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The Juror as Audience: The Impact of Non-Verbal Communication at Trial

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Some of the most significant evidence presented at trial is not governed by the rules of admissibility and may be received by jurors without counsel even being aware of its presentation. Years ago I served as a juror in a three-week trial. I was struck at the time by the extent to which I was drawn to and distracted by the non-verbal, non-testimonial information conveyed each day during the proceeding. I found myself observing not only the participants in the proceeding itself but also the spectators in the gallery. I remember taking notice of one testifying expert who returned most days to watch the trial unfold. On days he failed to show up, I wondered if that day's testimony was less important.

During my years as an advocate, I have often been reminded that jurors are taking in this kind of information. Following one trial in which my client received a favorable verdict, several jurors later told me they had observed that I had been ill during the course of the trial. Notwithstanding my best efforts to disguise my symptoms, the jurors picked up on how I was feeling. They recalled being concerned about how my illness was impacting me and appreciated my efforts to appear each morning for court.

In another case, I sat across from an attorney who flamboyantly emphasized certain points he argued by wadding up his notes and tossing the crumpled paper into a waste basket in true basketball fashion. I found out later that his theatrics amused the jurors; they even spent time imitating him during their deliberations. His efforts to impress, however, distracted from his argument. And although he demonstrated a flair for the theatrical, he failed to win his case.

Jurors are sworn to decide cases based solely on the evidence presented and the application of the law to the evidence. Yet, they are exposed daily, both inside and outside the courtroom, to

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so much more information than is admitted into the record. As illustrated by the events described above, jurors are impacted in some ways by litigants' behavior, comportment and other non-verbal communication. How much these factors actually affect jury verdicts is unknown; nevertheless, one should be mindful that jurors notice. For example, following a recent lengthy trial, jurors commented to the court that they felt some of the parties were not paying attention to witnesses' testimony if the litigants did not believe the testimony was relevant to their case. This trial reminded me of the dynamic effect non-testimonial information has on jurors and triggered my interest in exploring the impact of non-evidentiary information in courtrooms. By understanding the different ways non-verbal information is communicated, trial counsel can optimize its impact in their own presentation and will know when to object to certain forms of non-verbal communication that could prejudice the client.

Below is a synthesis of information gathered from research scientists, jury consultants and courts who have examined the impact of non-verbal communications on jurors. This article also addresses the court's role in safeguarding against forms of non-verbal communication that may prejudice a litigant and counsel's role in actively managing the effect of these potentially powerful forms of communication.

What Is Non-Verbal Communication?

When the eyes say one thing, and the tongue another, a practiced man relies on the language of the first.
- Ralph Waldo Emerson

Jurors are generally instructed to consider only evidence (i.e., testimony and exhibits) when deciding a case.[1] Yet, the courtroom is not a laboratory in which jurors scientifically evaluate evidence in a sterile environment.[2] The trial process boils down to formally introduced evidence and argument mixed with a variety of non-verbal communication, which may at times yield unpredictable results. Model jury instructions capture this dynamic with regard to the non-verbal component of witness testimony, noting that the assumption that a witness's testimony is truthful may be overcome by the manner in which the witness testifies and nature and quality of that testimony.[3] The model instructions, however, do not address the messages that are conveyed to jurors through various forms of non-verbal communication by those who are not witnesses or by witnesses when they are off the witness stand.

One of the first steps in understanding and managing the effect of non-verbal communication on jurors is to consider the jurors themselves. Prior to being called for service, most jurors have never before set foot into a courtroom. They come from all walks of life and often arrive with an expectation that their experience in court will mirror scenes from popular movies and television. With few exceptions, trial is rarely that exciting or dramatic. Nevertheless, trial consultant, Tom Capps, notes that "jurors often try to uncover some of the drama they expected by closely observing all of the participants in the courtroom."[4] Through even the most subtle non-verbal cues, jurors attempt to discover a hidden narrative that exists in the shadows behind the testimony of witnesses and other evidence presented in the case.[5]

Non-verbal communication is most commonly recognized as "body language." Eye contact, facial expressions, gestures, and posture all convey information to an observant juror. Other forms of non-verbal communication, such as dress and appearance, the relative proximity of counsel and litigant to the jury, paralanguage (speech rate, volume, variations in pitch), and the presence of spectators in the gallery, may also affect jurors' impressions.[6] The use of eye contact, higher vocal volume and synchronized hand gestures are a few factors that have been associated with persuasiveness and confidence. Conversely, speaking in a monotone and frequent self-touching are signals that the speaker is less assured. Of course, the relative weight and impact of these different forms of non-verbal communication vary as they are measured through the subjective lens of individual jurors.[7]

The impact of non-verbal communications has been studied in the context of demonstrative exhibits. When used in personal injury cases or criminal prosecutions involving violent crimes, research shows that graphic images contribute to increased damage awards and higher conviction rates.[8] In a scientific study on this effect, sample jurors were given a product liability case package in which an infant's hand had been severely burned by a steam vaporizer—the facts slightly and intentionally skewed in favor of the defense. The jurors were separated into three groups: the

first received detailed descriptions of the injury but no photos, the second received graphic photos taken immediately after the incident, and the third received both the injury photos as well as post-recovery photos.[9] In both groups shown the graphic images of the plaintiff's injury, jurors awarded significantly higher non-economic damages.[10] Interestingly, the influence of the photos on jurors' determination of liability was also dramatic: 58% of jurors in the group shown no photos found in favor of the defendant, 51% of jurors shown the graphic photos found in favor of the plaintiff; and 60% of jurors shown both sets of photos returned defense verdicts.[11] These results not only confirm the influence graphic imagery has on jurors' perceptions when assessing damages, but also its improper effect on liability verdicts.

Jurors Have a Virtual Backstage Pass

In the theatrical works we love and admire the most, the ending of the drama generally takes place offstage.
- Gustav Mahler

The difference between the formal presentation of evidence and information communicated through non-verbal means can be understood in terms of a theater performance. Witness testimony is part of the performance given "on stage," while non-verbal communication of information occurs through jurors' "offstage observations."[12] Unlike a traditional theater setting where actors waiting offstage are unseen by members of the audience, in the courtroom, litigants and counsel cannot hide backstage when it is not their turn in the limelight. Jurors have a virtual pass to observe the actors backstage and are able to view each of the players throughout the course of the proceeding.[13] Nor are these offstage observations limited to the courtroom itself; jurors may also be affected by observing trial actors' behavior in elevators, hallways, restrooms and even outside the courthouse.[14]

The effects of these so-called offstage observations vary among individual jurors. For example, studies on the effect of a defendant's physical attractiveness on jurors indicate more favorable outcomes for those perceived as attractive.[15] Yet, physical attractiveness being a distinctly personal preference may not impact any one juror in the same way.[16] Similarly, different jurors may interpret a defendant's tendency to fidget—often an indication of anxiety or boredom—as communicating the worry of the innocently accused or the idleness of a guilty mind simply waiting for the inevitable guilty verdict.[17]

In a recent study published in the journal *Law & Human Behavior*, researchers attempted to quantify the influence of offstage observations on individual jurors and whether they have a carry-over effect on group deliberations.[18] The study found that jurors' discussions about offstage observations had little measurable effect on the trial outcomes.[19] This conclusion is supported by the fact that merely 1.5% of juror discussion topics across all 50 cases in the study involved offstage observations.[20] Further, the majority of jurors' remarks favoring one party over the other focused negatively on plaintiffs, yet less than one-quarter of these cases resulted in a defense verdict.[21] Although the study found that offstage observations discussed by jurors during deliberations had little effect on verdicts, the study did not attempt to evaluate nor reach a conclusion regarding the impact of observations that were not openly discussed among jurors.

Another interesting discovery from this study was jurors' keen awareness of attempts by trial participants, particularly litigants, to "perform for the jury through displays of strong emotion or back-channel comments about witness's testimony."[22] Jurors' critical remarks about these types of efforts highlight the common misconception that jurors are gullible and easily fooled.[23] The study's authors also note that because many criminal defendants elect not to testify at trial, jurors in criminal trials may focus on and rely more heavily on offstage observations.[24] What is not known or quantified is the extent of the impact these observations may have had on individual jurors or how the observations of one juror may shape the attitudes of other jurors. However, the study established that jurors are exposed to and consider far more information throughout the trial process than what is admitted as evidence.

All Rise

Power is the most persuasive rhetoric.
- Friedrich Schiller

Non-verbal cues from judges can have a profound influence on jurors. Of all the courtroom actors, the person who holds the most power, and whose influence on jurors may be greatest, is the judge.[25] Part of the reason judges' potential influence on jurors is so great is based on what has been called

the *Rosenthal Effect*.[26] The Rosenthal Effect, named after psychology professor and researcher Robert Rosenthal, occurs when individuals modify their behavior to conform with what they perceive to be the expectation of the person in authority.[27] In the courtroom, that person is the judge. The trial judge guides jurors on procedures they must follow and manages the jurors throughout the proceeding.

One of the best places for counsel to actively reduce the potential influence of a trial judge's bias is during the reading of the jury instructions. Researchers have found that the use of model instructions, which are often formally worded and confusing to a layperson, leads jurors to rely on non-verbal cues from the judge more so than the use of modified instructions that are more easily understood.[28] By making an effort to simplify jury instruction, counsel can aid jurors in understanding their duties at trial and minimize the risk that they will lean on their perceptions of the trial judge's biases in reaching their verdict.

Of course, even most well-intentioned and competent trial judges are at times unable to prevent their non-verbal behavior from showing how they feel about a party or counsel and thereby unwittingly reveal a bias. In *State v. Mains*, the Oregon Supreme Court considered the effect of a trial court judge's seemingly biased approach to questioning a defense expert during cross-examination.[29] Recognizing jurors' sensitivity to both words and non-verbal communications of trial court judges, the court notes that excessive intervention by a trial judge "diminishes the effectiveness of the adversary system and may deprive a litigant of his right to an impartially administered trial."[30] Indeed, Oregon trial court judges are prohibited from instructing jurors or making comments "with respect to matters of fact."[31] Notably, the Federal Rules contain no similar restriction.[32]

The judge's role is meant to be one of impartiality.[33] Indeed, the court not only must remain unbiased in its actions, but must avoid even the appearance of prejudice through the use of language or conduct.[34] Yet, even the most careful judges are subject to their own human nature. Often having access to much more information than what is presented to jurors, trial judges may draw their own conclusions about testifying witnesses or the weight of the evidence. Armed with this information, a judge is at times unable to avoid transmitting subtle cues to jurors through non-verbal behavior as evidence is presented. The Alabama Supreme Court in *Allen v. State* acknowledged and accepted that judges transmit information to jurors when it wrote the following: "The trial judge is a human being, not an automaton or a robot. He is not required to be a Great Stone Face which shows no reaction to anything that happens in his courtroom."[35]

For this reason, trial counsel should observe the court's manner and demeanor and, if necessary to preserve the fairness of the proceeding, make timely objection to any expression of bias against her client. Such an objection should be made only when counsel believes the bias will seriously prejudice the client's rights since counsel's objections to comments or expressions of the trial court might alienate the judge and possibly the jury. When objecting, counsel should be sure to include a detailed description of the conduct at issue to be sure that the nuances of the court's non-verbal acts are fully and fairly considered on appeal.[36] Counsel should also request that the court provide a curative instruction directing the jurors to disregard the court's actions. Success on appeal depends on a showing that the court's conduct created "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interest of the court and the interests of the accused."[37]

Dress for Success

Clothes make the man. Naked people have little or no influence on society.
- Mark Twain

A client's physical appearance both on and off the witness stand conveys a great deal to jurors. Similarly, counsel's attire can draw the attention of both jurors and the court, though not always in the best way. Counsel should wear "comfortable, well-fitting clothes that are in good repair" and avoid clothing or hairstyles that are too distracting.[38] As a general matter, all persons attending court must be dressed appropriately.[39] Within this restriction, counsel has broad latitude in advising clients how best to present themselves.

