1.

10 In *Harder v. Dept. of Fin. and Admin.*, 1 Or App 26, 27-29, 458 P2d 947 (1969), the Court of Appeals noted that due process requires a hearing and judicial approval of early possession at least in those cases where the party in possession of the property refuses to vacate.

11 *See* 2005 Or Laws, ch 565.

12 *See* 1997 Or Laws, ch 797, § 1.

Legal Issues Involving Video Depositions Revisited

By David B. Markowitz and Lynn R. Nakamoto
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Back in 2001, we prepared an article for the *Litigation Journal* summarizing then-current law governing the taking of video depositions in Oregon state and federal courts. Since then, the federal rule citations have slightly changed, so we are taking the opportunity to revisit some of the rules and developments in the taxation of costs relating to video depositions in federal actions, including a ruling last year from the District of Oregon.

The general right to videotape.

In state court, the rules are unchanged. Under ORCP 39 D(2), a deposition is recorded stenographically, or else a party "shall designate the manner of recording and preserving the deposition" in the notice if "by other than stenographic means." ORCP 39 C(4). By doing so, a party has a right to videotape the deposition. *State ex rel Anderson v. Miller*, 320 Or 316, 318-19, 882 P2d 1109 (1994). For cause, the right may be curtailed. *See* ORCP 39 C(4) (for accuracy); ORCP 36 C (protective order); ORCP 39 E (judicial control once the deposition has begun).

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In federal court, the numbering and wording of the provisions within FRCP 30 relating to video recordings has changed somewhat, but their substance remains the same. Pursuant to FRCP 30(b)(3), a party "must state in the notice the method for recording the testimony," and "[u]nless the court orders otherwise, a deposition may be recorded by audio, audiovisual, or stenographic means." As in Oregon courts, a party in federal court may seek a protective order pursuant to FRCP 26(c) or FRCP 30(d)(3).

Opportunities for multiple means of recording the deposition.

If recording only by non-stenographic means is noticed, ORCP 39 D(2) allows another party or the deponent to have a transcript made upon its request and "payment of the reasonable charges therefor." FRCP 30(b)(3)(A) provides that "[a]ny party may arrange to transcribe a deposition," and FRCP 30(b)(3)(B) provides that another party may designate an additional means of recording the deposition and bears the expense "unless the court orders otherwise."

Recovery of videotaped deposition expenses as a taxable cost.

No recovery of deposition costs remains the rule in Oregon under ORCP 68. On the federal side, though, more courts have weighed in on the issue of whether expenses related to videotaping a deposition may be awarded as costs under 28 U.S.C. § 1920(2). Section 1920(2) allows costs to be taxed for "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."

Though the Ninth Circuit has not yet addressed the issue, the District of Oregon ruled on it last year. In *Nederhiser v. Foxworth*, No. CV 05-787-KI, 2007 WL 1378602 (D. Or. May 7, 2007), the defendants sought costs for both stenographic deposition transcripts and for videotaping the deposition of the plaintiff. *Id.* at *2. The district court recognized that several courts have awarded costs for

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both videotaping and the transcript. The threshold for an award of such costs in the District of Oregon, however, is a showing that "both are reasonably necessary for the litigation." *Id.* The district court ruled that the defendants' justification for videotaping as well as stenographically recording the plaintiff's deposition—the defense plan to use video excerpts at trial and the transcript for summary judgment—was insufficient. *Id.* The district court concluded that "something more is needed beyond convenience or duplication to ensure alternative methods of presenting materials at trial." *Id.* (quotation and citation omitted). The Fourth Circuit also permits the cost of either a stenographic transcript or videotaping a deposition to be taxed as a cost, but not both, in the absence of a showing that both were necessarily obtained for use in the case. *See Cherry v. Champion Intern. Corp.*, 186 F.3d 442, 449 (4th Cir. 1999).

The *Nederhiser* ruling falls between the circuit decision that disallows videotaping as a cost, *see Mota v. The University of Texas Houston Health Science Center*, 261 F.3d 512, 529-30 (5th Cir. 2001) (§ 1920 should be strictly construed; it has no provision for videotapes of depositions), and the holdings of the majority of circuits to speak on the issue, which generally allow costs for both videotaping and stenographic transcripts. *E.g.*, *Morrison v. Reichhold Chemicals, Inc.*, 97 F.3d 460 (11th Cir. 1996).

