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In This Issue...

Oregon's Statutory Peer Review Privilege for Health Care Providers: What It Is and How to Not Waive It.

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Where would you rather undergo coronary bypass surgery? At a hospital where mistakes and concerns that occurred during prior surgeries of other hospital patients are analyzed to develop and implement surgical policies that can help avoid similar future mistakes and obtain better patient results? Or at a hospital where surgical mistakes and concerns are regretted, but not analyzed as part of an ongoing program of quality improvement? The answer, of course, is obvious, and formed the Oregon legislature's rationale for enacting the state's medical "peer review" privilege statute, ORS 41.675, in 1963.

Oregon's medical peer review privilege statute provides protections to encourage medical service providers to engage in a robust peer review process.[2] The protections of ORS 41.675 apply in the context of "peer review bodies" of entities such as hospitals, emergency service providers, medical staff committees of the Department of Corrections, and certain health care facilities such as skilled nursing facilities.[3] The statutory privilege does not apply to assisted living or other residential care facilities.[4]

Under ORS 41.675, "data" provided to a "peer review body" is privileged and not admissible in evidence in any judicial, administrative, arbitration, or mediation proceeding.[5] The statute broadly defines "data" as "all oral communications or written reports to a peer review body, and all notes or records created by or at the direction of a peer review body, including the communications, reports, notes or records created in the course of an investigation undertaken at the direction of a peer review body."[6]

In construing Oregon's peer review statute, courts have explained that even though Oregon courts follow the federal view that evidentiary privileges should be strictly construed, courts have noted the broad language of the peer review privilege statute.[7] In *Dodele v. Conmed, Inc.*,[8] the plaintiff alleged that the defendants failed to provide proper medical treatment to a county jail prisoner. The plaintiff filed a motion to compel production of two letters related to the medical treatment. The defendants claimed the letters contained "data" provided to a peer review body and so fell under Oregon's peer review statute. The first letter, from the Oregon State Hospital to one of the defendants, raised concerns about the procedures and protocols for transporting patients from the jail to the hospital. The second letter, from another defendant, was a direct response to those concerns. It addressed the procedures and protocols and discussed how

they may be improved in the future. The court agreed with the defendants, finding that because the letters were "written to and from a medical provider, for the purpose of bona fide peer review," they were subject to the privilege.[9]

As explained in a 2014 United States District Court of Oregon decision, the peer review statute's protections are not unlimited. In *Roberts v. Legacy Meridian Park Hosp., Inc.*,[10] a neurological surgeon alleged that his clinical privileges were restricted because of racial animosity and for anticompetitive reasons. The defendants denied the surgeon's allegations and asserted there were legitimate reasons for the actions taken regarding the surgeon's surgical privileges. The surgeon moved to compel discovery of ten years' worth of medical peer review investigations or analyses over the past ten years of the surgeon as well as of certain defendants who were also doctors. Defendants argued that the materials were protected by the peer review privilege. The court rejected defendants' privilege argument for two reasons. First, the court explained that the Ninth Circuit does not recognize a federal peer review privilege and has expressly declined to create one. The court explained that because the defendants elected to remove the matter from state court to federal court, the defendants "deliberately chose a federal forum to litigate this suit." Thus, the federal common law of privilege applied, and no federal peer review privilege was applicable to the defendants.[11] Second, even assuming that Oregon's statutory peer review statute applied, the court explained that the statute includes an express exception that states the peer review data is not privileged in "proceedings in which a health care practitioner contests the denial, restriction or termination of clinical privileges by a health care facility or the denial, restriction or termination of membership in a professional society or any other health care group."[12] The court found that discovery sought by the plaintiff surgeon fell squarely within the statute's exception and ordered the defendants to produce the peer review materials subject to a protective order.

Oregon's medical peer review statute also provides that a person serving on, or communicating information to, any peer review body or a person conducting a peer review investigation may not be examined as to any communication to or from that peer review body or person. Further, service or participation in a peer review body is not subject to an action for civil damages for affirmative actions taken or statements made in good faith.[13] However, a person whose participation in peer review proceedings is in bad faith is not protected by the statute.[14]

Because the peer review/quality assurance privilege is such a valuable tool to improve patient and resident safety and care, attorneys should work closely with their Oregon health care facility clients to make sure appropriate steps are taken to ensure the privilege is understood, properly used, and not inadvertently waived. There are numerous practical steps that can be taken to help to preserve the peer review privilege. First, documents kept in the normal course of business (i.e., medical records of patients and residents, policy manuals, and records required to be kept by applicable law) are generally not peer review documents and are not covered by the privilege.[15] Accordingly, peer review policies and procedures should be developed and implemented to keep data created in the normal course of business separate from legitimate peer review data.[16]

Peer review policies and practices should also ensure that the peer review body actually performs its bona fide peer review function when sensitive peer review data is being created. Generally, this means that the purpose of the data should be to improve quality of care, and the data should contain peer review analysis, not just a recitation of facts.

Peer review data should also be clearly labeled as such. For example, written reports to a peer review body, and all notes or records created by or at the direction of the peer review body, should be marked with words such as "Peer Review Document – Privileged and Not Subject to Disclosure." Once the peer review materials are properly segregated and identified, steps should be taken to make sure the materials are not disseminated or reviewed by persons outside the peer review committee.

Attorneys representing the parties should carefully analyze whether they should assert both state and federal claims and whether to remove an action to federal court. As noted by the *Roberts* court, federal common law of privilege applies where there are federal questions and pendent state law claims, and the "Ninth Circuit does not recognize a federal peer review privilege and has expressly declined to create one," whenever a peer review privilege may be at issue.

Additionally, attorneys who represent skilled nursing facilities ("SNFs") should work with the SNFs to also make sure they comply with the specific requirements of federal statutes that require such facilities to "maintain a quality assessment and assurance committee."[17] Under these regulations, the quality assurance committees must consist of the director of nursing services, a physician designated by the facility, and at least three other members of the facility's staff. Such committees must meet at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary and to develop and implement appropriate plans of action to correct identified quality deficiencies.

Oregon's medical peer review privilege statute offers medical service providers important protections in exchange for the providers engaging in bona fide activities that are covered by the privilege in order to improve medical care. While the statute contains broad language, it also contains specific limitations and applicable requirements. Accordingly, appropriate steps should be taken to establish and maintain the privilege.

Endnotes

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2 *Straube v. Larson*, 287 Or. 357, 364, 600 P.2d 371, 376 (1979) (The privilege "is based not on confidentiality but on the need to encourage frank communication. It is not to preserve the privacy of the communication but to prevent the participants from incurring legal liability for what they say.").

3 Skilled nursing facilities and nursing homes are also covered by a federal statutory quality assurance privilege. 42 U.S. Code § 1395i–3(b)(1)(B)(ii) ("A State or the Secretary may not require disclosure of the records of [a quality assessment and assurance] committee except insofar as such disclosure is related to the compliance of such committee with the requirements of

[the statute]."); 42 U.S. Code § 1396r(b)(1)(B). Like Oregon's medical peer review privilege statute, the federal statutes do not apply to assisted living or other residential care facilities. 42 U.S. Code § 1395i–3(a); 42 U.S. Code § 1396r(a).

4 *See* ORS 441.015(1); ORS 442.015(12)(b)(A) ("'Health care facility' does not mean … A residential facility licensed by the Department of Human Services or the Oregon Health Authority under ORS 443.415").

5 ORS 41.675(3).

6 ORS 41.675(2); *Roberts v. Legacy Meridian Park Hosp., Inc.,* 299 F.R.D. 669, 674 (D. Or. 2014) ("Or.Rev.Stat. § 41.675 affords broad protection to medical staff documents used or created in the peer review process.").

7 *Dodele v. Conmed, Inc.,* No. 1:12-CV-00469-CL, 2014 WL 60361, at *3 (D. Or. Jan. 7, 2014) (citing *Straube v. Larson*, 287 Or. 357, 363, 600 P.2d 371, 375 (1979)).

8 2014 WL 60361, at *1 (D. Or. Jan. 7, 2014).

9 2014 WL 60361, at *3 (D. Or. Jan. 7, 2014).

10 299 F.R.D. 669 (D. Or. 2014).

11 299 F.R.D. at 672, citing *Agster v. Maricopa Cnty.*, 422 F.3d 836, 839–40 (9th Cir. 2005) (applying federal common law of privileges to a claim of medical peer review privilege over both federal question and pendent state law claims).

12 ORS 41.675(6).

13 ORS 41.675(4) and (5).

14 *Ford v. Cascade Health Servs.*, No. 03-6256-TC, 2006 WL 1805954, at *15 (D. Or. 2006) (explaining that if a jury agreed with a plaintiff that defendants used the peer review process to unlawfully discriminate against the plaintiff, "the defendants' participation would not be in good faith, and immunity would not attach … [and so] application of the protection of ORS 41.675 is inappropriate"). *See also Patrick v. Burget,* 800 F.2d 1498, 1506 (9th Cir. 1986), *rev'd*, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988) ("Oregon also provides good faith immunity to the participants in the peer review process.").