In her article on the theater of the courtroom, Loyola Law School professor Laurie L. Levenson discusses how the defendants' attire and demeanor during the 1993 trial of the infamous Menendez brothers influenced jurors' impressions of the accused.[40] Lyle and Erik Menendez were ultimately convicted of the brutal murder of their parents, but

not before jurors in their first trial could not agree whether to convict them of murder or manslaughter and failed to reach a verdict.[41] The two brothers, who were in their early twenties at the time of the first trial, appeared in court wearing crewneck sweaters, button-down shirts and slacks. The outfits, which gave them an appearance of youthful innocence compared with a more formal suit and tie, were discussed by jurors during deliberations.[42] In a book recounting her experience as a juror in the first Menendez trial, Hazel Thornton recalled jurors' recognition that the outfits, along with defense counsel's reference to the defendants as "boys" and her maternal behavior in court, were intended to elicit sympathy from jurors.[43] Ms. Thornton's account illustrates jurors' awareness of so-called "offstage observations" and the effect it has on jurors' consideration of formally admitted evidence, though in that case, awareness by some jurors that they were being manipulated was not enough for a conviction.

I personally experienced the effect a client's attire can have on jurors in a case I tried as a young, inexperienced lawyer. My client was facing rape and kidnapping charges and I wanted to soften his appearance. I had him appear for court wearing a sweater, but the sweater fit him too tightly and highlighted his muscular physique. I only noticed this unintended effect on his appearance when I called him to the stand to testify. Rather than appearing benign and harmless, the too-tight ribbed sweater made him look strong and physically powerful and sent the wrong message to jurors.

In a practice not endorsed by this author, a criminal defendant's use of nonprescription eyeglasses while appearing in court is another example of how appearance can affect jurors' perceptions.[44] While eyeglasses are primarily worn by persons with vision defects, their use as a fashion accessory is on the rise.[45] Characterized as the "nerd defense," the use of unnecessary eyeglasses plays on the commonly held stereotype that people who wear eyeglasses have a high intelligence.[46] Some attorneys assert that the use of eyeglasses is highly effective for conveying an appearance of innocence.[47] However, it is important to note that this positive influence on jurors' perception may be limited to cases involving violent crimes. In white-collar crime cases, defendants wearing eyeglasses were more often perceived as guilty.[48]

Further, the practice of outfitting a client in spectacles in an effort to influence jurors' perceptions can backfire. In a recent and highly publicized case in Washington, D.C., Orlando Carter and four other men were charged with multiple counts of murder for their alleged roles in what was described as the South Capitol Street Massacre.[49] Each of the defendants arrived for trial wearing noticeably large-framed and heavy-rimmed glasses.[50] Prior to trial, only one of the five defendants had ever appeared during pretrial hearings wearing eyeglasses.[51] By eliciting testimony that witnesses had never seen the defendants wearing glasses in the past, prosecutors exposed the defendants' attempt to manipulate jurors' perceptions—a revelation that may have contributed to the guilty verdict.[52]

The use of nonprescription eyeglasses to influence jurors' perceptions also raises an ethical question. Under the Oregon Rules of Professional Conduct, a lawyer is prohibited from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."[53] Advising a client to wear unnecessary eyeglasses may be nothing like rolling a perfectly healthy plaintiff into court in a wheelchair in a personal injury claim, yet both involve the use of a prop designed to influence how the client is perceived. Certainly the comparison is more apt in a criminal case where the defendant's identity is at issue.[54]

Courts also recognize the impact a defendant's physical appearance has on jurors' evaluation of guilt or innocence. For example, the United States Supreme Court has held that the use of visible shackles on a defendant undermines the fundamental presumption that a criminal defendant is innocent until proven guilty.[55] Only in cases where the government can show a substantial need based on safety concerns or risk of escape can a defendant be compelled to appear before jurors while visibly shackled.[56] However, the Court is careful to distinguish between a defendant appearing before jurors in shackles, which it describes as "inherently prejudicial," and a defendant who is forced to appear in prison garb.[57] Rather than adopt a "mechanical rule vitiating any conviction, regardless of the circumstances," in which a defendant is compelled to appear in prison clothes, the Court recognizes circumstances in which a defendant may elect to appear in prison attire hoping to elicit sympathy.[58] In these cases, a defendant's failure to raise a timely objection negates the compulsion necessary to establish a constitutional violation.[59]

As the above cases illustrate, a client's appearance can have a real and profound impact on how jurors perceive the client. Assisting clients to cultivate an image that meshes with the narrative counsel presents at trial is an effective tool for connecting with jurors in a positive way and helps to make a favorable impression. For example, a civil plaintiff's conservative dress and conduct at trial may be effective in conveying to jurors that he is a sympathetic victim. Similarly, a criminal defendant's appearance and demeanor might convey a message of contrition or suggest that he is incapable of committing the crimes for which he has been charged. However, counsel should exercise restraint when advising clients on how to appear in court and remain cognizant of jurors' ability to see through an obvious charade.

May I Sit Here?

Where you stand depends on where you sit.
- Nelson Mandela

Just as a person's physical appearance can play an important role in how he is perceived, a party's relative proximity to the jury box is also important.[60] Anthropologist Edward T. Hall describes four zones of space that exist around a person: (1) intimate space extending out only eighteen inches, (2) personal space stretching out to four feet, (3) social distance reaching out twelve feet, and (4) public distance in the space beyond.[61] Hall further describes social distance as the space used by "people who work together," while people who are at a public distance are "outside the 'circle of involvement.'"[62] In this sense, the party sitting nearest the jury box is more likely to be within the social distance, giving him a distinct advantage in making a personal connection with jurors over the party sitting farther away.[63]

In federal criminal trials, the prosecution generally sits at counsel table closest to the jury box. Often, government investigators and experts (e.g. FBI or IRS agents) sit just behind the prosecution. As a result, the entire prosecution team is seated in the immediate vicinity of jurors, or as Hall describes in his work, inside the social distance zone. By occupying this space, prosecutors enjoy a certain intimacy and connection with jurors.

Regardless of this practice, seating arrangements in the courtroom are within the trial judge's discretion.[64] When challenged by defense attorneys, the most common objections are that the state's burden of proof entitles it to the advantage of being closer to jurors or that the prosecution must be positioned between a defendant and jurors as a bulwark to protect their physical safety.[65] Indeed, the government made this objection when an attorney for Kenneth Lay, former head of Enron Corporation, requested that he and his client be seated at the table nearest to the jury during his high profile case in Texas District Court.[66] Describing his decision as guided by "fairness and common sense," Judge Simeon Lake resolved the issue by allowing each party to sit at the table closer to the jury when presenting their respective cases.[67] Custom and practice alone should not be the sole basis for denying a litigant's preferred seating in court.

Conventional wisdom tells us that jurors are more likely to reach a favorable verdict for your client if they have reason to like him. By taking the table nearer to jurors, counsel places a client within social distance to jurors, thus making it more likely that jurors will be able to observe the client's non-verbal cues and relate to them on a more personal level. Of course, when considering seating arrangements at trial, counsel should be aware of the idiosyncrasies of the client. The potential advantage of being closer to the jury may at times be outweighed by a client's inability to maintain decorum in court. Added distance from jurors in those cases may help reduce unwanted scrutiny.

Ask the Audience

The audience is the best judge of anything. They cannot be lied to. Truth brings them closer. A moment that lags—they're gonna cough.
- Barbra Streisand

Spectators in the gallery can also influence jurors.[68] With few exceptions court proceedings are open to the public. Because jurors are insulated by the court—instructed not to speak to anyone about the evidence as it unfolds—spectators in the gallery can be a barometer by which they gauge their own responses to witnesses' testimony and counsels' arguments. Jurors, especially those with no prior experience with court procedure, may expect the trial process to mirror their favorite legal-drama. A full gallery of spectators tends to meet those expectations, infusing the courtroom with energy and causing jurors to pay more attention. Conversely, an empty gallery may leave jurors feeling abandoned, making it more likely they will simply tune out. However, the presence of spectators also

increases the potential for jurors to be distracted and unduly influenced. In certain circumstances, these distractions may be grounds for objection when there is an argument that trial spectators' influence on jurors is prejudicial.

In *Holbrook v. Flynn*, a leading case on the issue, the Court considered a defendant's challenge to the presence of four uniformed and armed state police troopers seated in the gallery directly behind the defendant.[69] The Court disagreed that the troopers' presence created an inference of guilt and was inherently prejudicial, holding that the proper question when addressing challenges to courtroom arrangements is whether "an unacceptable risk is presented of impermissible factors coming into play."[70] The presence of spectators at trial wearing buttons in support of crime victims has been contested on similar grounds.[71] In *Norris v. Risley*, the defendant, who had been charged with kidnapping and rape, successfully argued that the presence of female spectators wearing buttons with the words "Women Against Rape" was "'so inherently prejudicial as to pose an unacceptable threat' to the [defendant's] right to a fair trial."[72] Here, the court concluded the buttons "tainted [the defendant's] right to a fair trial both by eroding the presumption of innocence and by allowing extraneous, prejudicial considerations to permeate the proceedings without subjecting them to the safeguards of confrontation and cross-examination."[73]

To establish, however, that visible messages or symbols worn by trial spectators present an unacceptable risk of prejudice is a high burden. In *Pachl v. Zenon*, the Oregon Court of Appeals held that buttons worn by spectators with the inscriptions "C.V.U." and "Crime Victims United" were not inherently prejudicial.[74] Unlike the buttons in *Norris v. Risley*, which "proclaimed public outcry" for a conviction in that particular case, the buttons in *Pachl v. Zenon* did not create an unavoidable effect on jurors that would cause them to "consider factors other than the evidence and law of the case."[75]

Outward displays of bias by spectators are clear targets for an objection, but counsel should monitor less obvious non-verbal communication between spectators and jurors as well. One often overlooked example is when a testifying witness returns to the courtroom on days following his or her appearance on the witness stand. In my experience, jurors' ability to observe the non-verbal reactions of previously testifying witnesses to subsequent witness testimony or legal argument might have the effect of the witnesses testifying a second time. Yet, this additional "testimony" is given without the opportunity for cross-examination. Counsel should take notice of spectators at trial and be prepared to object to conduct or attire that could result in prejudice.

Conclusion

Jurors are sworn to consider only the evidence and exhibits presented on the record. Thus, trial counsel's first priority is mastery of the facts and law at issue in the case. Yet, the volume and influence of non-verbal information being communicated both inside and outside the courtroom have an undeniable effect on how jurors process and interpret this evidence. By understanding how so-called offstage information is expressed and understood, counsel can increase his own effectiveness and can mitigate the impact of non-verbal cues that could have a negative impact on jurors.

Counsel should consider those elements that are within her direct control. She should dress in a manner that conveys confidence and increases rapport with jurors. When addressing the jury, she should step out from behind the podium or counsel table if allowed, make eye contact and adopt a conversational tone. Counsel should also determine whether it is advantageous to sit closer to the jury. Further, it is also important to understand that many jurors expect that the trial will provide some dramatic moments. Well-placed bits of stagecraft or a timely pause can be effective ways to draw jurors in and meet their expectations.

Equally important, counsel must help clients to make a favorable impression on the jury. Clients should avoid or minimize behaviors that may be construed negatively: eye-rolling, nodding along with a witness's testimony, smiling or smirking all convey messages to an observant juror. Clients should also avoid frequent asides with counsel and instead write down questions and concerns—taking notes is a visual cue that conveys interest and involvement. Most importantly, be mindful that trial is both physically and emotionally exhausting. Clients may be tempted try to reduce the stress of trial by multi-tasking or simply tuning out. However, a client who appears detached or mentally checked

out sends the wrong message to jurors. Clients should make every effort to remain present and in the moment.