In *Morrison*, the Eleventh Circuit read § 1920 in light of FRCP 30, which permits video and dual recording, and discussed the issue in detail in a case that was tried to a jury. The court held that "when a party notices a deposition to be recorded by non-stenographic means, or by both stenographic and non-stenographic means, and no objection is raised at that time by the other party to the method of recordation," then it is appropriate to tax "the cost of conducting the deposition in the manner noticed." *Id.* at 465. The court reasoned that a stenographic transcript is not obtained merely for the convenience of counsel because of the rule requiring that designations of deposition testimony to be presented at trial include a transcript of pertinent portions of the deposition if not taken stenographically, now FRCP 26(a)(3)(A)(ii), and the rule that a party must provide a transcript of any deposition testimony offered at trial, FRCP 32(c). *Id.* at 465 n.5.

Three other circuits have agreed with the Eleventh Circuit. *See Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1478 (10th Cir. 1997) ("in most cases, a stenographic transcript of a videotaped deposition will be 'necessarily obtained for use in the case'" as required by § 1920); *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 419-20 (6th Cir. 2005) (approving *Tilton* and holding the district court did not abuse its discretion in awarding costs for transcripts plus "charges for video services, rough disc, interactive real-time, video tapes, and the synchronization of the video and deposition transcripts"); *Little v. Mitsubishi Motors North America, Inc.*, 514 F.3d 699, 701-02 (7th Cir. 2008) (given that Rule 30 does not now require a party to arrange for a transcript "at its own expense" when the deposition is recorded by non-stenographic means, expenses for both can be taxed as costs).

The district court in *Nederhiser* referred to case law from all of the circuits noted above. However, the court did not discuss and reject the reasoning from the cases expressing the current majority rule. The result also apparently turned on the extent of the explanation offered for the necessity of both videotaping and a transcript. And, the cost bill in *Nederhiser* was not submitted after a trial, where the videotapes were actually used to present evidence. For these reasons, it appears possible for prevailing litigants to expand on the *Nederhiser* ruling and recover costs for videotaping depositions given the right case. ❒

Oregon State Bar

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Take me out to the ballgame… and the courthouse

By Brian Campf
Brian S. Campf PC

"History is the essence of innumerable biographies," wrote historian and essayist Thomas Carlyle (1795-1881). What follows is another contribution, a brief biography of William Wallace McCredie. Life teaches lessons, and here are three from his: follow your dreams; engage in public service; and don't provoke your family into suing you.

William Wallace—"W.W."—was born in Montrose, Pennsylvania in 1862. His father, a Union army officer, was killed at Gettysburg. The Washington Post described W.W. as a "former professional [baseball] player" who in his early days "was considered one of the best curve pitchers in the West and was regarded as of major league timber."

He moved to Portland, Oregon in 1890. W.W. practiced law in nearby Vancouver, Washington. Aspiring for more, W.W. served one term as a prosecuting attorney in Clark County, Washington; one term and part of another as a superior court judge in Vancouver; and he became a representative for Washington State in the U.S. Congress.

At the end of 1904, W.W. rekindled his passion for baseball when he bought Portland's professional baseball team (which became known as the Beavers) with his nephew, Walter. With Walter as its manager, the Portland club won Pacific Coast League ("PCL") pennants in 1906, 1910, 1911, 1913, and 1914.

The McCredies made Portland baseball a family affair. Bill Rodgers, Portland's second baseman from 1911-14 and 1916-17, explained, "[t]he judge was president; Walter was manager; Hugh McCredie, Walter's first cousin, was business manager; and Alice, the judge's wife, sold the tickets and handled the cash money at the gate. The judge and Walter were absolute owners of the club. It was a 50-50 partnership, one of the best and soundest baseball organizations ever operated."

In 1906, the Beavers captured the McCredies' first pennant with a 115-60 record. The season almost stalled following the 1906 San Francisco earthquake and fire. However, W.W. knew how to protect his investment; he personally came to the financial aid of the league to guarantee transportation costs for PCL ball clubs for the full season. He even reached into his own bank account to help one failing club.

W.W. shrewdly backed not only the Class A Beavers, but also Portland entries in the Class B Northwestern League (1909, 1911-14). In addition to offering local baseball every day in Portland, these farm clubs provided the Beavers with a stream of talent that included future Hall of Famer Dave Bancroft.