15 *Cornejo v. Mercy Hosp. & Med. Ctr.*, No. 12 C 1675, 2014 WL 4817806, at *2 (N.D. Ill. Sept. 15, 2014) ("Documents created in the ordinary course of business, to weigh potential liability risk, or for later corrective action by hospital staff are not privileged, even if they are later used by a committee in a peer-review process.").

16 Similarly, documents and information "otherwise available from original sources" are not immune from discovery. *Doe v. UNUM Life Ins. Co. of Am.*, 891 F. Supp. 607, 609 (N.D. Ga. 1995).

17 42 USC sec.1395i–3(b)(1)(B) and 42 USC sec.1396r(b)(1)(B).

"HOW TO GET YOUR POINT ACROSS IN 30 SECONDS OR LESS"

By Dennis P. Rawlinson
Miller Nash Graham & Dunn LLP


Dennis P. Rawlinson

We find ourselves in an age of fast food, fast transportation, and fast communication. Scientific advances are conditioning us to expect instant communication, instant responses, and instant gratification.

The business world recognizes that a businessperson who cannot get his or her point across in 30 seconds or less will not be persuasive. When we rise to our feet in court, put pen to paper, or key information into a computer, we should be guided by the same principle.

I recently read *How to Get Your Point Across in 30 Seconds or Less* by Milo O. Frank, one of America's foremost business communication consultants, and found that it echoed what most of us learn over the course of a litigation career about the value of brevity and clarity.

1. Attention Span.

Frank notes that the human mind has an attention span of approximately 30 seconds. Try to concentrate for a moment on a single object, such as a pencil. You will find that in about 30 seconds your mind begins to wander unless additional action recaptures your attention. This simple test corroborates what television, radio, and newsprint advertisers have known for years: You need to capture someone's attention, get your message across with high impact, and then stop within 30 seconds. Time a few commercials on television. I believe you will find that the most effective ones are those that last 30 seconds or less and follow the methodology set forth below.

2. Courtroom Application.

I have been told and have come to believe that no legal argument that cannot be explained to a colleague in a three-minute elevator ride will be successful. And if you don't catch that colleague's attention in the first 30 seconds, the other two and a half minutes will be wasted. One of the most challenging tasks of our practice is to reduce complex, complicated cases to brief, clear, concise contentions that persuade. The first 30 seconds are the most crucial.

3. Methodology.

Set forth below is a brief summary of the points made by Frank in his book. For the most part, they are the same points that trial-technique advocates preach and that experience confirms are valid.

a. Identify your objective.

b. Reduce your objective to a single persuasive sentence.

c. Identify an approach to your objective that will take into consideration the needs and interest of your listener (fact-finder).

d. Ensure that each point directly advances your objective and relates to the listener.

e. Use imagery to create a picture.

f. Tell a story.

g. Personalize the story characters (your client).

h. Add emotional appeal and idealism.

i. Be prepared, but don't memorize.

j. Care about what you are saying and use your voice and gestures to express that care.

k. IF YOU WISH TO EMPHASIZE SOMETHING *. . . speak softly.*

l. When you want the attention of the fact-finder *. . . pause.*

m. Start and end on a high note.

4. Conclusion.

It is not particularly surprising that effective communication, whether in the courtroom or in the boardroom, follows the same principles. This realization may suggest to some of us that we ought to attend fewer litigation seminars and more effective-communication seminars.

RECENT OREGON DECISIONS ADDRESS THE ISSUE OF SEQUENCING DISCOVERY IN TRADE SECRETS CASES: IS THE PLAINTIFF ENTITLED TO DISCOVERY FROM DEFENDANT BEFORE PLAINTIFF IDENTIFIES ITS OWN TRADE SECRETS WITH PARTICULARITY?

by Robert A. Shlachter and Timothy S. DeJong
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Courts across the country have been struggling with whether, in a case alleging misappropriation of trade secrets, a plaintiff may compel defendant to produce information (confidential or not) that may disclose that defendant misappropriated trade secrets before plaintiff specifically details which of plaintiff's trade secrets defendant allegedly has misappropriated. The tension is between various policies, including those favoring open and broad discovery and those disfavoring fishing expeditions to obtain a competitor's valuable trade secrets or other information.

In California, a jurisdiction rich in trade secret litigation, the legislature has attempted to address the issue with a statute. *See* Cal Civ Proc Code § 2019.210 ("In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act ..., before commencing discovery relating to the trade secret, the party alleging the misappropriation shall identify the trade secret with reasonable particularity subject to any orders that may be appropriate under Section 3426.5 of the Civil Code."); Cal Civ Code § 3426.5 (requiring a court to preserve the secrecy of an alleged trade secret by reasonable means, including protective orders limiting disclosure). Elsewhere, courts have taken different approaches, and the results are inconsistent. The trend appears to favor requiring plaintiff to specify its alleged trade secrets before obtaining defendant's own trade secrets or documents relating to the categories of plaintiff's trade secrets. However, the outcome generally seems to reflect the particular facts of the case.

Until recently there has been little precedent in Oregon. State trial court decisions are difficult to identify, and there is no Oregon appellate court decision addressing the specific issue. In 2015, however, United States District Court Judges Simon and Hernandez issued a a series of decisions on the subject. *St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 305 FRD 630 (D Or 2015); *Nike, Inc. v. Enter Play Sports, Inc.*, 305 FRD 642 (D Or 2015); *Vesta Corp. v. Amdocs Mgmt. Ltd.*, --- F.Supp.3d ----, 2015 WL 7720497 (D Or Nov. 30, 2015).

This article examines these three cases and a fourth decision by Judge Fun in Washington County Circuit Court.

A Typical Scenario

In a typical trade secret case, a plaintiff alleges broad categories of trade secrets allegedly misappropriated by the defendants, or refers generally to a category of trade secrets. The plaintiff does not specifically identify the trade secrets allegedly misappropriated. This is understandable in the context of a public pleading, because public disclosure would jeopardize or destroy their value as trade secrets.

Soon after commencement of litigation, plaintiff attempts to initiate discovery to force defendant to disclose its business information to establish that defendant misappropriated one or more of plaintiff's trade secrets. For example, if plaintiff alleges that defendant misappropriated its secret method of efficiently operating its assembly line, plaintiff requests all of defendant's documents relating to the method of operation of defendant's assembly line, to show that the plaintiff's secret method is in use by defendant and was misappropriated.

Defendant resists this discovery and seeks to force plaintiff to first disclose specific information about the alleged trade secrets. For example, defendant may assert that it is not required to provide discovery until plaintiff responds to an interrogatory asking plaintiff to identify with particularity the trade secrets at issue. Typically, this results in defendant filing a motion for a protective order or in plaintiff filing a motion to compel.

Recent Oregon Cases

St. Jude Med. S.C., Inc. v. Janssen-Counotte

In March 2015, Judge Simon issued two opinions, one day apart, addressing plaintiff's obligation to describe with particularity its alleged trade secrets before defendant is obligated to respond to certain discovery.

The first case, *St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 305 FRD 630 (D Or 2015), involved a subpoena to a third party. The defendant was a former high-ranking officer and employee of the plaintiff who, before leaving her employment to become the president of operations of one of the plaintiff's primary competitors, allegedly copied, emailed and downloaded trade secrets by use of 41 separate "thumb drives". *Id.* at 633. Plaintiff subpoenaed defendant's new employer, Biotronik, a non-party. The documents requested included Biotronik's strategic plans, sales and marketing plans, sales revenues by product, documents identifying new customers and other sensitive information.

Among other objections, Biotronik asserted that St. Jude should be required to describe with greater particularity its alleged trade secrets that are at issue before being allowed to proceed with discovery. Judge Simon noted that the defendant had not asked the court in the underlying litigation, which was pending in federal court in Texas, to require St. Jude "to define further its alleged trade secrets before being allowed to proceed with discovery, even though [defendant] filed numerous other motions" in the case. *Id.* at 639-40.

Biotronik cited cases holding that a plaintiff must identify the trade secrets before proceeding with discovery, and St. Jude cited cases in which the court declined to require plaintiff to make such disclosures. Applying instead a middle ground, Judge Simon found one case, *BioD, LLC v. Amnio Tech., LLC*, 2014 WL 3864658 (D Ariz Aug. 6, 2014), to be "particularly instructive for identifying the criteria that a district court should consider in deciding this question." *Id.* at 640. As Judge Simon explained, the *BioD* court suggested that a "'plaintiff will normally be required first to identify with reasonable particularity the matter which it claims constitutes a trade secret, before it will be allowed (given a proper showing of need) to compel discovery of its adversary's trade secrets'", *id.* (quoting *BioD*, 2014 WL 3864658, at *4), but the *BioD* court also recognized certain factors mitigating against such a requirement:

> "[C]ourts have identified at least three policies which support allowing the trade secret plaintiff to take discovery prior to identifying its claimed trade secrets. First, courts have highlighted a plaintiff's broad right to discovery under the Federal Rules of Civil Procedure. Second, the trade secret plaintiff, particularly if it is a company that has hundreds or thousands of trade secrets, may have no way of knowing what trade secrets have been misappropriated until it receives discovery on how the defendant is operating. Finally, if the trade secret plaintiff is forced to identify the trade secrets at issue without knowing which of those secrets have been misappropriated, it is placed in somewhat of a 'Catch-22' [because] [i]f the list is too general, it will encompass material that the defendant will be able to show cannot be trade secret. If instead it is too specific, it may miss what the defendant is doing."