Finally, be mindful of others in the courtroom and their potential influence on jurors. Subtle though unintentional cues from the court and the presence of spectators in the gallery can have a profound effect on how jurors interpret evidence and judge the credibility of witnesses. When an offstage source of non-verbal information could result in prejudice, timely objection may curtail its effect on jurors and will at a minimum preserve the objection on the record. Effective trial advocacy requires more than a mastery of the fact and law. By understanding how jurors receive information through non-verbal means, counsel can present a more persuasive case and reduce factors that may negatively impact jurors.

Endnotes

1 *See e.g.*, UCJI No. 10.01.

2 Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 Minn. L. Rev. 573, 574 (2008).

3 *See* UCJI No. 10.03.

4 Tom Capps is a trial consultant based out of Woodburn, Oregon.

5 *See* Levenson, *supra* note 2, at 575, n. 11.

6 Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 Law & Psychol. Rev. 83, 83–84 (1984).

7 *Id.* at 94–95.

8 *See* Bryan Edelman, *The Impact of Graphic Injury Photographs on Liability Verdicts and Non-Economic Damage Awards*, The Jury Expert: The Art and Science of Litigation Advocacy, Sept. 2009, at 1, 2.

9 *Id.* at 3.

10 *Id.*

11 *Id.*

12 Mary R. Rose, et al., *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials*, 34 Law & Hum. Behav. 310, 310 (2010).

13 *Id.* at 311.

14 *Id.*

15 *See* Levenson, *supra* note 2, at 582.

16 *See* LeVan, *supra* note 6, at 92–94.

17 *See* Levenson, *supra* note 2, at 583.

18 Rose, *supra* note 12.

19 *Id.* at 318–19.

20 *Id.* at 322.

21 *Id.* at 318.

22 *Id.* at 321–22.

23 *Id.* at 322.

24 *Id.*

25 *See* Andrea M. Halverson, et al., *Reducing the Biasing Effects of Judges' Nonverbal Behavior with Simplified Jury Instructions*, 82 J. Applied Psychol. 590 (1997).

26 LeVan, *supra* note 6, at 84.

27 *Id.*

28 *See* Halverson, *supra* note 25, at 597. The researchers analyzed the two sets of instructions used in their study through computation of a number of readability indexes. These included simple comparisons of words per sentence and the use of passive voice as well as how the instructions scored on the Flesch Reading Ease and Flesch-Kincaid Grade Level tests.

29 295 Or. 640 (1983).

30 *Id.* at 659.

31 ORCP 59E.

32 *See* Fed. Rules of Civ. Proc. 51; Fed. Rules of Crim. Proc. 30.

33 *See* JR 1-101(A); *also see State v. Garza*, 125 Or. App. 385, 388 (1993).

34 *Garza*, 125 Or. App. at 388.

35 290 Ala. 339, 342 (1973).

36 *See, e.g.*, *Allen*, 290 Ala. at 343.

37 *Garza*, 125 Or. at 389.

38 Kelly Zusman & the Hon. Anna J. Brown, *Couture in the Courtroom*, Oregon State Bar Bulletin, Aug./Sept. 2013, at 70.

39 *See, e.g.*, UTCR 3.010(1) (requiring court attendees to dress "so as not to detract from the dignity of court").

40 Levenson, *supra* note 2, at 593.

41 *Id.* at n. 105.

42 *Id.* at 594, n. 111 (citing Hazel Thornton, Hung Jury: The Diary of a Menendez Juror 111–12 (1995)).

43 Thornton, *supra* note 42, at 73–74.

44 *See* Sarah Merry, *"Eye See You": How Criminal Defendants Have Utilized the Nerd Defense to Influence Jurors' Perceptions*, 21 J.L. & Pol'y 725 (2013).

45 *Id.* at 731 (citing an estimate by the Vision Council that, as of the year 2011, approximately sixteen million Americans wore nonprescription eyeglasses solely for the purpose of altering their appearance).

46 *Id.* at 733–39 (citing a 2008 study conducted by psychologist Michael J. Brown in which mock jurors found that defendants accused of a violent crime who were depicted wearing glasses appeared less physically threatening than those without glasses and that the mock jurors returned fewer guilty verdicts for those defendants who were depicted wearing glasses).

47 Debra Cassens Weiss, *Jurors Less Likely to Convict Defendants Wearing Glasses, Say Lawyers and 2008 Study*, A.B.A. J. (Feb. 14, 2011) (quoting attorney Harvey Slovis: "I've tried cases where there's been a tremendous amount of evidence, but my client wore glasses, dressed well and got acquitted").

48 *See* Merry, *supra* note 44, at 753.

49 Rahiel Tesfamariam, *Lessons from the South Capitol Street Massacre*, Washington Post, May 4, 2012, http://www.washingtonpost.com/blogs/therootdc/post/lessons-from-the-south-capitol-street-massacre/2012/05/04/gIQAxucE1T_blog.html.

50 Merry, *supra* note 44, at 756.

51 *Id.* at 756–57.

52 *Id.* at 757.

53 ORPC 8.4(a)(3).

54 *See* Merry, *supra* note 44, at 761–62.

55 *Deck v. Missouri*, 544 U.S. 622, 630 (2005).

56 *Id.* at 624.

57 *Estelle v. Williams*, 425 U.S. 501, 513, n. 10 (1976).

58 *Id.* at 508.

59 *Id.* at 512–13.

60 *See* Steven Shepard, *Should the Criminal Defendant Be Assigned a Seat in Court?* 115 YALE L.J. 2203 (2006).

61 *Id.* at 2208, n. 30 (citing EDWARD T. HALL, THE HIDDEN DIMENSION, 108–22 (1966)).

62 *Id.* at 2208–09.

63 Jeffrey S. Wolfe, *The Effect of Location in Courtroom on Jury Perception of Lawyer Performance*, 21 PEPP. L. REV. 731, 769–71 (1994).

64 *See, e.g.*, *Mahon v. Prunty*, No. 96-55411, 1997 WL 51570, at *2 (9th Cir. Feb. 6, 1997) (unpublished decision) (noting that the trial court did not abuse its discretion by seating the defendant at the table closer to the jury).

65 *See* Shepard, *supra* note 60, at 2204–05, n. 10.

66 *Id.* at 2204.

67 *Id.* Interestingly, when it came time to present the defense case, Lay and his counsel elected to stay at the far table.

68 *See* THORNTON, *supra* note 42, at 47.

69 *Holbrook v. Flynn*, 475 U.S. 560, 562–63 (1986).

70 *Id.* at 570.

71 *See, e.g.*, *Carey v. Mulsadin*, 549 U.S. 70 (2006).

72 918 F.2d 828, 830 (9th Cir. 1990) (quoting *Holbrook*, 475 U.S. 560 at 572).

73 *Id.* at 834.

74 145 Or. App. 350, 360, n.1 (1996) (en banc).

75 *Id.*

Undue Influence—How Many Millions Are Not Enough?

Susan K. Eggum
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Susan K. Eggum

There are plenty of tort claims that can get a lawyer acutely focused on dismantling or establishing the credibility of the parties. One of those torts is a claim of undue influence in connection with making or amending a will or family trust. Until recently, I thought I had seen just about every variation of testimony under oath offering novel, at best, interpretations of the truth.

Undue influence cases by their nature are rife with questions about the integrity of the defendant-beneficiary. "* * * [U]ndue influence denotes something wrong, according to the standards of morals which the law enforces in the relations of men, and therefore something legally wrong, something, in fact, illegal." *Ramsey v. Taylor*, 166 Or. App. 241, 261, 999 P.2d 1178 (2000) (internal citations and quotation marks omitted).

For the fact finder hearing an undue influence case, the spectacle is who may be lying to retain or re-gain the assets and the cash detailed in the case. That spectacle is heightened if the defendant-beneficiary contends vigorously that the claimant, though a natural object of the bounty, was disinherited because of bad conduct. In that frequent scenario, both defendant *and* claimant are effectively on trial.

An additional challenge for the fact finder is that, in most of these cases, the maker of the will or trust is deceased and cannot speak for himself. However, generally, statements made by the testator are admissible to show the testator's state of mind, as well as susceptibility to undue influence. *See* OEC 803(3).

Another factor that can complicate matters for the fact finder is if the deceased never used a computer, sent an e-mail or a text, and did not otherwise correspond by pen and paper about what he planned to distribute at his death. Instead, sometimes, what we see in these cases is the ultimate beneficiary "helping" the testator make a record of what the testator "really" wanted by writing it up for him or her. Such "help," however, may weigh in favor of the claim that the influence exerted was undue.

In short, proving undue influence by clear and convincing evidence is generally considered a difficult task. Undue influence is "a species of fraud involving a beneficiary's reaping unfair advantage from wrongful conduct." *In re Reddaway's Estate*, 214 Or. 410, 419, 329 P.2d 886 (1958) (citation and internal quotation marks omitted). The emphasis in such cases is "on the conduct of the person allegedly exercising undue influence and whether that person gained an unfair advantage by devices which reasonable people regard as improper." *Slusarenko v. Slusarenko*, 209 Or. App. 307, 325-26, 147 P.3d 920 (2006) (citation and internal quotation marks omitted). The burden is lifted somewhat in cases where the defendant-beneficiary is in a "confidential" relationship with the testator. The Oregon Supreme Court, in the context of a claim for undue influence, has broadly defined a confidential relationship to include persons, such as a child, guardian or ward, who held a position of dominance or trust in relation to the testator. *In re Reddaway's Estate*, 214 Or. at 420. Where the challenged beneficiary was in a confidential relationship with the testator, then only slight evidence is necessary to establish the claim. *Smith v. Ellison,* 171 Or. App. 289, 293, 15 P.3d 67 (2000). In other words, "[t]he existence of confidential or fiduciary relations imposes upon the recipient of a gift the onus of establishing its absolute fairness." *Evans et al. v. Anderson,* 186 Or. 443, 471, 207 P.2d 165 (1949). When combined with suspicious circumstances, then an inference of undue influence arises. *Id.; Penn v. Barrett,* 273 Or. 471, 541 P.2d 1282 (1975).

These claims can often be won or lost in the conduct of first and third party discovery. There are truly a myriad of avenues to be pursued in establishing this tort. Here are a few that I have found productive.

In every case where the challenged will or trust was prepared by a lawyer, the immediate starting point is to subpoena that lawyer's hard files, electronic files, e-mails (and texts depending on the age of the case), desk and cell phone records, and accounting records limited to establishing the payor of the services. From time to time, the estate planning attorney will erroneously assert his file is protected from disclosure by the attorney-client privilege or work product doctrine. Neither assertion has any merit in such actions where that

attorney's client is deceased. Each of the record categories mentioned here will be produced, if necessary, following a motion to compel. OEC 503(4)(b) provides, "[t]here is no privilege under this section * * * [a]s to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction[.]" The Oregon Supreme Court's announced rule in 1966 remains the law: the attorney-client privilege "does not apply to litigation after the death of the client between parties who claim under the client." *Tanner v. Farmer*, 243 Or. 431, 434, 414 P.2d 340 (1966).

The above-described record categories are often a treasure trove of motive and causation gems—though not always favorable to the claimant. But, if the beneficiary-defendant meddled at all with the estate planning process and perceptions of the testator, any one of above records of the estate planning attorney, and typically a compilation of them, will frequently disclose that fact. In part, this can be due to the beneficiary-defendant believing that his communications with professionals—such as lawyers and accountants—were either privileged or somehow safe from later public view.

Of course, the estate planning attorney who consulted with the testator and then prepared the instrument of disinheritance will be answering questions in discovery and at trial about what steps were taken—other than talking with the client and possibly the beneficiary—to establish the absence of undue influence. At risk of losing the respect of their peers and the court, estate planning counsel will make no investigation into family dynamics and alleged facts that might facially appear to justify disinheriting the natural object of the bounty.

In addition to the testator's communications with his accountants and retirement planners, don't overlook accountant relationships the defendant-beneficiary had at the time of the alleged undue influence. None of the e-mail communications that may have occurred between the defendant-beneficiary and his accountant are privileged, contrary to the belief of some laypersons, and none of the accountant's work papers are privileged. It is never out of the question that the defendant-beneficiary communicated to his CPA what could amount to a future plan to have a family member disinherited.