The McCredies welcomed the 1912 season with a refurbished stadium, called Vaughn Street Park. The stadium, which was reportedly the finest minor league ballpark of its time, featured individual

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theater seats in the grandstand instead of benches. W.W.'s business plan was to make money through ticket sales, give each fan a comfortable seat with legroom, and sell concessions as cheaply as possible, even if the team made no money from it.

Great teams eventually fade, and so did the Beavers. The fans and the owners grew tired of a string of losing seasons. In July 1921, W.W. announced, "new blood, not only in the club, but in management would be gratifying to many Portland fans." The McCredies sold the Beavers. Walter stepped aside as manager after the season ended.

Afterward, Walter dabbled in various baseball pursuits, and even returned to manage the Portland Beavers for a short time in 1934. What happened to his uncle W.W. has mostly been lost to history ... except for the lawsuit. It is a safe bet that the McCredies did not share Thanksgiving dinner together in 1930. Here's why:

According to a 1930 Oregon Supreme Court decision in *McCredie v. McCredie*, 134 Or 517, 294 P 361 (1930)—a case name like that is never a sign of family harmony—Etta McCredie, wife of Walter McCredie, sued W.W. McCredie. Walter testified that in the Fall of 1921, he bought bonds for Etta from the proceeds of the sale of the Portland baseball club. Walter told W.W. that he had no insurance policy for his wife, and that he wanted to buy some bonds to fall back on "if things went wrong." He further testified that W.W. promised to take care of the bonds for him and to never touch them.

However, touch the bonds he apparently did, for W.W. reportedly delivered them to Hugh McCredie, Walter's first cousin (and also a defendant in the lawsuit). Hugh was said to have then delivered them to a bank as collateral security for a loan.

Somehow Walter learned of these alleged shenanigans and filed a lawsuit. Instead of making things right with Walter and Etta, W.W. asked Walter to release Etta's bonds and to accept a note drawing six percent interest. W.W. predictably claimed that everything he did was with Etta's knowledge.

The Oregon Supreme Court ultimately affirmed a decision against W.W. and Hugh and held that they had to account to Etta for the income of the bonds; that W.W. had to deliver to Etta the bonds not held by the bank; that W.W. had to account to Etta for the coupons on those bonds; that W.W. had to pay Etta $10,000; and that W.W. and Hugh had to pay Etta's court costs for the appeal.

"It is curious how vanity helps the successful man and wrecks the failure," author Oscar Wilde wrote. So it apparently was with W.W. McCredie.

Walter McCredie died on July 29, 1934, on the eve of a Beavers game that was to be played in his honor. Yet the game went on and, as Walter had requested, all the proceeds went to his widow Etta. The final chapter on the McCredie era closed when William Wallace McCredie died the following year on May 11, 1935, at age 73. ❒

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Oregon State Bar

Upcoming CLEs

The information listed is subject to change. Please check the CLE Seminars web calendar at www.osbarcle.org for updates for seminars shown here or scheduled after the publication of this calendar.

Wednesday, July 16, 2008
9 a.m.–Noon
Snap, Crackle and Pop: Injury Biomechanics in Litigation
Oregon State Bar Center, Tigard
3 General CLE credits

Friday, July 18, 2008
9 a.m.–4:30 p.m.
Handling Domestic Relations Cases
Oregon Convention Center, Portland
4.25 General CLE or Practical Skills credits and 2 Ethics credits

Wednesday July 23, 2008
1 p.m.–4 p.m.
So, You're Not a Physician?
Oregon State Bar Center, Tigard
3 General CLE credits (pending)

Recent Significant Oregon Cases

Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

T.R. v. Boy Scouts of America, 344 Or 282 (2008)
Johnson v. Mult. Co. Dept. Community Justice, 344 Or 111 (2008)