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St. Jude, 305 FRD at 640 (quoting *BioD*, 2014 WL 3864658, at *5).

Judge Simon applied these factors and ruled that St. Jude was not required to identify its trade secrets with greater particularity before it would be allowed to conduct discovery in order "to determine what precisely Defendant Janssen took and whether she is using it improperly for the benefit of her new employer." *Id.* at 641. Judge Simon found that the federal court in the underlying case had not limited the plaintiff's right to discovery, that plaintiff appeared to have numerous trade secrets but no way of knowing what trade secrets were misappropriated without discovery, and that St. Jude would be placed in the "Catch-22" identified by the *BioD* court. *Id.*

Nike, Inc. v. Enter Play Sports, Inc.

In a second opinion issued the following day, *Nike, Inc. v. Enter Play Sports, Inc.*, 305 FRD 642, 643 (D Or 2015), Judge Simon addressed the plaintiff's motion for a protective order and defendant's cross-motion seeking to require Nike to "first provide a more specific list describing the trade secrets at issue with reasonable particularity before Defendant should be required to provide discovery."

Nike alleged (1) that it had conceived of confidential concepts regarding a three-dimensional braided "upper" for athletic footwear, (2) that as part of vetting the braided upper concepts, it had retained defendant EPS to build samples, and (3) that the parties had signed a non-disclosure agreement ("NDA"). Unbeknownst to Nike at the time, EPS had filed provisional patent applications with the Patent Office regarding the braided upper concepts. Nike filed its complaint under seal, and included numerous specifics, including drawings and illustrations.

As in *St. Jude*, each party in *Nike* found non-binding authority to support its position. Judge Simon again applied the factors identified in *BioD* and again allowed the discovery against defendant to proceed.

Judge Simon explained that he had "closely reviewed NIKE's Complaint and [found] NIKE's specifications of the trade secrets at issue to be sufficient, at least to permit discovery to proceed." *Id.* at 646. The court noted that EPS did not challenge the sufficiency of the allegations by pleading motion. Judge Simon found that defendant's own pleading demonstrated that defendant had sufficient information on the specifics of the claimed trade secrets to allow defendant to assert, by counterclaim, that Nike's alleged trade secrets either were not disclosed in defendant's patent applications or, to the extent they were disclosed, the alleged trade secrets were expressly excluded from the coverage of the NDA and not protected. *Id.*

Vesta Corp. v. Amdocs Mgmt. Ltd.

More recently, in *Vesta Corp. v. Amdocs Mgmt.*, --- F.Supp.3d ----, 2015 WL 7720497 (D Or Nov. 30, 2015), Judge Hernandez ordered plaintiff to plead or disclose its alleged trade secrets with more particularity before obtaining discovery from defendants. In its ruling, the court distinguished the *St. Jude* and *Nike* decisions on the grounds that the policy considerations in those cases did not apply under the circumstances of the *Vesta* case.

Plaintiff Vesta, an electronic payments and fraud prevention technology company, and defendant Amdocs, a telephone billing software and services company, had collaborated to integrate their services to appeal their shared customer base. Vesta sued Amdocs alleging, in relevant part, that Amdocs had stolen information obtained via Vesta in the course of the collaboration, including "Confidential Solutions Methods". The parties had stipulated to a scheduling order that required Vesta first to answer Amdocs' interrogatories regarding the trade secrets, but the parties disagreed about the adequacy of Vesta's responses. Amdocs filed a motion to compel complete responses to the interrogatories and to excuse it from responding to Vesta's discovery requests in the interim.

Judge Hernandez found "no bright-line answer as to the degree of particularity that must be disclosed in order for discovery to proceed in a trade secrets case" and explained that "the Court's analysis in each case is fact-intensive and the outcome is fact-specific." *Id.* at *3. Judge Hernandez noted that Judge Simon's decisions in *St. Jude* and *Nike* appeared to be the only prior written opinions on the issue in this District.

> Neither of Judge Simon's opinions adopted the rule applied by many federal courts across the country requiring the party alleging a claim for misappropriation of trade secrets to identify its alleged trade secrets with reasonable particularity before compelling discovery of its adversary's trade secrets. However, Judge Simon did not reject the rule either. Instead, Judge Simon considered the rule, as well as additional policy considerations. Judge Simon found that those policies weighed against requiring *Nike* or *St. Jude* plaintiffs to provide further specificity as to their trade secrets.

Id. at *5 (footnote omitted).

Like Judge Simon, Judge Hernandez applied the *BioD* analysis to resolve the dispute. *Id.* However, Judge Hernandez reached the opposite conclusion based upon the facts of the case.

The court cited the trend in the federal courts throughout the country requiring plaintiff to make such disclosures at the outset. *Id.* at *6. Judge Hernandez found that several policy considerations weighed in favor of imposing that requirement on Vesta. Among those policies, he explained, the disclosure requirement would prevent "fishing expeditions" and would deny plaintiff the opportunity to mold its trade secret claim to fit the evidence obtained from defendant. *Id.* Requiring disclosure would also limit unnecessary exposure of a defendant's trade secrets by allowing only well-investigated claims to proceed. *Id.*

Judge Hernandez found that the policy considerations against the requirement for plaintiff to specifically identify its trade secrets did not weigh as heavily as in *St. Jude* and *Nike*. *Id.* The court concluded that "this case differs from other cases where plaintiffs may face an inherent difficulty identifying what portions of trade secrets have been misappropriated prior to receipt of discovery from defendants. Unlike the plaintiff in *St. Jude*, for example, Plaintiff here should know exactly what trade secrets were shared with Defendants because such disclosures took place in a discrete number of joint meetings and exchanges of information over a defined time frame. This is not a case where Defendants stole large volumes of documents or secrets from Plaintiff without Plaintiff's knowledge." *Id.* (citations omitted).

Columbia Indus., LLC v. Entro Inc.

In an earlier, unreported state court ruling, Judge James L. Fun of the Washington County Circuit Court considered arguments similar to those discussed above but based his decision instead on the Oregon Uniform Trade Secrets Act as a whole, including, in particular, the punitive attorney fee provisions set forth in ORS 646.467. *Columbia Indus., LLC v. Entro Inc.*, Case No. C121052CV (Order June 6, 2012) ("Order"). Judge Fun declined to require the plaintiff to specify its trade secrets with particularity before proceeding with discovery from defendants.

Columbia Industries sued its former engineers for misappropriation of trade secrets after they left their positions at Columbia Industries and started a competing business selling the same types of heavy equipment they had designed for Columbia Industries. Defendants moved for a protective order, asking that discovery be stayed until Columbia Industries disclosed its trade secrets with specificity, and Columbia Industries filed a cross-motion to compel production of defendants' documents relating to the technology at issue.

Judge Fun denied the motion for a protective order and granted the motion to compel. In doing so, the court did not expressly consider the policy considerations discussed in the District of Oregon cases. Instead, Judge Fun found the answer in the Oregon trade secrets statute: "Looking at the Oregon Uniform Trade Secrets Act as a whole, the statutory provision pertaining to bad faith claims is the mechanism Oregon has chosen to prevent abusive use of the Oregon Uniform Trade Secrets Act, rather than conditioning discovery on plaintiff identifying its trade secrets with particularity." Order at 4.

Conclusion

Based upon the Oregon federal court decisions discussed in this article, the sequencing of discovery may turn on whether the specifics of the misappropriation should be known to the plaintiff. A defendant is less likely to be able to delay discovery of its trade secrets or other information if the facts of the case align more closely to the scenario in which a departing employee is known to have taken information, but the contents of the information that was taken are unknown to the plaintiff. It is notable that the analysis applied by Judge Fun is not addressed in any of the Oregon district court opinions. However, federal courts may have implicitly rejected Judge Fun's analysis in the policy considerations and fact-specific analysis that they have applied.

The Juice is Back . . . What Were the Takeaways Again?

By Charese A. Rohny
Charese Rohny Law Office, LLC


Charese A. Rohny

Twenty years have passed since the *People v. O.J. Simpson* trial, and the case has made its way back to our screens.[1] As lawyers, we are reminded of our emotions at the time and of the takeaways we debriefed interminably as every detail aired.

Everything in the case was big – the media, the drama, the defendant's celebrity, and the mistakes. Often lessons can best be learned when using an extreme as an illustration. The "O.J. case" gives a motherlode of extremes. It can be excruciating at worst and annoying at best to "Monday morning quarterback" how the trial was handled. We have all lost at trial, and we have all suffered through excessive commentary on the O.J. case. Much of the commentary post-verdict was on how the prosecution failed to make their case.[2]

There is simply too great a wealth of material and relevancy to current societal issues not to again seize the opportunity for a discussion on takeaways. Now we can do so with historical perspective. In evaluating what happened, I examined the following:

- Each side's theories of their case;
- What evidence each side offered to support their theories, what the court allowed and excluded as evidence, and what each side did with it; and
- The jury biases relevant to the theories of the case, and how each side addressed them.