Last, but not least, are the deceased's surviving friends and confidants—this is the one area of third party discovery where leaving a stone unturned could mean the difference between winning or losing the case. Such third parties, though often reticent and uncooperative, can unveil just the one piece of evidence that demonstrates the defendant–

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beneficiary "gained an unfair advantage by devices which reasonable people regard as improper." *Slusarenko v. Slusarenko*, 209 Or. App. at 325-26.

Happy hunting and may justice be done.

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Ethics in Deposition: Do the Rules of Professional Conduct Require Self-Restraint by the Questioning Lawyer?

By David B. Markowitz and Joseph L. Franco

David B. Markowitz

Joseph L. Franco

The following excerpt from a recent Oregon trial describes a scenario that many litigators have encountered: a malleable deponent who is inadequately protected by counsel.

"Q … During that March 12, 2009 deposition, you asked a number of questions, got a whole lot of confessions. Did you observe the quality of [Lawyer's] representation of his client in that deposition?

A Yes.

Q Will you tell the jury what you observed.

A Well, I used this term in my deposition a week or so ago with these lawyers. And what I observed was what I call sitting there like a bump on a log. [Lawyer] appeared to me to be basically letting me have my way with his client. And his client was sinking fast."

With the defending lawyer failing to protect his witness, and a witness who is on the ropes and subject to manipulation, are there any bounds beyond which an ethical questioner should or must not go? While numerous cases and articles address the ethical duties of a lawyer defending a client's deposition, comparatively little attention has been paid to the questioning lawyer's duties. These duties are most important, and easiest to violate, when the deponent is malleable and inadequately protected.

This article suggests that Oregon's Rules of Professional Conduct should and do constrain a questioning lawyer's conduct during a deposition, particularly when the deponent and opposing counsel are themselves unwilling or unable to impose meaningful constraints.

Misrepresentations to the Witness or Opposing Counsel

While questioning a weak deponent, the lawyer may gleefully muse: I wonder just how far can I take this witness? There are any number of ethically sound questioning techniques designed to obtain the information and admissions you need from such a witness. A skilled questioner often will obtain what is needed before the witness or opposing counsel realize the import of what has transpired. In this process of having one's way with the witness, however, the questioning lawyer should always take care not to cross the line between skilled, creative questioning and misrepresentation.

The ethical prohibitions against false statements and misrepresentations apply to a lawyer's conduct during depositions. Oregon Rule of Professional Conduct ("Rule") 4.1 provides that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person…" Rule 8.4(a)(3) in turn provides that it is "misconduct for a lawyer to…(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." ORPC 8.4(a)(3). A misrepresentation may include "both affirmative statements and nondisclosure of material facts." *In re Kluge*, 332 Or 251, 255, 27 P3d 102 (2001) (defining "misrepresentation" for purposes of DR 1-102). In *Kluge,* the accused was disciplined for lying about being a notary and administering an oath to the deponent. *Id.* at 256. The misrepresentation was deemed to be material because the misrepresentation and unauthorized oath "could or would have influenced [the] decision to proceed with the deposition." *Id.*

A misrepresentation made during a deposition may not even need to be material in order to result in discipline. Rule 3.3, Candor Toward the Tribunal, prohibits a lawyer from knowingly making *any* false statement of fact or law to a tribunal. ORPC 3.3(a)(1). Under the ABA Model Rules of

Professional Conduct ("Model Rules"), "tribunal" is defined to include depositions. Cmt. to Model Rule 3.3 (defining "tribunal" to include "an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition";) *see also In re Hostetter*, 348 Or 574, 590, 238 P3d 13 (2010) (finding the commentary to the Model Rules persuasive authority). Oregon adopted the definition of "tribunal" from the Model Rules without modification. *See* ORPC 1.0(p) and Model Rule 1.0(m). If, consistent with the Model Rules, the Oregon Supreme Court were to interpret "tribunal" to include depositions, then a false statement made during a deposition would not need to be material to result in discipline.

There are a number of ways in which the questioner might make a misrepresentation during a deposition. The misrepresentation could be an overt lie to the deponent and counsel, such as in *Kluge*. It might also be made on the record as part of the questioning. The authors have defended depositions in which opposing counsel have prefaced a question with the phrase "I will represent to you that…" There is little doubt that the above sentence would be deemed a "representation," even if part of a question. If the questioning lawyer knows the representation is false, then the lawyer may be subject to discipline. In any event, such statements on the record by the questioning lawyer are unnecessary. The questioning lawyer may achieve the same result through use of a hypothetical question, which avoids the risk that a false preface to a question will be deemed a misrepresentation.

Another, perhaps less clear-cut example is the use of a leading question containing a statement that the questioner knows to be false. Such questions often are nothing more than a statement of fact by the lawyer, which the witness affirms or denies by answering "yes" or "no." *State v. Sing*, 114 Or 267, 288, 229 P 921 (1924). For example, in an automobile injury case assume the lawyer knows through photographic evidence that the signal light was red when her client entered the intersection. The lawyer nevertheless asks the following leading question of a third party: "The light was green when [client] entered the intersection, correct?" Is it conceivable that such a question could be deemed a false statement for purposes of Rule 3.3 or 4.1?

Bluffing during a deposition can also result in an ethical violation. *See Cincinnati Bar Assoc. v. Statzer*, 800 NE2d 1117 (Ohio 2003). In *Statzer,* a lawyer who deposed her former legal assistant stacked some audio cassettes next to her on the table and insinuated that the cassettes contained damaging recordings of the deponent. *Id.* at 119. The questioning lawyer referred to the tapes throughout the deposition in an attempt to secure the witness's compliance with questioning. *Id.* at 1120. The tapes were either blank or held information unrelated to the deponent. *Id.* The questioning lawyer was found to have violated Ohio's version of DR 1-102(A)(4) which prohibits the lawyer from engaging in fraud, deceit, dishonesty or misrepresentation, and DR 7-106(C)(1) which prohibits a lawyer from appearing before a tribunal and alluding to matter that will not be supported by admissible evidence. *Id.* Whether these same facts would lead to a violation under Oregon's version of the Model Rules is not certain, but it is nevertheless a risk. This risk is heightened if the term "tribunal" is deemed to encompass ancillary proceedings such as depositions for purposes of Rule 3.3, Candor to the Tribunal. For this reason, one commentator has urged that lawyers proceed with caution when bluffing during a deposition. Michael Downey, *Know the Boundaries: The Ethics of Bluffing*, 47 No. 6 DRIFTD, June 2005 at 54.

Eliciting Testimony the Questioning Lawyer Knows to Be False

If a witness is vulnerable, the questioning lawyer may be able to intentionally elicit testimony that the lawyer knows to be false. For example, it may be beneficial to the questioning lawyer's case for a contract to have been signed on January 1 rather than February 1. The questioning lawyer knows from independent sources that the contract was indeed signed on February 1. The questioning lawyer nevertheless waits until the end of the day when the witness is weary and asks the following leading question: "So you signed the contract at issue on January 1, correct?" The witness, simply wanting the ordeal to end, responds: "Sure, yeah."

As noted in the section above, an intentionally false statement within a leading question might be deemed a false statement. Beyond that, there are other potential issues with attempting to elicit false testimony during a deposition. At a minimum, the lawyer may not use the untrue testimony at a trial or hearing because Rule 3.3(a)(3) prohibits the lawyer from offering evidence the lawyer knows to be false. It may also be that the questioning lawyer's

purposeful elicitation of false testimony would violate Rule 3.4(b), which prohibits a lawyer from "assist[ing] a witness to testify falsely…"

In addition, the intentional procurement of false testimony may constitute "conduct that is prejudicial to the administration of justice." ORCP 8.4(a)(4). A violation of Rule 8.4(a)(4) exists if: 1) the lawyer's conduct was improper; 2) the improper conduct took place within a judicial proceeding, or a proceeding with the trappings of a judicial proceeding; and 3) the improper conduct had or could have had a prejudicial effect on the administration of justice. *In re Paulson*, 346 Or 676, 683, 216 P3d 859 (2009). It is not a stretch to suggest that the purposeful procurement of false testimony on the record could satisfy all three elements.

Harassing or Embarrassing the Deponent or Opposing Counsel

Aggressive questioning of a witness can certainly be appropriate, but it should at all times remain professional. Questions that are designed to merely harass or embarrass a witness are improper and may result in discipline. A lawyer should not ask questions during a deposition that "have no substantial purpose other than to embarrass, delay, harass or burden" the deponent. ORPC 4.4(a). In addition to a violation of Rule 4.4, a number of jurisdictions have found such tactics constitute conduct prejudicial to the administration of justice. *In re Hammer,* 718 SE2d 442 (SC 2011) (the questioning lawyer inappropriately asked the deponent about his sexual orientation, whether he had HIV, and if he had Alzheimer's disease); *The Florida Bar v. Ratiner,* 46 So3d 35 (Fla 2010) (belligerent conduct toward opposing counsel constituted conduct prejudicial to the administration of justice).

Conclusion

Even if the deponent or the defending lawyer does not place effective limits on the deposition questioner, the ethical rules sometimes call for restraint. The occasions for restraint discussed above are not exhaustive, but are instead meant to be food for additional thought. There are myriad ways in which the Oregon Rules of Professional Conduct may be implicated during a deposition. How they are implicated will depend on the unique facts of every case.

Comments from the Editor

An Alternative to Mock Jury Trials

By Dennis Rawlinson, Miller Nash LLP

Dennis Rawlinson

Most of us recognize the value of using jury-trial consultants and conducting mock jury trials to develop trial themes, determine any gaps in our cases, and discern their strengths, weaknesses, and worth.

Engaging trial consultants and conducting mock jury trials can be expensive. The expense can usually be justified only in the most substantial cases we handle. It is difficult, if not impossible, to justify such an expense in a case involving $100,000 or less.

Yet there are some alternatives to consider in our trial preparation. There are other, less expensive ways to determine:

- whether we have selected a persuasive theme.
- whether we can get our point across in 30 seconds or less.
- the strengths and weaknesses of our case.
- whether we have developed a proper "story" for our case.
- whether gaps or questions are raised by our story.
- whether we have personalized our story characters.
- whether we have successfully reduced our case to a single persuasive sentence.

What are these less expensive alternatives to mock jury trials? Every day we have opportunities to spend time with "regular folks" whose reactions and opinions concerning our cases may well be as helpful as those of the jury consultant or those of a mock jury panel. Many of these people are available to us at little or no expense.

1. Gas-Station Attendants. Next time you stop to get fuel for your automobile, select a time of the day that is early or late enough that the gas station will not be busy. Service stations providing 24-hour service are ideal in providing these opportunities.

As the gas-station attendant is filling your automobile's tank, get out of your car and ask the person's indulgence in listening to the facts of a case you are handling and providing you with his or

her reactions to it. I believe you will find that most attendants are pleased to have the mental stimulus and are flattered by your interest in what they think.

If you go to a service station regularly and try this out, you can easily develop a relationship with one or two service-station attendants who will look forward to discussing your next case with you.

2. Barbers and Hairstylists. Barbers and hairstylists can sometimes be a good barometer of public opinion. Once a month or so, most of us sit for 30 minutes or more with a hair professional with whom we have developed a relationship. I suspect that most of them would be pleased to share their reactions to your case themes and give their opinions on your case's strengths and weaknesses.

3. Cab Drivers. Similarly, cab drivers can serve as an excellent alternative to a mock jury panel. It might cost you $40 to ride to and from the airport, but most drivers would be pleased to listen to you explain your case and to provide you with their reactions and opinions. Cab drivers meet a lot of people, listen to a lot of radio, and often have a pretty good sense of public opinion.

The list, of course, goes on and on. Often your 12-year-old son or daughter would be flattered if you would take 20 minutes or so to discuss one of your cases to obtain his or her reactions and opinions. Although you may think that you know what your child will say, you could be surprised.