The Supreme Court cases applied the "discovery rule" in addressing statute of limitations defenses in two recent cases. In 1996, Sergeant Tannehill, a police officer with The City of The Dalles and leader of a Boy Scouts Explorers program, sexually molested the plaintiff in *T.R.* Six years later, plaintiff learned from a newspaper article that another police officer from The Dalles had been arrested for serving alcohol to a minor. Plaintiff called a telephone number listed in the article and disclosed Tannehill's actions. Based on statements made at grand jury proceedings shortly thereafter, plaintiff "suspected for the first time" that city officials "may have permitted the sexual abuse that Tannehill had committed and failed to protect Explorers…against such abuse." 344 Or at 288. Plaintiff filed a claim against the city under 42 USC § 1983 within 2 years of the grand jury proceedings. At trial, the city moved for a directed verdict, contending that plaintiff's claim was barred by the 2-year statute of limitations in ORS 12.110(1) (which applied to the section 1983 claim). The trial court denied the motion, but the Court of Appeals reversed, holding that the claim accrued in 1996 when "plaintiff knew that he was injured and that Tannehill was the physical cause of his injury." *Id*. at 289. According to the Court of Appeals, plaintiff's knowledge "triggered a duty to inquire further into the city's role in causing that injury…therefore commencing the running of the statute of limitations." *Id*. The Supreme Court reversed. The Court explained that "the discovery accrual rule provides that a plaintiff's claim against a particular defendant accrues when (1) the plaintiff knows, or a reasonable person should know, that there is enough chance that the defendant had a role in causing plaintiff's injury to require further investigation; and (2) an investigation would have revealed the defendant's role." *Id*. at 296. Applying this rule "is a factual issue for the jury unless the only conclusion a reasonable jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter." *Id*. In this case, the Court concluded that plaintiff's claim was not barred because "a reasonable jury could have found that, under the circumstances existing in 1996, plaintiff acted reasonably in not undertaking an investigation of whether the city itself had caused the harm." *Id*. at 298.

In *Johnson*, the issue was "whether, and to what extent, the appearance of newspaper articles in local papers suggesting that a public agency may have had a role in a plaintiff's injury should be deemed to put that plaintiff on notice of his or her claim against the public agency, and thus trigger the 180-day notice period" under the Oregon Tort Claims Act, ORS 30.275(2)(b). 344 Or at 113. The plaintiff was 14 years old in 1997, when she was raped by an assailant later identified as Ladon Stephens, a convicted felon who was being supervised by defendant Multnomah County Department of Community Justice at the time of the rape. Stephens was arrested in 2002 and connected with other crimes, including the rape and murder of another young girl. At some point thereafter (by July 2003 at the latest), plaintiff became aware that Stephens very likely had been her assailant. In December 2003, plaintiff learned that Stephens was under defendant's post-prison supervision when he raped her, and that the supervision "may have been inadequate." *Id*. at 114. The trial court held that plaintiff's April 2004 notice of claim under ORS 30.275(2)(b) was untimely, concluding as a matter of law that "a reasonable person in plaintiff's shoes would have learned about defendant's alleged inadequate supervision of Stephens long before October 28, 2003 (180 days before April 28, 2004, when plaintiff gave notice of her claim to defendant)." *Id*. at 115. The Supreme Court, agreeing with the Court

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of Appeals, reversed. The Court rejected defendant's argument that plaintiff was on "inquiry notice"—the Court specifically disapproved using that term (*Id*. at 119, n.3)—by July 2003 because she knew by then that Stephens was her assailant, and "a reasonable inquiry at that time would have led to media reports about defendant's negligent supervision of Stephens." *Id*. at 119. The Court explained that "[a] duty to inquire must arise from circumstances stronger than the mere drifting possibility that something of interest might come to light. The facts that defendant relies on—plaintiff's knowledge of Stephens's identity and her knowledge that Stephens was being discussed in the media—might raise a question in the mind of a reasonable person about the involvement of a parole agency in plaintiff's injuries, but would not necessarily do so." *Id*. at 120. The Court also rejected defendant's argument that, "for purposes of the discovery rule, an objectively reasonable person should be assumed to be aware of readily available media publications relevant to his or her tort claim." *Id*. at 121. The Court explained that, "[t]he fact that news about some event was *available* at a particular time does not, by itself, resolve whether a reasonable person would have read or heard that news, much less what a reasonable inquiry based on that news would have uncovered." *Id*. at 122 (emphasis in original). Thus, the Court concluded that "there is a triable issue of fact as to when plaintiff should have known of defendant's connection to her injury." *Id*. at 123.