Any accusation or insinuation that the verdict was based solely on race or celebrity is inaccurate and insulting to the jurors. The O.J. case reveals the following takeaways:

1. Understand juror biases and address them within the historical context of your case;
2. Know and vet your key witnesses thoroughly, predict, and preempt their weaknesses, particularly as it relates to your theory of the case;
3. Never underestimate the importance of motions *in limine*, and conversely of opening the door through impeachment; and
4. Limit the length of your case.

The prosecution's theory against O.J. was that the murders were the culmination of increasingly violent spousal abuse; whereas the defense's theory was that a "racist cop" planted key evidence.[3] From the outset, juror biases were against the prosecution's theory and in favor of defendant's.

The Prosecution

Theory of the case:

The prosecution believed that they had a "mountain of evidence" and that this case was "a domestic violence case at its core."[4] In the soon to be released documentary, *O.J.: Made in America,* Prosecutor Marcia Clark emphasizes that she had never had a case with so much evidence.[5] The prosecution's strategy included a focus on the blood and DNA evidence and the "why" of the murder in shaping their theory. In pretrial briefings, the prosecution argued that "[t]his is a domestic violence case involving a murder, not a murder case involving a domestic violence."[6] The prosecution had more than 50 incidents of abuse or misconduct by O.J. against Nicole in the 17-year span of their relationship, beginning shortly after they met in 1977, and continuing until the night of her murder.[7] This was "a pattern" of abuse, not a few "isolated events."[8] Following the verdict, District Attorney Gil Garcetti stated that the trial had been for "Nicole Simpson and every other victim of domestic violence."[9]

Evidence offered / allowed / presented in support of theory of the case:

The defense team filed a motion *in limine* to exclude evidence of domestic violence on November 21, 1994.[10] In response, the prosecution submitted an 85-page brief, 12 pages of which exhaustively detailed the beatings, stalking, and threats Nicole received from O.J.[11] The prosecution argued that O.J.'s history of violence toward Nicole was admissible as "abuse and control evidence," and highly probative of his motive, intent, identity, and plan to control Nicole.[12] In turn, defense predictably argued that any probative value was outweighed by a substantial danger of undue prejudice.[13]

On January 18, 1995, less than a week before trial began, Judge Ito ruled that the prosecution was permitted to tell the jury about only a dozen or so incidents, which included seven incidents of prior assault by O.J. and two 911 calls by Nicole.[14] Under California law at the time, all of Nicole's out-of-court statements concerning her fear of O.J. or his threats against her were inadmissible hearsay.[15] Thus, the prosecution was barred from presenting to the jury Nicole's call to a women's shelter only 4 days before the murder, in which she expressed her fear of O.J.; Nicole's statements to her family and friends that she knew O.J. would kill her, and that he would get away with it; Nicole's counseling sessions in which she disclosed her fear of O.J., and that he had threatened to kill her; Nicole's statement that O.J. had told her, "If I can't have you, no one can"; and Nicole's diary excerpts documenting the long history of abuse.[16]

In his opening statement, Deputy DA Christopher Darden promised the jury that the evidence would show that O.J. used "force," "violence," and "fear" to control Nicole, and that her murder was the final abusive act.[17] Yet during the trial, the prosecution presented only about half of the admissible evidence of domestic violence allowed by Judge Ito.[18] Prosecutors *did* present, at length, evidence regarding O.J.'s assault on Nicole in 1989 that resulted in Nicole's hospitalization, including arrest records and photos of Nicole's battered face. However, other admissible incidents of assaults, and all but one instance of stalking, were never mentioned.[19]

Although a promised witness in Darden's opening statement, he never called Keith Zlomsowitch, an ex-boyfriend of Nicole's.[20] Zlomsowitch had previously testified before the grand jury that O.J. had threatened and intimidated him when he dated Nicole in 1992, O.J. had stalked Nicole, and O.J. had once watched them have sex through a window.[21]

Somehow, the trial that started out as a "domestic violence case at its core" stopped focusing on domestic violence. In his closing argument, Darden admits that he left evidence on the table: "on domestic violence, I told you [in opening statement] I was going to call a few other people. I didn't. I think you got the point, you know, and I can't keep you here forever."[22]

There are many theories on what went wrong, and what should have happened.[23] However, before we judge any jury as right or wrong, it is important to know what they actually heard. Through the court's paring down of domestic violence evidence, and then the prosecution further limiting what was offered, the defense was handed its argument that the few assaultive incidents discussed in open court were mere "domestic discord," the term favored by the defense to sugar-coat O.J. and Nicole's violent relationship.[24]

Juror bias pretrial and juror post-trial responses:

Domestic violence is a societal issue involving deeply-rooted prejudices. The 75-page juror questionnaires revealed a significant bias against victims of domestic abuse. Foreperson Amanda Cooley wrote that she "viewed domestic battles as just 'personal problems.'"[25] Juror David Aldana stated that "[d]omestic violence is a minor family problem and that there are no significant issues surrounding domestic abuse."[26] Dismissed juror Michael Knox believed that "[d]omestic violence only occurs in certain lower-class households."[27] Dismissed juror Jeannette Harris, who was released for failing to report her own past experience with domestic violence, stated that "[d]omestic violence [is] a family matter."[28] And Gina Rosborough revealed that she watched her father beat her mother as a child, but "as an adult, I don't go for any man being abusive to me."[29]

After the trial, juror sentiments seemed to agree with defense counsel Johnny Cochran when he asked: "[W]hy did Mr. Darden spend all that time on domestic violence? This is a murder case."[30] Juror Brenda Moran called the time spent by the prosecution depicting O.J. as an abuser and playing a 911 tape of him shouting as his wife begged for help as "a waste of time."[31] "This was a murder trial, not domestic abuse."[32]

Even twenty years post-verdict, juror Carrie Bess states simply: "I don't respect any woman that takes an ass-beating."[33] It is hard to know if the prosecution could have overcome these biases. But given that we now realize how little the jury heard, it is fair to agree with Foreperson Cooley, who insisted post-verdict that the evidence presented was "too limited" to see O.J.'s spousal abuse as adequate motivation for the killing.[34]

Each side had a jury consultant. Each side had twenty challenges. For the defense, Jo-Ellan Dimitrius consulted closely for every part of jury selection. Marcia Clark's jury consultant sat in the courtroom for only one day of jury selection, and then she never consulted him again.[35]

Historical context:

At this time, our national discussion was in its infancy regarding combatting domestic violence. On September 13, 1994, Congress passed the Violence Against Women Act. Subsequently, local laws were passed that "without the Simpson case would have gotten lost."[36] Gloria Allred, civil rights attorney and counsel for the Brown family, predicted that the O.J. case would "be to the domestic abuse issue what Anita Hill was to sexual harassment. . . . It forces the nation to debate."[37] News coverage was abundant, and domestic violence awareness increased.[38]

In response to the prosecution's domestic violence theory, the defense very strategically called expert witness Lenore Walker, EdD.[39] Walker was a noted feminist psychologist and an honored pioneer of the battered women's movement.[40] She explained to the press prior to the testimony, "I am not saying O.J. Simpson is not a batterer. What I am saying is because you are a batterer that does not make you a murderer."[41]

Myths and misconceptions about domestic violence abound in the general population, and this particular jury was no different. Against that backdrop, the prosecution failed to sufficiently present evidence, overcome biases, and establish the motive for the crimes.

The Defense

Theory of the case:

In July 1994, six months prior to opening statements, the defense floated the theory that a "racist cop" planted the bloody glove.[42] The defense's theory was to cast doubt on every piece of evidence offered by the prosecution by highlighting police misconduct and capitalizing on racial tensions between the LAPD and the black community. Their theory was the three C's – corruption, contamination, and conspiracy.

Evidence offered / allowed / presented in support of theory of the case:

Early on, defense experts testified regarding evidence of a blood preservative, implying police planting of evidence, and contamination in the LAPD lab, casting doubt on the blood evidence.[43] Defense attorney Barry Scheck was assigned the more technical job of methodically picking apart the DNA evidence, and putting it on trial.[44] While the prosecution had struggled to overcome the lack of knowledge and understanding regarding forensic science, specifically DNA, amongst the jurors, Scheck managed to make the information palatable (and maybe even enjoyable) for jurors.[45]

Then, like "pennies from heaven," the defense received an anonymous call pointing them in the direction of a screenwriter who possessed what are now termed the "Fuhrman tapes," containing recordings of Fuhrman using the N-word and boasting of covering up police misconduct.[46] Subsequently, on August 22, 1995, defense filed its Amended Offer of Proof with 41 examples of Fuhrman using the N-word and 18 examples of misconduct related to his credibility and willingness to fabricate.[47]

Similarly faced with the issue of inadmissibility of out-of-court statements, defense counsel offered Fuhrman's 41 uses of the N-word as impeachment evidence, and did not argue they were related to their theory of planted evidence.[48] Judge Ito ruled all 41 uses were relevant and admissible to impeach, but allowed only the two most innocuous passages to be presented to the jury.[49] The remaining 39 were of an "insulting and inflammatory nature" that caused their probative value to be "substantially and overwhelmingly outweighed by the danger of undue prejudice."[50] Pursuant to Judge Ito's ruling, on August 29, 1995, the defense presented the two passages in which Fuhrman used the N-word. One was on tape, the other was read to the jury.[51]