Another alternative to mock jury trials is simply to make a video recording of yourself giving a mock opening statement. You can then play this video for family members, legal secretaries, or other staff members to get their reactions and opinions. You will probably find that by watching yourself on video, you will gain certain insights on how to improve your persuasion and presentation, with or without the help of others.

There is no question that jury consultants and mock jury trials can offer a wealth of information to improve our ability to persuade. But don't overlook the opportunity to use less expensive alternatives.

Ninth Circuit Rejects Jim Brown's False Endorsement Claim Against Provider of Madden NFL Video Game Series

By Julia E. Markley
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Julia E. Markley

The Ninth Circuit rejected NFL great James "Jim" Brown's claim that the use of his likeness in Electronic Arts, Inc.'s *Madden NFL* football video games violated section 43(a) of the Lanham Act. *Brown v. Elec. Arts, Inc.*, __ F.3d __, No. 09-56675, 2013 WL 3927736 (9th Cir. July 31, 2013).

Brown is one of the NFL's all-time greatest players. He played for the Cleveland Browns from 1957 to 1965, garnering MVP honors four times and setting multiple records for rushing the ball. He was inducted into the Pro Football Hall of Fame in 1971. After his retirement from pro football, Brown worked as a movie actor and as a public servant. In the Ninth Circuit's words, "There is no question that he is a public figure whose persona can be deployed for economic benefit." *Brown*, 2013 WL 3927736, at *1.

Electronic Arts delivers games, including the *Madden NFL* series of football video games, for Internet-connected consoles, personal computers, mobile phones, and tablets. The *Madden NFL* games allow users to control virtual players in virtual football games. In each version of the game, virtual players on current NFL teams bear the names, numbers, physical attributes, and physical skills of a current NFL player. Some versions of the game also include historical players. Unlike current players, *Madden NFL* does not use names for historical players, but the players "are recognizable due to the accuracy of their team affiliations, playing positions, ages, heights, weights, ability levels and other attributes." *Id.* at *2.

Electronic Arts has licensing agreements with the NFL and NFL Players Association for its use of the names and likenesses of current NFL players. But Brown, as a former player, is not covered by those agreements and has never authorized Electronic Arts to use his likeness in *Madden NFL. Id.* Nonetheless, *Madden NFL* included historical teams, including the 1965 Cleveland Browns and the All Browns teams,

that included a player that was clearly recognizable as Jim Brown. Brown sued Electronic Arts in district court for unfair competition under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), under a theory of false endorsement. He also asserted California state law claims for invasion of privacy and unlawful business practices. Electronic Arts filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

The district court applied the *Rogers* test to the false endorsement claim. In *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), the court developed a test balancing the public's interest in being free from consumer confusion about affiliations and endorsements with the First Amendment interest in free expression. "Under the *Rogers* test, § 43(a) will not be applied to expressive works 'unless the [use of the trademark or other identifying material] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [use of trademark or other identifying material] explicitly misleads as to the source or content of the work.'" *Brown,* 2013 WL 3927736, at *1 (*quoting Rogers*, 875 F.2d at 999). The Ninth Circuit adopted the *Rogers* test in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002). The district court ruled that Brown's claim under section 43(a) failed to fall within either exception of the *Rogers* test, and dismissed that claim. The district court declined to exercise supplemental jurisdiction over the state law claims.

On appeal, the Ninth Circuit affirmed. The court first ruled that the video game *Madden NFL* was indeed an expressive work to which the *Rogers* test applies. "Even if *Madden NFL* is not the expressive equal of *Anna Karenina* or *Citizen Kane*, the Supreme Court has answered with an emphatic 'yes' when faced with the question of whether video games deserve the same protection as more traditional forms of expression." *Brown*, 2013 WL 3927736 at *3 (citing *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (no relation to current parties).

The Ninth Circuit declined Brown's invitation to modify the *Rogers* test by also applying the "likelihood of confusion" test or the "alternative means" test. *Id.* By doing so, the court reaffirmed its commitment to the *Rogers* test as appropriately balancing the public's interest in being free from consumer confusion and Electronic Arts' First Amendment rights.

In applying the *Rogers* test, the Ninth Circuit had no trouble finding that the first exception—whether the use of the trademark has no artistic relevance to the underlying work whatsoever—was not met. "As Brown emphasizes in arguing that it is in fact his likeness in the games: '[I]t is axiomatic the '65 Cleveland Browns simply, by definition, cannot be the '65 Cleveland Browns without the players who played for the '65 Cleveland Browns. This fundamental truth applies especially to that team's most famous player, Jim Brown.' Given the acknowledged centrality of realism to EA's expressive goal, and the importance of including Brown's likeness to realistically recreate one of the teams in the game, it is obvious that Brown's likeness has at least some artistic relevance to EA's work." *Id.* at *4.

Neither was the second exception of the *Rogers* test—whether the use of the mark or material explicitly misleads consumers as to the source or the content of the work—met here. Among other rulings, the Ninth Circuit stated that merely using Brown's likeness was not sufficient to make the use misleading, even if survey evidence showed that consumers of the *Madden NFL* series believed that Brown endorsed the game. "[I]f the use of a mark alone were sufficient 'it would render *Rogers* a nullity.'" *Id.* at *7 (quoting *Mattel*, 296 F.3d at 902). The Ninth Circuit found no allegation that Electronic Arts explicitly misled consumers as to Brown's involvement with *Madden NFL.*

Lesson Learned: Once a work is found to be an expressive work to which the *Rogers* test applies, it will be difficult for a plaintiff to assert a Lanham Act section 43(a) claim. That is because the first exception to the *Rogers* test—that the use of the trademark has *no artistic relevance* to the underlying work *whatsoever*—is weighted heavily towards the First Amendment. And the second exception—whether the use of the mark or material is explicitly misleading to consumers—is also a rigorous standard.

Standing, Ripeness and Mootness: Tools to Identify Nonjusticiable Cases

By Alan Galloway
Davis Wright Tremaine LLP


Alan Galloway

I. STANDING

Under Oregon law, not everyone is entitled to a day in court. "'Standing' is a legal term that identifies whether a party to a legal proceeding possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties."[1] The particular requirements for standing depend on the statute under which a party seeks relief.[2] In many cases, the issue of standing is raised when a party seeks relief under the Uniform Declaratory Judgments Act, and in such cases a litigant has standing only if (1) he or she has "some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law," (2) the interest is "real or probable rather than hypothetical or speculative" and (3) court adjudication would have a practical effect on his or her rights.[3] These three requirements extend to injunctive relief and other contexts as well.[4]

A. Development of Oregon law on standing

Standing has been characterized as one of several requirements for a case to be "justiciable."[5] However, as Oregon's jurisprudence on standing has developed, it has not always been clear whether the standing requirement is a fixed constitutional limitation or a prudential doctrine.

In *Yancy v. Shatzer*, the Oregon Supreme Court described standing as part of a "constellation of related issues" concerning justiciability that also included both ripeness and mootness—which was the issue before the court in *Yancy*.[6] The *Yancy* court held that mootness reflected a constitutional limit on the "judicial power" granted to Oregon courts under Article VII (Amended) of the Oregon Constitution,[7] applying the framework for constitutional interpretation set forth in *Priest v. Pearce*.[8]

Previously, in *Utsey v. Coos County*, the Court of Appeals, citing federal case law in the course of its own *Priest v. Pearce* analysis, also took the view that the standing is a constitutional limitation on the judicial power, such that the legislature cannot confer standing because doing so would increase the power of the courts beyond constitutional limits.[9] In *Utsey*, a statute said that any party participating in a proceeding before the Land Use Board of Appeals could seek judicial review of a final order.[10] A majority of the Court of Appeals interpreted that as amounting to conferring a "right to obtain an advisory opinion," and held the legislature has no ability to confer such a right due to constitutional limitations.[11]

However, in *Kellas v. Department of Corrections*, the Oregon Supreme Court shifted its approach, holding that a statute conferring standing to challenge administrative rules on "any person" was consistent with the Oregon Constitution.[12] The court cited a key difference in the scope of the judicial power granted by Article VII (Amended) and the federal judicial power set forth in Article III of the U.S. Constitution. The court noted that while Article III, section 2 of the U.S. Constitution limits the power of federal courts to resolution of "cases" or "controversies," the Oregon Constitution contains no "cases" or "controversies" provision. Based on that difference, the court cautioned against "import[ing] federal law regarding justiciability into our analysis of the Oregon Constitution and rely[ing] on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government."[13] The court quoted former Justice Hans Linde:

> "In sum, rejecting premature or advisory litigation is good policy, but rigid tests of 'justiciability' breed evasions and legal fictions. It is prudent to keep judicial intervention within statutory or established equitable and common law remedies. It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, and thereby to foreclose lawmakers from facilitating impartial, reasoned resolutions of legal disputes that affect people's public, rather than self-seeking, interests. Requirements that rest only on statutory interpretations can be altered to meet desired ends, but change becomes harder once interpretations are elevated

into supposedly essential doctrines of 'justiciability.' * * *"[14]

The Oregon Supreme Court then expressly rejected the *Utsey* view of standing, holding that the Oregon Constitution does not impose a strict requirement that litigants have a "personal stake" in a case, or that the outcome have a practical effect on the parties' rights.[15] Thus, the court rejected a federal-style limitation on judicial power, and embracing Justice Linde's view that standing is a prudential doctrine to avoid premature or advisory litigation. Under that view, the requirements for standing may be established by statute (as in *Kellas* itself).[16] Accordingly, the requirements may vary with the statute under which a claim is brought.[17]

Most recently, in *Morgan*, the Oregon Supreme Court reiterated that standing is based on "the particular requirements of the statute under which he or she is seeking relief," with no discussion of Article VII (Amended) or limits on judicial power imposed by the Oregon Constitution.[18] Overall, although *Yancy* has not been overruled with respect to mootness,[19] it is clear from *Kellas* and *Morgan* that the Oregon Supreme Court's analytical approach with respect to standing has changed since *Yancy* was decided.

B. Illustrations of standing requirements in declaratory actions

Eacret v. Holmes offers an examination of the first *Morgan* requirement—that the interest be particular to the party, rather than an abstract interest in the correct application of law.[20] In *Eacret*, plaintiffs sought a declaration that the Governor had no authority to commute the death sentence of a man who had murdered their son. The Oregon Supreme Court, upholding the trial court's dismissal of the suit as lacking a justiciable controversy, held that despite the plaintiffs' relation to the victim, the plaintiffs lacked standing because the gravamen of the suit was simply to have the pardon power properly exercised. As the court explained:

> "The wrong of which [plaintiffs] complain— if there be a wrong—is public in character. The complaint discloses no special injury affecting the plaintiffs differently from other citizens. The fact that it was their son for whose murder Nunn has been sentenced to die does not alter the case, even though it be natural that they should feel more deeply upon the subject than other members of the general public. Punishment for crime is not a matter of private vengeance, but of public policy. Any violation of constitutional rights which might be supposed to flow from what is asserted to be an 'unconstitutional' exercise by the executive of the pardoning power would affect equally all the people of the state, rather than the plaintiffs in a different and special way. * * * The plaintiffs have a difference of opinion with the Governor, but that does not of itself make a justiciable controversy."[21]

Thus, while the plaintiffs had a strong personal connection to the case, the legal interest at stake—that the pardon power be applied constitutionally—was shared by all citizens. Because that legal interest was not particular to the plaintiffs, it was not sufficient for standing.[22]

The second *Morgan* requirement—that the interest be real, rather than hypothetical—precludes "friendly" lawsuits designed to obtain a ruling in the absence of a pressing conflict between the parties' interests. In *Gortmaker v. Seaton*, the Marion County district attorney brought a declaratory judgment action seeking judicial clarification of statutes and regulations restricting the sale of LSD.[23] The district attorney asserted—without elaboration—that he might be sued for damages for prosecuting under the statute, or prosecuted by the state for failing to prosecute under the statute.[24] The Oregon Supreme Court noted that such issues could arise in every criminal statute, and that the statements about future legal action against the district attorney were "mere conclusions, highly speculative, hypothetical, and, as statements of law, open to serious question." In reality, the court said, "[t]he only purpose of this admittedly 'friendly' litigation is to obtain an advisory opinion * * *."[25] The court held that the district attorney lacked standing, suggesting that interpretation of the law would have to wait until a criminal defendant prosecuted under the law questioned its meaning.[26] *Gortmaker*, while decided on standing, may also be viewed as a ripeness case, and the court's decision effectively held that until a criminal defendant challenged the meaning of the law, the question presented was merely hypothetical and thus not ripe for adjudication.