Harris v. Suniga, 344 Or 301 (2008) *Wallach v. Allstate Ins. Co.*, 344 Or 314 (2008)

The Supreme Court clarified the law governing tort remedies in two recent cases. In *Harris*, the Court addressed the "economic loss" doctrine, which precludes recovery of purely economic losses on a negligence claim absent a special relationship between the parties. 344 Or at 305. Defendants argued that the doctrine barred plaintiffs from recovering the cost of repairing an apartment building that was damaged by dry rot as a result of defendant's negligent construction, because plaintiffs' loss was "an investment loss." *Id*. at 309. Defendants reasoned that (1) plaintiffs were subsequent purchasers who had no relationship with defendants; (2) defendants' negligence could only have harmed the property of the initial owner, for whom defendants constructed the building; and (3) plaintiffs' injury occurred because they paid more for the property than it was worth in its negligently-constructed condition. The Court acknowledged that defendants' argument "has some logical appeal" (*Id*.), but rejected it because it "proves too much." *Id*. at 310. The Court explained that "[e]very physical injury to property can be characterized as a species of 'economic loss' for the property owner, because every injury diminishes the financial value of the property owner's assets." *Id*. "Yet the law ordinarily allows the owner of the damaged [property] to recover in negligence from the person who caused the damage." *Id*. In this case, the Court concluded that plaintiffs' damages were "quite different" from the kinds of damages previously characterized as "economic losses", so the "economic loss" doctrine did not preclude plaintiffs' "recovery for physical damage to their real property[.]" *Id*. at 310.

The plaintiff in *Wallach* was injured in 3 separate automobile accidents. At trial on the first accident, the court instructed the jury that it could hold defendant liable "for any enhancement or aggravation of plaintiff's injuries caused by the subsequent accidents if the enhancement or aggravation would not have occurred but for the first accident." 344 Or at 316. The Supreme Court reversed and remanded for a new trial, holding that the instruction "is erroneous in two separate but related respects." *Id*. at 319. First, it "is at odds with the general rule that a defendant is liable only for the foreseeable consequences of his or her negligence." *Id*. Second, the instruction "told the jury that it could hold the first tortfeasor liable for any aggravation damages that the second accident caused without regard to whether the second accident was a foreseeable consequence of the [first] driver's negligence." *Id*. at 321. The Court agreed with courts from other jurisdictions, holding that "when the second accident is not a foreseeable consequence of the first, the defendant involved in the first accident is not liable for any aggravation of the plaintiff's injuries that the second accident causes." *Id*.

Lowe v. Philip Morris USA, Inc., 344 Or 403 (2008)

The plaintiff in *Lowe* alleged that "defendants' negligent manufacture and sale of cigarettes caused her to suffer a significantly increased risk of developing lung cancer" requiring medical monitoring. 344 Or at 407. The trial court granted defendants' motion to dismiss because the complaint "did not allege a present physical injury and thus failed to state a claim for negligence." *Id*. The Supreme Court agreed, holding that "negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence." *Id.* at 415.

Constitutional law

Hughes v. PeaceHealth, 344 Or 142 (2008)

The plaintiff in *Hughes* brought a wrongful death action after her daughter died while under the care of PeaceHealth

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medical providers. A jury returned a verdict that included $1 million in noneconomic damages, which the trial court reduced to $500,000 based on the statutory damages cap in ORS 31.710. Plaintiff contended that "application of the statutory cap on noneconomic damages violated her right to a jury trial under Article I, section 17, of the Oregon Constitution, as well as the Remedy Clause of Article I, section 10." 344 Or at 146. The Supreme Court disagreed. Applying the statutory cap did not violate Article I, section 10, the Court explained, because there was no basis to conclude that "the common law [in 1857] would have recognized the particular cause of action that plaintiff now asserts[.]" *Id*. at 152. It did not violate Article I, section 17, because that provision "is not a source of law that creates or retains a substantive claim or theory of recovery in favor of any party." *Id*. at 155 (quoting *Jensen v. Whitlow*, 334 Or 412, 422 (2002)). Thus, "plaintiff is entitled to a jury determination of her damages, both in type and amount, only to the extent that the substantive law, *i.e.*, the statute, pertaining to her claim so provides." *Id*. Justices Durham and Walters dissented. Justice Durham opined that, under the reasoning in *Lakin v. Senco Products, Inc.*, 329 Or 62, 78 (1999), "the conclusion is inescapable that cutting the jury's noneconomic damages in half, pursuant to a statutory damages cap, constitutes a deprivation of the constitutional right to jury trial." 344 Or at 170 (Durham, J., dissenting). Justice Walters compared a plaintiff bringing a wrongful death action to a plaintiff bringing a common-law negligence action. She explained that, in both instances, the plaintiffs' rights to bring their claims, and the measure of damages, arose from sources of law outside of Article I, section 17, so both plaintiffs "have the right to have a jury determine the facts in those actions—including damages—without legislative interference." 344 Or at 178 (Walters, J., dissenting).