The prosecution's biggest mistake was putting a poorly-vetted Mark Fuhrman on the stand.[52] *The New Yorker* had published months before jury selection what was uncovered in Fuhrman's disability case in his attempt to get benefits[53] – that at a minimum Fuhrman hated blacks and bragged about violence to the extent he thought he was disabled. Based upon that, it was not a stretch to conclude that Fuhrman was either racist, psychotic and/or a malingerer.[54] Clark admits that she felt they were in a bind if they did not call a detective who found key evidence, so Fuhrman testified.[55] By the time Fuhrman took the stand in March 1995, the defense's "racist cop" theory had been public fodder for nearly eight months, defense had early on sought Fuhrman's personnel records, and the prosecution had moved to exclude Fuhrman's use of the N-word.[56] It was predictable that the case would become the Fuhrman trial. The prosecution failed to preempt and then confront their biggest weakness. Instead, the prosecution spent less than a minute of their closing arguments rebutting the defense's key argument: that the LAPD had framed O.J.[57]

In closing, Johnny Cochran hit hard on his themes, and implored the jurors to make a powerful statement against racism in America by acquitting O.J.[58] Perhaps the most controversial part of his closing was his comparing the discredited Fuhrman to Hitler; his point that Fuhrman was the personification of evil.[59] Cochran was subsequently condemned by the Anti-Defamation League, Simone Wiesenthal Center, and the father of murder victim Ron Goldman.[60] Cochran shot back, asking, "[W]hen you have a person who says he would like to burn all black people, is that such a quantum leap to say if this man is left unchecked he would be a scourge?"[61]

Juror bias pretrial and juror post-trial responses:

The jurors had just lived through the Rodney King trial and riots two years prior, with a number of the jurors from neighborhoods in South Central.[62] Even if Simpson's celebrity, wealth, and belief that "I'm not black, I'm O.J." all dissociated him from the black, working-class world from which many of the jurors came, the defense's theory of police corruption, contamination, and conspiracy rang true. Dismissed juror Knox explained that "the deeply held belief in [the black] community is that black men who rise high are eventually brought down by the white Establishment; and that the police are quick to railroad black men."[63]

The defense's win in the O.J. case is often credited to their "playing the race card." However, at that time and location, race was inevitably and undeniably part of the case. Foreperson Cooley felt the first "race card" was dealt by the prosecution when it conspicuously swapped white Deputy DA William Hodgman with Darden two days after the predominantly black jury was empaneled.[64] Yet she also contended that many jurors were appalled by Cochran's showboating, especially in his closing argument.[65]

Even if the lawyers had not addressed race, the historical context of the case provided a spotlight on racial tensions. Although most of the black jurors vehemently denied that race had any bearing on their decision to acquit, white juror Anise Aschenbach, who believed O.J. was guilty and was one of the two guilty votes in the first poll, stated that she voted to acquit because of the defense's theory that Fuhrman had a racist vendetta against O.J.[66] When the verdict was read, juror and former Black Panther Party member Lionel Cryer gave the black power salute to the defense.[67]

Historical context:

Valuing the historical context allowed the defense to seize on the concept of a LAPD conspiracy that resonated with LA minority communities during the mid-1990s. Similarly, the demagogue status of O.J. Simpson could not be underestimated for either whites or blacks. O.J. was not just a star athlete; he was considered charming and highly accomplished by people of every race. For African Americans, there were few modern black heroes, and O.J. was one of them. The prosecution was asking the jury to believe the corrupt LAPD version of facts, and destroy a rare hero by finding him a criminal.[68]

Historical context matters. It sounds obvious but it cannot be overstated. Race was at the center of the defense's theory, and the prosecution failed to take on the issue in any meaningful way.[69] Perhaps the number one insurmountable obstacle for the prosecution was that "[i]f people don't trust police, it doesn't matter how good the evidence is. People won't trust the evidence if [those] dealing with that evidence weren't trustworthy."[70]

Lastly, but not least importantly, the O.J. case teaches us to pay attention to the length of the case. Another extreme in the case – 266 nights of juror sequestration – is far too long.[71] The prosecution took six months to present their evidence, and when it takes you that long to make your case, "the jury is going to be left with either one of two impressions: Either your evidence is overwhelming, or . . . it's not, and you're laboring day by day to make it appear to be better than it is."[72]

The biggest lessons are often not the legal ones, but to identify ways to eliminate racial bias and improve our judicial system, and evaluate how we consider jury verdicts given what they actually heard during the historical context in which they heard it. Today, we are repeatedly reminded that we still have a long way to go in addressing and remedying discrimination and racial bias in our justice system.

Endnotes

1 This year we have both a dramatized retelling of the trial and a documentary, *O.J.: Made in America* by director Ezra Edelman, set to air in June 2016. *American Crime Story: The People v. O.J. Simpson:* (FX television broadcast 2016); O.J.: Made in America (ESPN Films 2016). I had an opportunity to watch this 7.5 hour mini-series at the Sundance Film Festival this past January. It is a film that will elicit provocative discussions about race, the larger cultural context, and societal issues beyond just whether or not O.J. did it, and recognizes the "Trial of the Century" within the larger context of America's racial history.

2 *See, e.g.,* Gerry Spence, *O.J. the Last Word* (1997); Vincent Bugliosi, *Outrage: The Five Reasons Why O.J. Simpson Got Away with Murder* (1996).

3 Of the final jury panel, 42% thought it was acceptable to use physical force on a family member, and 42% stated that they or a family member had had a negative experience with law enforcement. Marc Davis & Kevin Davis, *Star Rising for Simpson Jury Consultant*, ABA Journal, Dec. 1995, at 14.

4 People's Response to Defendant's Motion to Exclude Evidence of Domestic Violence, *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Dec. 14, 1994).

5 *O.J.: Made in America*, *supra* note 1.

6 People's Response, *supra* note 4.

7 *Id.*

8 *Id.*

9 Timothy Egan, *The Simpson Case: The Jury; With Spotlight Shifted to Them, Some Simpson Jurors Talk Freely,* N.Y. Times, Oct. 5, 1995, available at *http://www.nytimes.com/1995/10/05/us/simpson-case-jury-with-spotlight-shifted-them-some-simpson-jurors-talk-freely.html*.

10 Defendant's *in limine* Motion to Exclude Evidence of Domestic Discord, *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Nov. 21, 1994). Note the use of "domestic discord" rather than the already euphemistic "domestic violence." The defense at one point also asked the Court to disallow the words "battered wife" and "stalker" and to order the prosecution to use "domestic discord" instead of "domestic violence" or "spousal abuse." *See* Andrea Dworkin, *Disorder in the Court: The Abuse: In Nicole Simpson's Words,* L.A. Times, Jan. 29, 1995, available at *http://articles.latimes.com/1995-01-29/opinion/op-25763_1_nicole-brown*; *see also* Bill Boyarsky, *Simpson Lawyers Twist the Language to Suit Their Need*, L.A. Times, Jan. 8, 1995, available at *http://articles.latimes.com/1995-01-08/local/me-17749_1_simpson-lawyers*.

11 People's Response, *supra* note 4.

12 *Id.* at #3; *see* Cal. Evid. Code § 1101(a), (b); *cf.* OEC 404(2), (3).

13 Defendant's *in limine* Motion, *supra* note 10; *see* Cal. Evid. Code § 352; *cf.* OEC 403.

14 Ruling on Defendant's *in limine* Motion to Exclude Evidence of Domestic Discord with Appendix, *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Jan. 18, 1995) (holding that prior assaults were admissible under Cal. Evid. Code § 1101(b) because they "involve[d] either a direct observation of defendant engaged in assaultive conduct against Brown Simpson or an admission of such conduct by defendant," and finding that Nicole's 911 call was admissible under the excited utterance and present sense impression hearsay exceptions) (hereinafter, "DV Ruling").

15 *Id.*; *but see* Cal. Evid. Code § 1370, otherwise known as the Nicole Brown Simpson hearsay exception. Passed in the aftermath of the Simpson verdict, this evidentiary rule permitted judges to admit hearsay statements that explain the threat or infliction of physical injury upon the declarant. Unfortunately, the Oregon legislature has yet to enact a similar evidentiary exception.

16 DV Ruling, *supra* note 14. Judge Ito, seemingly admitting his hands were tied, noted that "[t]o the man or woman on the street, the relevance and probative value of such evidence is both obvious and compelling, . . . the laws and appellate court decisions that must be applied" bar its admission."

17 *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Jan. 24, 1994) (Darden's opening statement).

18 Bugliosi, *supra* note 2 at 174-76. During his eight years in the L.A. County D.A.'s office, Bugliosi successfully prosecuted 105 out of 106 felony jury trials, which included 21 murder convictions without a single loss, including that of Charles Manson.

19 *Id.* Bugliosi also notes that the jury never heard about the angry encounter O.J. had with Nicole a few months prior to the murders when he spotted her having coffee with Ron Goldman and another friend, and as discussed *supra*, the jury could not hear about Nicole's calls to a domestic abuse shelter, her diary entries, and her fearful statements concerning O.J.'s threats to her family, friends, and counselor.