The third *Morgan* requirement—the practical effect on the party required for standing—was explored in *League of Oregon Cities v. State*, which

concerned challenges to Measure 7, an initiative requiring compensation to landowners when regulations decreased land values.[27] In that case, the court found no standing for plaintiffs who had merely alleged that they were landowners and that the initiative would increase development. Those plaintiffs, the court wrote, "failed to allege or show that Measure 7 would lead to increased development, how it would do so, and how, specifically, that increased development would affect them as landowners."[28] In contrast, a rancher who alleged that new development would diminish the value of his ranch and interfere with his ability to continue ranching was held to have standing.[29] So was a mayor who alleged that his city was actively reconsidering mining restrictions on land that, if lifted, would decrease the value of his own property in the city.[30]

Morgan itself also illustrates the practical effects requirement. There, plaintiff sought a declaratory judgment that a school district unlawfully issued bonds to finance capital improvements, and further sought an injunction blocking the district from making payments on the alleged bonds. The plaintiff asserted standing as a voter, as a taxpayer, and on the basis of "hybrid" standing arising from his combined voter/taxpayer status. The court rejected taxpayer standing, agreeing with the Court of Appeals that plaintiff's allegations were too attenuated and speculative—those allegations being that bonds *could* jeopardize the district's operations, "increas[ing] the likelihood" that the district would seek voter-approval for more bonds from taxpayers, ultimately affecting him.[31] The court held he had no standing as a voter, concluding that the relief sought could not have a practical effect on his voting rights since he did not seek to force an election on the issue.[32] The court rejected the "hybrid" argument, noting that neither voter nor taxpayer arguments showed a remediable injury to voting rights or any actual fiscal harm.[33]

While a full examination of the Oregon Supreme Court's case law on standing is beyond the scope of this article, it is clear that claims in Oregon courts for declaratory relief may be brought only by those persons who have particular interests upon which the relief sought would have a concrete, practical impact.

II. RIPENESS AND MOOTNESS

The concepts of ripeness and mootness are closely related to standing. Both concern the timing of adjudication with respect to the interests that form the basis for standing. Broadly speaking, ripeness assesses whether a dispute is sufficiently concrete that adjudication will have a practical effect on the party bringing it, while mootness terminates an action when, due to a change in circumstances, court adjudication will no longer have such a practical effect. Although related to standing, ripeness and mootness are distinct doctrines, as discussed below.

A. Ripeness

"A controversy is ripe if it involves present facts, as opposed to future events of a hypothetical nature."[34] In contrast, where adjudication would only have a practical effect if a number of uncertain future events occur in a certain way, that case is not yet ripe. Whereas standing is generally described as an attribute of a party, ripeness is generally described as an attribute of the case. But the relation to standing is strong. The ripeness requirement, in effect, prohibits premature adjudication where it is unclear when (if ever) the adjudication would have a practical effect on a party. Ripeness, then, involves the timing of adjudication with respect to the interests that form the basis for standing.

Ripeness was addressed in Oregon's jurisprudence soon after the 1910 amendment of Article VII. In *Oregon Creamery Manufacturers Association v. White*, butter manufacturers brought an action under Oregon's Uniform Declaratory Judgment Act to enjoin enforcement of the Oregon Agricultural Marketing Act, though the Department of Agriculture had neither promulgated rules under the act nor taken enforcement actions against the plaintiffs.[35] The Oregon Supreme Court held that, in the absence of rules that could be enforced against the manufacturers, the case was not yet ripe:

> "In our opinion, plaintiffs' case is not ripe for judicial determination. * * * We agree that plaintiffs are not obliged to wait until the director undertakes to enforce some rule or regulation to their damage. We cannot, however, concur in the view that there is reasonable ground for complaint before any rules or regulations have been promulgated."[36]

The court likened deciding an unripe case to rendering an advisory opinion:

> "Deciding hypothetical cases is not a judicial function. Neither can courts, in the absence of constitutional authority, render advisory opinions. A declaratory judgment has the force and effect of an adjudication. Hence, to invoke this extraordinary statutory relief there must be an actual controversy existing between adverse parties."[37]

Two features of *Oregon Creamery* are worth noting. First, the court did not hold that a present enforcement action was required for ripeness. The opinion implies that enactment of relevant rules by the department could have provided the basis for a justiciable complaint—even absent enforcement of those rules against the plaintiffs. Second, the court's dismissal of the claim as unripe did not preclude the very same plaintiffs from filing essentially the same claim once the case ripened. Indeed, the court expected as much. The court concluded by stating that "the constitutionality of the marketing act in question * * * will be reserved for decision when an actual controversy arises."[38]

B. Mootness

Mootness precludes continuing a process of adjudication that would no longer have a practical effect on the litigants—even if it would have practical effects on others, or answer an important question of law. Whereas ripeness prevents litigation from being brought too early (and before standing exists), mootness concerns the continuation of litigation when it is too late (where the factual predicates of standing no longer exist). Mootness may require dismissal of a complaint at any time from filing through trial and appellate review.[39]

An important difference between Oregon and federal law is that under federal jurisprudence, courts may decide moot cases if they are "capable of repetition, yet evading review."[40] Such cases may concern time-sensitive matters involving, for instance, upcoming elections, or abortion rights, where it is not possible for appellate review to take place before the election or pregnancy in question is over. Prior to *Yancy*, Oregon had recognized the "capable of repetition, yet evading review" doctrine.[41]

However, in *Yancy*, the Oregon Supreme Court held that the "judicial power" conferred on the courts by the Oregon Constitution flatly "does not extend to moot cases," and consistent with the idea of a constitutional limit on the judicial power, held that rendering decision on cases that are "capable of repetition, yet evading review" was simply beyond the power conferred upon the courts.[42] Accordingly, the court ordered the trial court's judgment vacated, and the writ of review dismissed.[43] The divergence from federal law in *Yancy* reflected a different analytical foundation for mootness under Oregon law. The U.S. Supreme Court appears to treat mootness as a "prudential," subconstitutional doctrine, rather than a mandate of Article III's "case or controversy" requirement.[44] In contrast, the Oregon Supreme Court analyzed mootness in *Yancy* as a constitutional limit imposed by Article VII (Amended)—and indeed, one traceable to the intent of the framers of the Oregon Constitution about the original Article VII. *Yancy* concluded that 1910 voters did not intend to change the scope of "judicial power" from the original Article VII, and that "the framers * * * and those who later adopted that constitution, are most likely to have understood the grant of judicial power in the restrained sense espoused in the early [U.S.] Supreme Court cases—that is, an authority limited to the adjudication of an existing controversy."[45]

The Oregon Supreme Court's decision in *Yancy* was based on the conclusion that mootness is a fixed, constitutional limit established by Article VII. That approach stands in contrast to the subsequent analysis of standing in *Kellas*, where the court adopted a more "prudential" approach. It is possible that *Kellas* signals a more general shift towards a prudential view of justiciability issues that could have implications for mootness and ripeness.

III. CONCLUSION

Before filing a complaint in Oregon's courts, plaintiffs should carefully consider standing and ripeness. Where a claim is brought under a statute, that statute governs the requirements for standing —sometimes by expressly granting standing (e.g., to "any person"). Claims for relief under the Uniform Declaratory Judgment Act and claims for injunctive relief must meet the requirements set forth in *Morgan*: (1) a concrete injury specific to the plaintiff, (2) that is not speculative or hypothetical, (3) where adjudication will have a practical effect on the plaintiff. Plaintiffs should also consider how evidence to be produced during the case will sustain the allegations concerning standing. Careful analysis of standing is essential where a plaintiff challenges a government action by seeking declaratory or

injunctive relief as a voter,[46] taxpayer,[47] or both.[48]

Defense counsel, for its part, should scrutinize every complaint for allegations sufficient to establish standing under any relevant statute. Where declaratory or injunctive relief is sought concerning a governmental action, defendants should analyze whether the *Morgan* requirements are met. A motion to dismiss may dispose of a case if there is no injury particular to the plaintiff, the injury is speculative, or adjudication will have no practical effect on the plaintiff. Where standing is properly alleged, but the facts giving rise to standing are in dispute, counsel should consider whether there is enough supporting evidence of those facts to survive summary judgment.[49]

Appellate counsel should consider whether the party seeking review has standing to do so within the relevant statutory framework. If factual findings were made by the court or jury at trial, counsel should also analyze whether those findings are inconsistent with the facts relied on for standing. Appellate counsel should also pay special attention to a case that has been rendered moot by intervening events as it wends its way through the courts.

Overall, attentiveness by counsel to standing, ripeness and mootness advances clients' interests and helps judges ensure that Oregon's judicial resources are utilized to adjudicate the claims of parties that are entitled to their day in court.

Endnotes

1 *Morgan v. Sisters School Dist. No. 6*, 353 Or. 189, 194, 301 P.3d 419, 423 (2013) (quoting *Kellas v. Dept. of Corrections*, 341 Or. 471, 476–77, 145 P.3d 139 (2006)).

2 *Morgan*, 353 Or. at 194, 301 P.3d at 423.

3 *Id.* at 195-97, 301 P.3d at 423-24.

4 *Id.* at 201, 310 P.3d at 426 (applying declaratory judgment standing requirements to claim for injunctive relief, noting long-standing practice); *see, e.g.*, *Hamel v. Johnson*, 330 Or. 180, 184, 998 P.2d 661 (2000) (noting prohibition on abstract, hypothetical or contingent questions, and requirement for practical effect on the parties' rights in *habeas corpus* proceeding).

5 *See Yancy v. Shatzer*, 337 Or. 345, 349, 97 P.3d 1161, 1163 (2004).

6 *Id.*

7 Article VII (Amended) of the Oregon Constitution states that "[t]he judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law." Or. Const., art. VII, § 1 (amended 1910).

8 *Yancy*, 337 Or. at 353, 97 P.3d at 1166 (applying the framework set forth in *Priest v. Pearce*, 314 Or. 411, 416, 840 P.2d 65 (1992).

9 *See Utsey v. Coos County*, 176 Or.App. 524, 32 P.3d 933 (2001)*, abrogated by Kellas v. Dept. of Corrections*, 341 Or. 471, 476-77, 145 P.3d 139 (2006).

10 *Id.* at 549, 32 P.3d at 947.

11 *Id.* at 595, 32 P.3d at 972.

12 *Kellas v. Dept. of Corrections*, 341 Or. 471, 476, 145 P.3d 139, 142 (2006).

13 *Id.* at 478, 145 P.3d at 143.

14 *Id*. at 478-79, 145 P.3d at 143 (quoting Hans A. Linde, "The State and the Federal Courts in Governance: Vive La Différence!," 46 Wm. & Mary L. Rev. 1273, 1287–88 (2005)).

15 *See id.* at 484-86, 145 P.3d at 146-47.

16 *See id.* at 478, 482, 145 P.3d at 142, 145 (discussing plenary power of legislature, including power to "deputize its citizens to challenge government action in the public interest").

17 *See id*. at 483-85, 145 P.3d at 145-46 (comparing cases analyzing standing under the Oregon Administrative Procedures Act with those applying the Uniform Declaratory Judgment Act).

18 *Morgan v. Sisters School Dist. No. 6*, 353 Or. 189, 194, 301 P.3d 419, 423 (2013) (citing *Local No. 290 v. Dept. of Environ. Quality*, 323 Or. 559, 566, 919 P.2d 1168 (1996)).