Goddard v. Farmers Ins. Co., 344 Or 232 (2008)
Williams v. Philip Morris Inc., 344 Or 45 (2008)

The Supreme Court addressed due process limitations on punitive damage awards in two recent cases. In *Goddard*, the Court concluded that, "as a very general rule of thumb, the federal constitution prohibits any punitive damages award that significantly exceeds four times the amount of the injured party's compensatory damages, as long as the injuries caused by the defendant were economic, not physical." 344 Or at 260. In *Williams*, the Court adhered to its earlier decision (which concluded that a $79.5 million punitive damage award against a tobacco company to the widow whose husband died of lung cancer did not violate due process) on remand from the United States Supreme Court. The Court stated that its task on remand was "to apply the constitutional standard set by the Supreme Court in our consideration of the sole issue raised by Philip Morris, *viz.*, whether the trial court erred in refusing to give proposed jury instruction No. 34." 344 Or at 55. The Court concluded that the trial court did not err in refusing to give that instruction because, "even assuming that proposed jury instruction No. 34 clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly." *Id*. at 61.

Procedure

Gwin v. Lynn, 344 Or 65 (2008)
Howell v. Willamette Urology, P.C., 344 Or 124 (2008)

In *Gwin*, the Supreme Court held that "a witness may be both an expert witness and a fact witness and, therefore, may be deposed concerning facts that pertain to the witness's direct involvement in or observation of the relevant events that are personally known to the witness and that were not gathered primarily for the purpose of rendering an expert opinion." 344 Or at 67. In *Howell*, the Supreme Court held that "venue for the purposes of a wrongful death action lies either in the county where at least one of the defendants resides or in the county in which the wrongful act or acts that ultimately resulted in decedent's death occurred." 344 Or at 130.

McIntyre v. Freeman, 218 Or App 321 (2008)
Anderson v. State Farm Mutual Auto Ins. Co., 217 Or App 592 (2008)
Horton v. Western Protector Ins. Co., 217 Or App 443 (2008)

In *McIntyre*, a divided Court of Appeals held that, under ORCP 17, "the failure to sign a certificate of mailing does not invalidate the filing or service…unless the failure is called to the attention of the movant and the movant then fails to sign the certificate." 218 Or App at 325-26. In *Anderson*, the Court of Appeals held that, where a moving party fails to file a certificate of compliance substantiating that the parties have conferred regarding the issues in dispute or stating facts showing good cause for not conferring, "[t]he consequence of that failure is mandatory: 'The court *will* deny' the motion." 217 Or App at 592 (quoting UTCR 5.010(1); emphasis in original). The court also stated that "futility does not excuse noncompliance with the requirements of UTCR 5.010(3)." *Id*. And in *Horton*, the Court of Appeals held that the timing requirements of ORCP 21A apply to a "special motion to strike" under ORS 31.150; to be timely, such a motion must be filed "before a responsive pleading is filed." 217 Or App at 453. ❒

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Owen Panner Award

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Another speaker, Tom Cooney, commented that Carl is someone who believes strongly that the words "officer of the court" mean something. Carl understands that his job as an attorney is to be an officer of the court and help clients work through the litigation system. "I've always found that Carl does that very well," said Cooney, "and the other thing is—you can always trust him."

Although known as a tough and effective advocate, Carl is widely respected by his peers and the judges before whom he practices. His law partner, Tim Helfrich, described one of Carl's consistent characteristics: His adversaries frequently become his friends. Even after hard fought trials against Carl, opposing attorneys often come back to him for advice and counsel. They view him with respect and they trust him.

Helfrich also mentioned the many young lawyers—throughout the State of Oregon—who view Carl as a mentor. One lawyer, now Circuit Court Judge of Malheur County, Patricia Sullivan, sent a letter of congratulations. She thanked Carl for being so good to her when she was first starting out as a young lawyer. She expressed gratitude "for the kindnesses and support you showed me then and through the years. They just don't make 'em like you any more!" ❐