20 *Id.*; *see also* Henry Weinstein & Jim Newton, *Transcripts Reveal New Details in Simpson Case: Investigation: Ex-boyfriend of Nicole Simpson told grand jury of defendant's intimidating behavior,* L.A. Times, Jul. 31, 1994, available at *http://articles.latimes.com/1994-07-31/news/mn-22042_1_grand-jury*.

21 *Id.*

22 *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Sept. 27, 1995) (Darden's closing argument).

23 Experts sharply disagree on whether the prosecution spent too much or too little time on proving past domestic violence as proof of motive. Erwin Chemerinsky thought that the prosecution should have led with the physical evidence rather than with domestic violence. *Where prosecutors went wrong, according to experts*, USA Today, Oct. 3, 1995, available at *http://usatoday30.usatoday.com/news/index/nns078.htm* (hereinafter, "*According to experts*"). Advocates for battered women said that testimony about O.J.'s spousal abuse

was buried and largely disregarded. *Messages mixed on domestic violence,* USA Today, Oct. 11, 1995, available at *http://usatoday30.usatoday.com/news/index/nns091.htm*. And William Hodgman of the prosecution ultimately concluded that their strategy of domestic violence did not work due to jurors' "cognitive dissonance" – they either refused to accept or refused to value the evidence of abuse. *The O.J. Verdict: Interviews – William Hodgman*, PBS Frontline, Apr. 4, 2005, *http://www.pbs.org/wgbh/pages/frontline/oj/interviews/hodgman.html*.

24 *See supra* note 10.

25 Timothy Egan, *Not Guilty: The Jury; One Juror Smiled; Then They Knew,* N.Y. Times, Oct. 4, 1995, available at *http://www.nytimes.com/1995/10/04/us/not-guilty-the-jury-one-juror-smiled-then-they-knew.html* (described simply as "forewoman," but later identified as Ms. Cooley). Coincidentally, O.J. used the same descriptor of "personal problems" to characterize his spousal abuse of Nicole to police in 1989. *Simpson Had Wife-beating History*, Boston Globe, Jun. 19, 1994, available at *http://articles.chicagotribune.com/1994-06-19/news/9406190405_1_nicole-brown-simpson-oj-wife-batterer*.

26 People's Response, *supra* note 4 (identified as juror 19).

27 *Id.* (identified as juror 620).

28 *Id.* (identified as juror 462).

29 *Profiles: Who are the O.J. Simpson jurors?*, USA Today, Oct. 18, 1996, available at *http://usatoday30.usatoday.com/news/index/nns5.htm*.

30 *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Jan. 24, 1994) (Cochran's opening statement).

31 *Messages mixed*, *supra* note 23.

32 *Jurors say acquittals were based on lack of evidence*, USA Today, Oct. 12, 1995, available at *http://usatoday30.usatoday.com/news/index/nns070.htm* (hereinafter, "*Lack of evidence*").

33 *O.J.: Made in America*, *supra* note 1.

34 Patricia Holt, *BOOKS – O.J. Simpson Jurors Speak Out / Reasoning behind verdict detailed,* San Francisco Chronicle, Jan. 23, 1996, available at *http://www.sfgate.com/entertainment/article/BOOKS-O-J-Simpson-Jurors-Speak-Out-2996621.php*. Cooley stated they only heard "one incident with three little episodes. . . . It wasn't until we got out that we heard about all these other incidents."

35 Jeffrey Toobin, *The Run of His Life* (2015).

36 Per Richard Gelles, then-director of the Family Violence Research Program. *Messages mixed*, *supra* note 23.

37 *Id.*

38 *Id.* There was an increase in women calling hotlines, fearing they may end up like Nicole; an increase in restraining orders, seeking support services (in particular an increase in calls from people in the upper middle class and above); and increase in personnel training on domestic violence for government and professional services.

39 Betinna Boxall, *Abuse Expert Stirs Uproar With Simpson Defense Role: Trial: Psychologist Lenore Walker says she is testifying to bar either side from distorting data on battered women,* L.A. Times, Jan. 29, 1995, available at *http://articles.latimes.com/1995-01-29/news/mn-25821_1_battered-women*

40 Dr. Walker was the first to research "battered women's syndrome," using Martin Seligman's learned helplessness theory to explain why abused spouses stayed in destructive relationships. Lenore E. Walker, *The Battered Woman* (1979).

41 Boxall, *supra* note 39.

42 As a part of a public relations strategy, O.J.'s lawyers leaked to the press their theory that Detective Fuhrman was a rogue cop who framed an innocent man. *See* Jeffrey Toobin, *An Incendiary Defense*, The New Yorker, Jul. 25, 1994, available at *http://www.newyorker.com/magazine/1994/07/25/an-incendiary-defense* (discussing defense lawyers continuing a vigorous investigation into Fuhrman's past).

43 David Margolick, *Simpson Expert Supports Conspiracy-Theory Defense*, N.Y. Times, Jul. 25, 1995, available at *http://www.nytimes.com/1995/07/25/us/simpson-expert-supports-conspiracy-theory-defense.html*; David Margolick, *Contamination Rife in Police Laboratory, Simpson Witness Says*, N.Y. Times, Aug. 3, 1995, available at *http://www.nytimes.com/1995/08/03/us/contamination-rife-in-police-laboratory-simpson-witness-says.html*.

44 David Margolick, *A Simpson Lawyer Makes New York Style Play in Judge Ito's Courtroom*, N.Y. Times, Apr. 17, 1995, available at *http://www.nytimes.com/1995/04/17/us/a-simpson-lawyer-makes-new-york-style-play-in-judge-ito-s-courtroom.html*.

45 Jurors Amanda Cooley, Carrie Bess, and Marsha Rubin-Jackson stated that Scheck was one of the few attorneys who "spoke to us at our level," whereas the prosecution's DNA expert, Dr. Robin Cotton, "talked down to us like we were illiterates." Holt, *supra* note 34. And 20 years later, juror Yolanda Crawford similarly stated that Scheck was her favorite attorney because he did not talk down to the jurors. *O.J.: Made in America*, *supra* note 1.

46 Quote from defense attorney Carl Douglas. *O.J.: Made in America*, *supra* note 1; *see also* Art Harris, *Private detective tracked down Fuhrman tapes*, CNN, Aug. 22, 1995, available at *http://www.cnn.com/US/OJ/daily/8-22/man_behind_tapes/*.

47 Defense's Amended Offer of Proof re: "Fuhrman Tapes," *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Aug. 22, 1995). Defense also offered two comments related to Fuhrman's attitude toward testifying as a witness. Since these comments were analyzed under Cal. Evid. Code § 780(j), which does not have a similar Oregon rule, and ultimately ruled irrelevant, we do not discuss them here.

48 *Id.; see* Cal. Evid. Code § 780(f); *cf.* OEC 609-1.

49 Ruling on Defense's Offer of Proof Re: "Fuhrman Tapes," *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Aug. 31, 1995).

50 *Id., see* Cal. Evid. Code § 352; *cf.* OEC 403. Judge Ito further ruled that none of the 18 instances of misconduct were relevant to defense's "planting evidence theory," and the fact that some of the 18 incidents were factually disputed would consume too much court time to prove or disprove. In essence, the no "mini-trial" judicial rationale.

51 *All the 'evidence' the jury will not take into deliberations*, USA Today, Oct. 3, 1995, available at *http://usatoday30.usatoday.com/news/index/nns31.htm*.

52 Defense counsel Alan Dershowitz on the prosecution's mistakes: "It was a circumstantial case with overwhelming evidence, and a case that the prosecution easily could have won if they hadn't made so many mistakes. . . . They put on a policeman who was a Nazi lover and a perjurer and an evidence planter." *Verdict: Interviews – Alan Dershowitz*, PBS Frontline, Apr. 12, 2005, *http://www.pbs.org/wgbh/pages/frontline/oj/interviews/dershowitz.html*.

53 *Fuhrman v. City of Los Angeles Fire & Police Pension System*, Case No. 465,544.

54 Jeffrey Toobin, *The Run of His Life* (2015).

55 *O.J.: Made in America*, *supra* note 1. *See also Verdict: Interviews – Scott Turow*, PBS Frontline, Apr. 26, 2005, *http://www.pbs.org/wgbh/pages/frontline/oj/interviews/turow.html* ("If you're going to use the statements or the evidence that's gleaned as a result, [Furman's] in your case. He's your case.") (hereinafter, "*Scott Turow*").

56 *See* The People's Motion *in limine* to Exclude from Trial Remote, Inflammatory, and Irrelevant Character Evidence Regarding LAPD Detective Mark Furhman, *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Dec. 12, 1994).

57 Bugliosi, *supra* note 2. In fact, the prosecution probably devoted more time to admitting that Fuhrman was racist. For example, Marcia Clark: "Let me come back to Mark Fuhrman for a minute, just so it's clear. Did he lie when he testified here in this courtroom saying that he did not use racial epithets in the last 10 years? Yes. Is he a racist? Yes.

Is he the worst LAPD has to offer? Yes. Do we wish that this person was never hired by LAPD? Yes. Should LAPD have ever hired him? No. Should such a person be a police officer? No. In fact, do we wish there were no such person on the planet? Yes." *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Sept. 26, 1995) (Clark's closing argument).

58 *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Sept. 28, 1995) (Cochran's closing argument).