19 *See Pendleton School Dist. 16R v. State,* 220 Or.App. 56, 65-66, 185 P.3d 471, 477 (2008) (concluding that "whatever the broader discussion in *Kellas* might otherwise suggest, *Yancy* remains good law"), *overruled on another point of law*, 345 Or. 596, 200 P.3d 133 (2009).

20 *Eacret v. Holmes,* 215 Or. 121, 333 P.2d 741 (1958).

21 *Id*. at 124-25, 333 P.2d at 742-43 (citations and internal quotations omitted).

22 *Eacret* was decided prior to the addition of Article I, section 42, guaranteeing certain rights to crime victims, to the Oregon Constitution. It is unknown whether that provision would have altered the court's conclusion regarding plaintiff's legal interest. After analyzing standing, the court in *Eacret* also stated that separation of powers forbade the courts from interference with the Governor's power to commute sentences. *Id*. at 126, 333 P.2d at 743.

23 *Gortmaker v. Seaton*, 252 Or. 440, 442, 450 P.2d 547, 548 (1969).

24 *Id*. at 443, 450 P.2d at 548.

25 *Id.*

26 *Id.* at 445, 450 P.2d at 549.

27 *League of Oregon Cities v. State*, 334 Or. 645, 668-69, 56 P.3d 892, 906-07 (2002)

28 *Id.* at 659, 56 P.3d at 902.

29 *Id*. at 661, 56 P.3d at 903.

30 *Id.* at 660, 56 P.3d at 902.

31 *Morgan*, 353 Or. at 190, 200-01, 301 P.3d at 421, 426.

32 *Id.* at 199, 301 P.3d at 425.

33 *Id.* at 201, 301 P.3d at 426.

34 *Menasha Forest Products Corp. v. Curry County Title, Inc.*, 234 Or.App. 115, 120, 227 P.3d 770, 773 (2010), *reversed on other grounds*, 350 Or. 81, 249 P.3d 1265 (2011) (citing *McIntire v. Forbes*, 322 Or. 426, 434, 909 P.2d 846 (1996)).

35 *Oregon Creamery Mfrs. Ass'n v. White*, 159 Or. 99, 78 P.2d 572 (1938).

36 *Id*. at 110-11, 78 P.2d at 577.

37 *Id.* at 109, 79 P.2d at 576.

38 *Id.* at 113, 78 P.2d at 578.

39 *See, e.g.*, *Hamel v. Johnson*, 330 Or. 180, 184, 998 P.2d 661, 664 (2000) (affirming dismissal of appeal as moot).

40 *See Yancy*, 337 Or. at 359-60 (*citing Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498, 514, 31 S.Ct. 279 (1911)).

41 *See Perry v. Oregon Liquor Commission*, 180 Or. 495, 498–99, 177 P.2d 406 (1947), *expressly overruled by Yancy v. Shatzer*, 337 Or. 345, 363, 97 P.3d 1161, 1171 (2004).

42 *See Yancy*, 337 Or. at 363, 97 P.3d at 1171.

43 *See also Brumnett v. Psychiatric Sec. Review Bd.,* 315 Or. 402, 406, 848 P.2d 1194, 1196 (1993) ("Cases that are otherwise justiciable, but in which a court's decision no longer will have a practical effect on or concerning the rights of the parties, will be dismissed as moot.").

44 *See Friends of Earth, Inc. v. Laidlaw Env. Svcs.*, 528 U.S. 167, 190, 120 S.Ct. 693, 699 (2000) ("[I]if mootness were simply [Article III] 'standing set in a time frame,' the exception to mootness that arises when the defendant's allegedly unlawful activity is 'capable of repetition, yet evading review,' could not exist.") (alteration added); *see also Honig v. Doe*, 484 U.S. 305, 339, 108 S.Ct. 592, 612 (1988) (Scalia, J., dissenting) (criticizing majority for view that "mootness is only a prudential doctrine and not part of the 'case or controversy' requirement of Art. III.").

45 *Yancy*, 337 Or. at 353, 362, 97 P.3d at 1165-66, 1171 (alteration added).

46 *Compare Morgan*, 353 Or. at 199, 301 P.3d at 425 (no voter standing when relief sought would not remedy alleged failure to hold election) *with Webb v. Clatsop Co. School Dist. 3*, 188 Or. 324, 328, 215 P.2d 368 (1950) (finding standing where voter alleged that an election result would have changed had he been allowed to cast his vote) *and deParrie v. Oregon*, 133 Or.App. 613, 616-17, 893 P.2d 541 (1995) (voter had standing to challenge action that would interfere with the benefit voter would have received).

47 *Compare Morgan*, 353 Or. at 190, 301 P.3d 420-21 (2013) (no standing where plaintiff alleged that unlawful bonds might jeopardize daily operations of the district, and could cause the district to seek voter-approval for additional bonds in the future) speculation of *Gruber v. Lincoln Hospital District*, 285 Or. 3, 588 P.2d 1281 (1979) (no standing without allegation that contract involved expenditure of tax funds) *with Savage v. Munn*, 317 Or. 283, 856 P.2d 298 (1993) (finding standing where taxpayer showed he would pay proportionally more for the same services than similar property owners, despite lack of showing that his tax bill would increase).

48 *See Morgan* 353 Or. at 201, 301 P.3d at 426 (rejecting "hybrid" standing argument).

49 *See Morgan v. Sisters School Dist. No. 6*, 241 Or.App. 483, 492, 251 P.3d 207, 212 (2011), *aff'd* 353 Or. 189, 194, 301 P.3d 419 (2013) (Schuman, J.) (explaining that standing is analyzed according to the procedural posture of the case).

I Need Some Advice… The Uncertain Status of Communications with Law Firm In-House Counsel

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In March 2013, the Oregon Supreme Court granted mandamus in a case that involves an issue of direct interest to Oregon lawyers, particularly those practicing at law firms with designated in-house counsel: when and to what extent may lawyers obtain confidential legal advice related to a current client?

It is every lawyer's worst nightmare to discover that he or she may have made a mistake in representing a client. Potential errors raise a number of ethical issues that demand immediate attention, including consideration of whether the mistake may harm the client and the extent to which any harm can be mitigated, determination of what disclosure obligations the lawyer has to the client, and evaluation of whether the lawyer may even need to withdraw from the representation.

Similar issues arise if a client expresses displeasure with a lawyer's services and asserts or suggests a possible malpractice claim, even if the lawyer believes it is unfounded.

In both situations, the lawyer is suddenly in the uncomfortable and ethically fraught circumstance of wanting to do what is best for the client without unintentionally increasing his or her own exposure to a potential claim. In many cases, what is best for the client is best for the lawyer as well—avoiding or minimizing any possible harm from the actual or alleged error. The situation is a difficult one, however, full of ethical land mines, and the facts and circumstances of each case will vary dramatically.

Ultimately, if the lawyer's handling of the situation falls short of the requirements of the Oregon Rules of Professional Conduct (ORPC), the lawyer may face disciplinary action. As such, it cannot be exaggerated how important it is that lawyers take all necessary and appropriate action to fulfill their

ethical obligations to clients when potential issues arise.

Separate and apart from any potential disciplinary action for failure to abide by the ORPC, however, is the question whether and to what extent a lawyer may seek confidential legal advice on issues related to a current client, particularly from in-house counsel at a law firm. This issue is presently pending before the Oregon Supreme Court in a mandamus proceeding in *Crimson Trace Corp. v. DWT*, No. S061086.

If a lawyer seeks legal advice for himself or herself regarding a current client, related to a potential malpractice claim or otherwise, are those communications privileged or are they discoverable if the client later sues the lawyer or law firm? Similarly, to what extent does work product protection apply?

Over the last two decades, it has become increasingly common for law firms to have in-house counsel. Exact titles vary, but typically the position is a formal one akin to the position of in-house general counsel at any organization. The position may be full-time, but, in Oregon, it is more commonly a part-time position held by a designated firm lawyer (or lawyers). In-house counsel may review contracts for the firm, address human resources issues, manage the firm's relationship with its professional liability insurer, and handle complaints about individual lawyers or firm practices.

In-house counsel also is available to advise partners and associates on professional and ethical issues on which they require legal advice, including but not limited to potential malpractice claims. Indeed, professional liability insurers often recommend or even require that law firms have general counsel for this purpose. Although relatively few matters on which in-house counsel are consulted involve malpractice, and even fewer ripen into actual malpractice claims, this is an important part of the role of law firm in-house counsel.

In *Crimson Trace*, two lawyers sought legal advice about a current client from their law firm's designated in-house counsel, known as the "Quality Assurance Committee." The client had stopped paying its legal bills, expressed dissatisfaction with its representation in certain patent litigation, and asserted or implied a possible malpractice claim. The lawyers communicated with in-house counsel on these subjects, understanding the communications to be confidential and privileged. In-house counsel was not formally screened from the external client matter but had no direct involvement in it.

The client subsequently terminated the representation and sued for legal malpractice in connection with the patent litigation. In discovery, the law firm produced the entire client file, but it did not produce communications or work product between the lawyers and in-house counsel, identifying those documents as privileged. The client moved to compel production. The trial court granted the motion, acknowledging the issue as one of first impression in Oregon. The law firm petitioned for mandamus. The Supreme Court issued an alternative writ, but the trial court stood by its decision, and the matter is now pending in the Supreme Court. Oral argument is scheduled for November.

The Supreme Court's decision will be of direct significance to Oregon lawyers. If lawyers' communications with law firm in-house counsel are not privileged, it is likely that law firm in-house counsel and their firms will seriously reevaluate that role.

Moreover, a decision that such communications are not privileged could call into question whether lawyers may ever seek confidential legal advice regarding a current client, even from a lawyer who does *not* work at the same firm. If the act of seeking legal advice is inherently disloyal to the client, it may not matter whether the lawyer from whom the advice is sought is in-house or outside counsel. Alternatively, if the reason to deny the privilege relates solely to in-house counsel's personal conflict (due to the imputation rule applicable to law firm lawyers under ORPC 1.10), then the court will need to clarify why that causes waiver of the privilege when normally the client holds the privilege and only the client may waive it.

More generally, the case raises issues about the relationship between the ORPC, which is in the exclusive jurisdiction of the Oregon Supreme Court, and the Evidence Code, which trial courts must apply in deciding whether documents are subject to the attorney-client privilege.

Courts in other jurisdictions have struggled with the issue now pending before the Oregon Supreme Court. Some courts have historically denied privilege to lawyers who seek in-house legal advice regarding current clients, especially federal courts.

However, in recent years, other courts have rejected that approach, particularly state courts, in what appears to be a growing trend. Most recently,

in July 2013, the Massachusetts Supreme Court and the Georgia Supreme Court each issued decisions, just one day apart, holding communications with law firm in-house counsel privileged under state law so long as certain criteria are met.

In August 2013, the ABA House of Delegates also approved a resolution urging courts, legislatures, and other governmental bodies to recognize the attorney-client privilege as to communications with law firm in-house counsel.

Ultimately, the question must be decided under state law. Some lawyers may simply assume that communications with their own counsel, whether in-house or external, are privileged, which may or may not be the case. Other lawyers may be surprised that the role of in-house counsel even exists. Whatever the law is, fairness dictates that lawyers, like anyone else, know whether they can or cannot have privileged communications. The Oregon Supreme Court will be deciding that issue as a matter of first impression in Oregon in the near future.

Recent Significant Oregon Cases

Honorable Stephen K. Bushong

Judge Stephen K. Bushong
Multnomah County Circuit Court

Claims and Defenses

Elk Creek Management Co. v. Gilbert, 353 Or 565 (2013)

The plaintiff tenants sued their landlord, alleging that the landlord terminated their tenancy in retaliation for their complaints about the electrical system on the property in violation of ORS 90.385. The trial court found in favor of the landlord; the Court of Appeals affirmed. The Supreme Court reversed, concluding that, to establish retaliation under the statute, tenants only needed to prove that the landlord served the notice of termination because of the tenants' complaint. Tenants need not prove, in addition, "that the complaint caused the landlord actual or perceived injury or the landlord intended to cause the tenant equivalent injury in return." 353 Or at 566. To establish causation, it is enough to show that the tenants' complaints "were one of the factors that the owner considered in making her decision to evict, and that the owner would not have made that decision 'but for' the tenants' complaints . . . even if there also were other factors that the owner considered in arriving at her conclusion." *Id.* at 586.

Brandrup v. Recon Trust Co., 353 Or 668 (2013)

Niday v. GMAC Mortgage, LLC, 353 Or 648 (2013)

These cases address the status of Mortgage Electronic Registration Systems, Inc. (MERS) in foreclosure cases arising under the Oregon Trust Deed Act (OTDA), ORS 86.705 to 86.795. In *Brandrup*, the Court, answering questions certified by the United States District Court, concluded that (1) MERS is not a "beneficiary" of a trust deed within the meaning of the OTDA; only the lender and its successors can be designated as the beneficiary on a trust deed; (2) not every assignment of the lender's interest in the trust deed must be recorded; and (3) MERS can serve as the agent for the lender and its successors if the record shows that those entities agreed to that arrangement. In *Niday,* the Court held that a genuine issue of material fact as to the validity of the appointment of a successor trustee existed that precluded resolving the case on summary judgment. The Court noted that, under the OTDA, the trust deed beneficiary has the absolute authority to appoint a successor trustee, but MERS was not a beneficiary for purposes of the OTDA. Absent evidence showing the identity of the lender's successors in interest and MERS' authority to act for those successors in interest, an issue of fact remained as to the validity of MERS' purported appointment of a successor trustee and that trustee's authority to initiate and pursue a nonjudicial foreclosure proceeding under the OTDA.

Bell v. Tri-Met, 353 Or 535 (2013)

Paton v. American Family Mutual Ins. Co., 256 Or App 607 (2013)

In *Bell*, the Supreme Court concluded that a survival action against a public body must be brought within two years of the alleged injury as provided in ORS 30.275(9). ORS 30.075(1), which provides that survival actions must be brought within three years of the alleged injury, is superseded by the two-year limitations period in ORS 30.275(9). In *Paton*, the Court of Appeals concluded that plaintiff's underinsured motorist (UIM) claim against an insurer was not barred by the two-year limitations period in ORS 742.504(12)(a) because the insurer "formally instituted" arbitration proceedings within two years of the accident within the meaning of the statute when it sent a letter to plaintiff's attorney

stating that the defendant insurer consented to submitting the case to binding arbitration.

Kemp v. MasterBrand Cabinets, Inc., 257 Or App 530 (2013)

Doyle v. City of Medford, 256 Or App 625 (2013)

In *Kemp*, the Court of Appeals concluded that the trial court did not err in allowing the jury to decide plaintiff's claim that she was wrongfully discharged on the basis of sex because of her pregnancy. The court explained that plaintiff's state and federal statutory remedies were not adequate and were not intended to displace the common law wrongful discharge claim. In *Doyle,* four retired city employees sued the City of Medford, alleging that the city was obligated by ORS 243.303(2) to provide them with health insurance after their retirement. The Court of Appeals held that ORS 243.303(2) did not provide a private right of action for damages. The court further held that the trial court erred in (1) allowing plaintiffs' statutory age discrimination claim to proceed to trial on an unpleaded disparate impact theory; (2) allowing plaintiffs' breach of contract claim to proceed to trial on an unpleaded claim based on the health plan's member handbook; and (3) entering judgment on a breach of contract claim that was not tried. 256 Or App at 652.

Two Two v. Fujitec America, Inc., 256 Or App 784 (2013)

Plaintiffs were injured in separate incidents when an elevator in the building where they worked dropped unexpectedly and stopped abruptly. They sued defendant Fujitec, which had modernized the elevator and was responsible for maintaining it pursuant to a contract with the federal General Services Administration. The trial court granted Fujitec's motion for summary judgment, concluding that (1) the negligence claim failed because plaintiffs had not submitted any admissible evidence of causation; and (2) the products liability claim failed because Fujitec did not manufacture, sell, distribute, or lease the elevator. The Court of Appeals affirmed. The court explained that plaintiffs' ORCP 47 E affidavit was insufficient to avoid summary judgment on the negligence claim because the affidavit "specified the issues on which their expert would testify—*i.e.*, that Fujitec 'was negligent in [its] service and maintenance' of the elevator—but did not indicate that the expert had offered an opinion on whether Fujitec's negligence was the cause of their injuries, an element essential to proof of a negligence claim." 256 Or App at 791. Strict products liability under ORS 30.090 did not apply because the evidence "only supports the allegation that Fujitec provided a service by installing . . . component parts manufactured and supplied by other parties." *Id.* at 796.

Rucker v. Rucker, 257 Or App 544 (2013)

The plaintiffs in *Rucker* sought to recover on a promissory note. The trial court denied recovery, and the Court of Appeals affirmed, concluding that "the parties intended their settlement to extinguish the obligation on the promissory note and replace it with the substituted terms of the settlement agreement." 257 Or App at 550. The trial court erred, however, in dismissing plaintiffs' claim under the settlement agreement that was pled in the original complaint—but not in plaintiffs' amended complaint—because the amended pleading "completely replaced and superseded the prior pleading." *Id.* at 552.

Shelter Products v. Steelwood Construction, 257 Or App 382 (2013)

In *Shelter Products*, the trial court granted summary judgment in favor of a subcontractor on its claim to recover costs it incurred on the project before the contractor terminated the contract "for convenience." The Court of Appeals affirmed, holding that the contractor is not entitled to an offset for the subcontractor's allegedly defective work or for amounts the contractor paid to discharge liens by other suppliers on the project. The court explained that, "in the absence of an opportunity to correct allegedly defective work . . . where a party has terminated a contract for convenience, that party may not then counterclaim for the cost of curing any alleged default." 257 Or App at 402.

PacifiCorp v. SimplexGrinnell, LP, 256 Or App 665, *adhered to as modified,* 257 Or App 677 (2013)

Plaintiff alleged that defendant breached its contract to perform fire inspection services at plaintiff's power plant, causing property damage and loss of business. Defendant prevailed at trial and sought to recover its attorney fees under the contract's indemnity clause and ORS 20.096, which makes reciprocal a one-sided prevailing party attorney fee provision. The indemnity clause required defendant to indemnify and defend plaintiff

against any type of damage, including attorney fees, incurred on claims brought or made against or incurred by plaintiff. The trial court declined to award defendant its attorney fees; the Court of Appeals affirmed. The court concluded that the indemnity clause unambiguously applied to third-party claims but "does not apply to actions between the parties." 256 Or App at 673.

Procedure

PGE v. Ebasco Services, Inc., 353 Or 849 (2013)

In *PGE*, the Supreme Court held that (1) a trial court violated ORCP 67 C when it entered a default judgment awarding monetary relief if the underlying complaint did not state the specific amount of money or damages being sought; and (2) that violation rendered the judgment voidable (and therefore not subject to collateral attack) and not void (and therefore subject to challenge at any time). The court explained that service of the complaint provided defendant with notice of the defect, and the rules of civil procedure provided defendant "with ample opportunity for a predefault hearing at a meaningful time and in a meaningful manner." 353 Or at 865. Thus, "due process does not demand the nullification of the default judgment by means of a collateral challenge." *Id.*

Pearson v. Philip Morris, Inc., 257 Or App 106 (2013)

Plaintiffs alleged that defendant violated the Unlawful Trade Practices Act, ORS 646.605 to 646.652, by misrepresenting the characteristics of Marlboro Light cigarettes. Pursuant to ORCP 32, plaintiffs sought to certify a class of approximately 100,000 people who had purchased the cigarettes in Oregon during the period 1971 to 2001. The trial court denied class certification, concluding that a class action would not be superior to individual actions. A divided Court of Appeals reversed and remanded for the trial court "to reconsider whether a class action is superior to other methods of litigating the controversy." *Id.* at 172. The court explained that whether plaintiffs and the putative class members have suffered ascertainable losses caused by their reliance on the alleged misrepresentations "can be proved on a common basis" and the trial court erred in concluding otherwise. *Id*. Thus, the trial court's conclusion that a class action would not be superior to other available methods for adjudicating the controversy "was premised on a legal error[.]" *Id*. Four judges dissented in part, concluding that "the element of causation cannot be litigated on a class-wide basis." *Id.* at 173 (Duncan, J., concurring in part and dissenting in part).

Marton v. Ater Construction Co., LLC, 256 Or App 554 (2013)

Plaintiffs sued their homebuilder after discovering water intrusion and related property damage caused by construction defects. The builder filed third-party contribution and indemnity claims against a window distributor and manufacturer. Plaintiffs entered into a "Mary Carter" agreement with the builder, which kept the builder in the litigation as a defendant but capped its liability at $100,000. The trial court then granted summary judgment in favor of the window distributor and manufacturer, concluding that the builder's contribution and indemnity claims failed as a matter of law because the Mary Carter agreement only extinguished the builder's liability, not the liability of the window distributor and manufacturer, as required for contribution under ORS 31.800 or indemnity under *Moore Excavating, Inc. v. Consolidated Supply Co.,* 186 Or App 324, 328-29 (2003). On appeal, the builder argued that ORCP 22 C(1) altered the substance of a contribution claim under ORS 31.800 and common-law indemnity. The Court of Appeals disagreed and affirmed the trial court's ruling. The court concluded that ORCP 22 authorized the builder "to bring, as part of the same action as plaintiffs' underlying claims, a third-party claim" against the window distributor and manufacturer, but it "does not create a remedy where one otherwise does not exist." 256 Or App at 564.

Park v. Dept. of Corrections, 257 Or App 553 (2013)

Plaintiff sued her employer for sex discrimination and unlawful retaliation. A jury returned a verdict in defendant's favor, and then returned a "special verdict form" finding plaintiff to be untruthful in her statements to her employer and to the court regarding the underlying incidents. The trial court awarded the employer its attorney fees under Title VII of the Civil Rights Act, 42 USC § 2000e-5(k). The Court of Appeals, applying the standard for assessing attorney fee awards to a prevailing defendant established in *Christiansburg Garment Co., v. EEOC,* 434 US 412, 422 (1978), reversed. The court explained that, "because there was evidence, independent of the testimony disbelieved by the court, that supported plaintiff's claims and would have permitted the jury to draw inferences

supporting her claims, the trial court's determination that plaintiff's claims were unreasonable and frivolous is error." 257 Or App at 565.

Miscellaneous

Couey v. Brown, 257 Or App 434 (2013)

Plaintiff alleged that a statute prohibiting him from obtaining signatures on initiative petitions for which he is being paid at the same time as obtaining signatures on petitions for which he is not paid violates his state and federal constitutional free expression rights. The trial court dismissed the claims as moot because the time period for circulating petitions and plaintiff's status as a registered paid circulator had elapsed. The Court of Appeals affirmed, concluding that the case is moot and does not qualify for ORS 14.175's exception for cases that are capable of repetition yet likely to evade judicial review.

Schutz v. La Costita III, Inc., 256 Or App 573 (2013)

Plaintiff was severely injured in a car crash after she attempted to drive home from a bar while intoxicated. She sued the bar, alleging that it had negligently served her excessive quantities of alcohol and then allowed her to drive. The trial court dismissed the action, concluding that plaintiff's claims were barred by ORS 471.565(1). Under that statute, a person who voluntarily consumes alcohol does not have a cause of action against the person serving the alcohol, even if she was served while visibly intoxicated. On appeal, plaintiff contended that she was too intoxicated to have consumed alcohol "voluntarily" and that the statute, if applicable, deprives her of a remedy in violation of Article I, section 10 of the Oregon Constitution, and violates her right to a jury trial under Article I, section 17. The Court of Appeals disagreed, concluding "that ORS 471.565(1) bars plaintiff's claim and that the statute does not violate Article I, sections 10 or 17[.]" 256 Or App at 573.

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