59 "There was another man not too long ago in the world . . . who had racist views . . . and they didn't do anything about it. This man, this scourge, became one of the worst people in this world, Adolf Hitler, because people didn't care, didn't try to stop him." *Id.*

60 Henry Weinstein, *Lawyer's Family Tragedy Inspires Hitler Reference,* L.A. Times, Sept. 30, 1995, available at *http://articles.latimes.com/1995-09-30/news/mn-51611_1_family-tragedy*. In addition, Fred Goldman, father of Ron Goldman, stated: "We have seen a man who perhaps is the worst kind of racist himself . . . someone who compares a person who speaks racist comments to Hitler a person who murdered millions of people."

61 Cochran continued: Fuhrman "is a man who talked on the tapes about beating people to a pulp during the 1978 Hollenbeck incident. Here's a guy with power over people: He could stop you and shoot you. He advocates genocide toward African Americans. I think that is something all right-thinking people should be offended by and that's what I was trying to say. And I was trying to say to the jury it's time to stand up if you see something wrong." *Id.*

62 E.g., Cooley, Bess, Moran, and 72 year old black juror Beatrice Wilson.

63 Henry Weinstein, *Ex-Simpson Jurors' Views Differ Sharply: Publication: In book, Michael Knox says he is leaning toward a guilty verdict. But he adds that prosecutors have fumbled badly,* L.A. Times, Jun. 25, 1995, available at *http://articles.latimes.com/1995-06-25/local/me-16996_1_michael-knox*.

64 Holt, *supra* note 34.

65 *Id.; see also supra* notes 55-57.

66 *Lack of evidence, supra* note 32.

67 Egan, *supra* note 25.

68 *Scott Turow, supra* note 55.

69 The prosecution's meager attempt to address race was to place Christopher Darden on the prosecution team two days after the predominantly black jury was empaneled on November 3, 1994. The jurors saw this calculated move as pandering, and as Cooley notes, his presence "didn't fool me and it didn't fool a lot of other people on the jury either."

70 Quoting Gerry Spence, a criminal attorney initially wanted by O.J. Simpson to defend him instead of Cochran. *According to experts*, *supra* note 23; *see also* Michiko Kakutani, *Figuring Out the O.J. Trial,* N.Y. Times, Sept. 10, 1996, available at *http://www.nytimes.com/1996/09/10/books/figuring-out-the-o-j-simpson-trial.html*.

71 In discussing this case, it is helpful to be armed with the facts. As we examine takeaways, in the criminal context, it's noteworthy to compare what happened in the civil case:

O.J. Simpson Trial by Numbers

	Criminal	Civil
No. of Days of Testimony	Prosecution: 99 Defense: 34	Plaintiffs: 29 Defense: 14
No. of Witnesses	Prosecution: 72 Defense: 54	Plaintiffs: 73 Defense 39
Days Jurors Sequestered	266	0
Trial Exhibits	857	700 (approximately)
Length of Court Transcript	>50,000 pages	8,000 pages (approximately)
Cost	Prosecution: *est.* $9 million Defense: *est.* $3-6 million	Plaintiffs: $1 million Defense: $2 million
Venue	Downtown LA District	Santa Monica District (population 7% black)
Jury	9 African Americans 2 white persons 1 Hispanic person	1 African American 9 white persons 1 Hispanic person 1 person of mixed Asian and African ancestry 1 African American later replaced by an Asian American after deliberations began
Verdict	*For* Defendant O.J.	*Against* Defendant O.J. $33.5 million

72 *Scott Turow*, *supra* note 55.

ORCP 39 C(6) DOES NOT CIRCUMVENT OREGON'S BAR ON PRE-TRIAL EXPERT DISCOVERY

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Organizational depositions are a powerful discovery tool with unique benefits. Through their use, parties may require a corporate deponent to prepare with information reasonably available to the organization, and designate a witness whose testimony will be binding. ORCP 39 C(6); FRCP 30(b)(6); *see e.g. Great Am. Ins. Co. of N.Y. v. Vegas Const. Co.*, 251 FRD 534, 538 (D Nev 2008). The requirement that an organization prepare with information reasonably available frequently gives rise to disputes about whether the corporate designee has been adequately prepared. *Bd. of Tr. of the Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 FRD 524, 526 (CD Cal 2008) (holding that Rule 30(b)(6) requires the designee to review matters known or reasonably available to the organization in preparation for the deposition).

One issue the authors have seen arise with increasing frequency in this context is whether, and to what extent, an organizational witness must be prepared to testify about facts and opinions developed by an expert retained by the organization for purposes of litigation. The suggestion is that expert information is "reasonably available" to the organization, and should therefore be discoverable at least in part.

This article discusses the somewhat unique approach the Oregon Rules of Civil Procedure take to expert discovery, and concludes that Oregon's general rule against expert discovery precludes use of the Rule 39 C(6) "preparation" requirement as a Trojan Horse to invade expert work product that is otherwise non-discoverable. This article also considers federal case law interpreting the Federal Rules of Civil Procedure as a source of guidance and concludes that, if anything, federal case law supports the authors' conclusions about Rule 39 C(6).

I. Oregon's Rules of Civil Procedure Generally Prohibit Expert Discovery.

When it comes to the subject of pre-trial expert discovery, the "Oregon Rules of Civil Procedure authorize what is colloquially referred to as 'trial by ambush.'" *Hinchman v. UC Market. LLC*, 270 Or App 561, 569 (2015). The absence of expert discovery in Oregon resulted from a deliberate decision by the legislature to omit from the Oregon Rules of Civil Procedure a provision modeled after the federal rules that would have expressly authorized expert discovery. *Stevens v. Czerniak*, 336 Or 392, 403-404 (2004). In part, concerns over the "increased costs that expert discovery brings and on the peer pressure against testifying that can occur when a party discloses his or her expert's name" were responsible for the legislature's deliberate decision to preclude expert discovery. *Id.* at 404.

The contours of Oregon's prohibition on expert discovery are broad. Generally speaking, the identity and substance of the expert's anticipated testimony are not subject to discovery. *Hinchman*, 270 Or App 569. The breadth of the rule against expert discovery is also embodied in ORCP 47 E, a unique summary judgment procedure adopted by Oregon in light of the prohibition on expert discovery. The rule permits a party to create an issue of material fact and avoid summary judgment based upon anticipated expert testimony while disclosing virtually no information about the expert. *Lavoie v. Power Auto, Inc.*, 259 Or App 90, 96 (2013) (A Rule 47 E affidavit need not recite the issues upon which the expert will testify, but merely needs to state that "an expert has been retained and is available and willing to testify to admissible facts or opinions that would create a question of fact.") (internal quotation marks omitted). The rule provides that summary judgment motions "are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their *facts* or opinions." ORCP 47 E (emphasis added). From the text of Rule 47 E, it is clear that facts developed by an expert are exempted from discovery, in addition to the expert's identity and opinions. Accordingly, a party cannot bypass the rule by claiming that she is simply seeking discovery of facts rather than mental impressions or opinions.

Following its decision in *Stevens*, *supra*, the Supreme Court again recognized the general prohibition on expert discovery in *Gwin v. Lynn*, 344 Or 65 (2008). In *Gwin*, the defendant sought to depose an individual who had percipient, non-expert, involvement in the underlying subject matter of the case, but whom the plaintiff also intended to call as an expert witness at trial. The court concluded that a witness could be both a fact witness and an expert witness, but made clear that a witness could not be considered a "fact" witness if the person obtained "evidence principally for the purpose of rendering an expert opinion in that trial." *Id.* at 67, n 1. The court in *Gwin* allowed a deposition to proceed because the facts sought pertained "to the witness's direct involvement in or observation of the relevant events that are personally known to the witness and that were not gathered primarily for the purpose of rendering an expert opinion." *Id.* at 67. The court was equally clear that the defendant was not entitled to inquire as to the witness's expertise or opinions, and that should questioning stray into those areas, the lawyer defending the deposition would be permitted to instruct the witness not to answer pursuant to ORCP 39 D(3)(c). *Id.* at 73-74.

While ORCP 44 allows discovery of expert physical and mental examinations of a party, this exception has no application in the vast majority of civil cases and we are left with a rule of broad application that generally prohibits expert discovery. So the question becomes, is there anything in the text of Rule 39 C(6) that somehow permits discovery of an expert's identity, facts or opinions? There is not.

II. The Rule 39 C(6) "Preparation" Requirement Does Not Circumvent the General Rule Barring Expert Discovery.

Rule 39 C(6) requires an organizational designee to be prepared to testify as to "matters known or reasonably available to the organization." One can imagine an opposing lawyer making the simplistic argument that facts and opinions developed by experts are "reasonably available" to an organization and therefore must be disclosed. Such an argument is misguided for a variety of reasons.

Rule 39 C(6) contains no exception to the general rules that privileged, work product and expert witness information is non-discoverable. *See* ORCP 36 B(1), (3) (prohibiting discovery of privileged materials, and requiring the showing of a substantial need for trial preparation materials); *Stevens,* 336 Or at 405 (generally precluding discovery of expert witness identities and information). An express exception to these general rules would be necessary because "in a civil action, a party has no obligation to disclose information to another party in advance of trial unless the rules of civil procedure or some other source of law requires the disclosure." *Stevens,* 336 Or at 400 *citing State ex rel Union Pacific Railroad v. Crookham*, 295 Or 66, 68-69 (1983).

Moreover, the existence of such an exception is foreclosed by the court's decision in *Stevens*, which concluded that Oregon's rules of civil procedure do not require pre-trial "disclosure of either an expert's name or the substance of the expert's testimony." *Stevens,* 336 Or at 404. The court made no exception for Rule 39 C(6).

We have found no Oregon appellate decisions addressing Rule 39 C(6) that suggest the "preparation" requirement might somehow render expert witness identities, facts or opinions discoverable. Ordinarily, one would look to analogous federal rules when faced with a dearth of case law interpreting a particular Oregon procedural rule. *See Vaughan v. Taylor,* 79 Or App 359, 363, n 3 (1986) (in construing the Oregon Rules of Civil Procedure, relying primarily on cases and treatises construing the analogous federal rules). In this context, however, the federal and state procedural rules are not entirely analogous. While ORCP 39 C(6) and FRCP 30(b)(6) are highly similar, the two sets of rules are generally at odds over the availability of expert discovery. Nevertheless, the federal rules may provide some limited guidance.

III. Federal Case Law Does Not Suggest A Contrary Result.

Case law interpreting the Federal Rules of Civil Procedure cannot provide highly persuasive authority on a question concerning the availability of expert discovery under Oregon's procedural rules given the stark differences on that point between the two sets of rules. That said, the federal rules and case law do provide some guidance on this subject and support the concept that an organizational deposition is not the proper vehicle for an end-around expert discovery rules.

For example, when the federal rules prohibit certain types of expert discovery, that prohibition is not dependent upon the particular procedural vehicle through which the discovery is sought. This is evident in the context of testifying versus consulting experts. Information about the former is discoverable pursuant to Rule 26(a)(2). Information regarding consulting experts generally is not discoverable pursuant to Rule 26(b)(4)(D). *See Spirit Master Funding, LLC v. Pike Nurseries Acquisition, LLC,* 287 FRD 680, 686 (ND Ga 2012) (denying document requests and holding that investigative findings and opinions of consulting experts were protected work product subject to disclosure only if the requesting party makes the difficult showing of "exceptional circumstances"). So seriously do federal courts take the "consulting expert" protection that they will extend it to experts who were initially designated as testifying experts and participated in the discovery process, but before providing a report are re-designated as "consulting" experts. *See Estate of Manship v. U.S.,* 240 FRD 229, 233, 239 (MD La 2006) (issuing a protective order preventing the depositions of experts re-designated as consulting experts).

There is nothing in these cases to suggest that expert information exempted from discovery might somehow become discoverable if it is sought through a particular procedural device. The prohibition on consulting expert discovery contained in Federal Rule 26(b)(4)(D) is plainly applicable to all discovery devices, as is Oregon's even broader prohibition on expert discovery. Accordingly, federal case law lends support to the rule that a party cannot obtain otherwise impermissible expert discovery in Oregon state courts through use of a Rule 39 C(6) organizational deposition.

In addition, some federal district courts within the Ninth Circuit have held that Rule 30(b)(6) organizational depositions are an inappropriate way to obtain what amounts to expert discovery. *See Dagdagan v. City of Vallejo*, 263 FRD 632, 635-636, 639-640 (ED Cal 2009). In *Dagdagan* the plaintiff noticed a Rule 30(b)(6) deposition but counsel did not limit his questions to factual matters within the purview of the Rule 30(b)(6) designees, and instead asked opinion questions that would only be appropriate for a testifying expert. *Id.* at 635, 639. The court noted that the federal rules distinguish between testifying experts and other witnesses and noted that "even retained experts, much less employees of the entity defendant, are immune from Rule 26 expert inquiry if they have not been designated by a party to testify as an expert." *Id.* at 635. The court declined to compel responses to questions that sought what amounted to expert opinion testimony in the context of a Rule 30(b)(6) deposition. *Id.* at 636, 640. Citing *Dagdagan*, the court in *Boyer v. Reed Smith, LLP*, No. C12-5815 RJB, 2013 WL 5724046, *3-4 (WD Wash Oct 21, 2013) built on this proposition in concluding that Rule 30(b)(6) questions seeking opinions about whether "certain 'practices' complied with corporate 'policies'" sought expert opinions and were therefore not among the information "known or reasonably available to the organization." *Id.* These cases holding that expert opinion discovery cannot be compelled through a Rule 30(b)(6) organizational deposition support the proposition that a party likewise may not do so with an Oregon Rule 39 C(6) deposition – particularly when Oregon's procedural rules generally bar pre-trial expert discovery.

IV. Conclusion.

Oregon's prohibition on pre-trial expert discovery is a broad rule of general application. Nothing in the text of Rule 39 C(6) addresses, much less provides for an exception to, this general rule. The Rule 39 C(6) "preparation" requirement does not change the equation. When it comes to Oregon's general prohibition on expert discovery, there is simply no reason to treat Rule 39 C(6) differently than other procedural devices.

PAY ATTENTION TO THE MIDDLE AND NOT JUST THE BOOKENDS: CONDUCT DURING TRIAL

By Steve English
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Steve English

You've just finished an outstanding opening statement. You were compelling. The jury seemed to be hanging on your every word. And that's exactly how you thought it should be because you had just finished picking the perfect jury. You followed all the guidelines for jury selection. You got rid of the jurors who would be biased against your client. You eliminated all the people who could be too dominant in the jury room. You used your challenges prudently and selectively and you were left with a jury both you and your trial consultant felt was strong. So what could go wrong? Guess what--just about everything. As difficult as it is for lawyers to get their heads around the idea, lawyers generally do not "win" a case. (Studies indicate that a lawyer's performance in a case is a small percentage of the overall factors entering into a jury's decision.) The bad news is a lawyer can in fact have a significant influence on losing a case. This is because a lawyer has a variety of ways that he or she can lose that case during trial as opposed to in jury selection or opening statement.

Let's set the stage so you understand more clearly what I'm talking about. The jury is set up in a manner that they actually have a view not just of the stage, *i.e.*, the witness stand and the judge and perhaps the lawyer examining the witness, but the jury also has an opportunity from where they sit to see everything going on in the courtroom. They can see who is sitting in the back of the courtroom. They can see the lawyers who are not examining. They can see, and do in fact watch, everything going on in the courtroom. Despite the courtroom is our home field, and even though we relish the trials as they unfold, a juror has a far different perspective coming in generally. Jurors are asked to sit still and not say a word for hours on end with eleven other strangers. They are then told by the judge that they are absolutely forbidden to talk about the only thing they have in common with those eleven other people, which is the case. So jurors occupy themselves with keeping an eye on everything going on in the courtroom and not just on the witness stand. What this means is that lawyers' conduct both during the trial and during the breaks, witnesses conduct during the trial and during the break, and observations by the jury both in the courtroom and outside the courtroom all can have an influence on the ultimate conclusion a jury reaches. So what are the kinds of things that can profoundly influence a jury despite brilliant oratory and compelling facts in your favor? Here are some tips that will help you avoid losing your case despite strong facts and a good jury.

1. Conduct yourself professionally at all times inside and outside the courtroom.

This is such an obvious point that I hesitated to list it as my top recommendation, but the reality is that jurors are very favorably impressed by lawyers who look and act professional and treat their opponents in the courtroom professionally. I've had the pleasure of trying more than one case against Chuck Paulson, a worthy opponent and an incredible lawyer. After one of our cases we agreed to have the jury interviewed by a trial consultant to see what they liked and didn't like about the case. The consistent theme from jury was that what they found most impressive was the fact that Chuck and I treated one another professionally and with respect. Given the level of drama in TV shows involving trials, they were pleasantly surprised and impressed with the fact that two lawyers could put on a case in a very forthright way without attacking one another and creating a side show.

In this regard, however, keep in mind that if you have a serious case involving high levels of emotions and your portrayal in trial is serious, focused, yet professional, jurors will pick up on inconsistent behavior from attorneys. If as they walk out on their break they see the lawyers laughing and joking together, they'll reach the conclusion that your courtroom sincerity is just an act. The bottom line is to be professional, be courteous, but don't let your friendship or social interaction with your opponent come across as inconsistent with your in-trial demeanor.

2. Pay attention to the little things because the jury is.

As I indicated above, the jury is, despite our best efforts, frequently bored with what they are hearing and what they are seeing. That causes their eyes and minds to wander. To that end, don't be the only person in the room that has bottled water while the jury and your opponent pour theirs into cups provided by the court. Sit up straight. In one of my post jury interviews over the years, I remember jurors commenting on the fact that one lawyer in particular seemed bored with the proceedings because he kept sitting tilted back, slouched in his chair. They consider this a negative in terms of his commitment to his case. If your table is so filled with books and binders, and notes and materials are scattered, whether we like it or not the jury gets the impression that you are disorganized and don't exactly know what you're doing. Again, not an impression you want to convey. I would be remiss if I didn't comment on the fact that in at least one trial I had, jurors apparently, for lack of anything more interesting (how embarrassing to admit), were having daily contests judging which tie among the lawyers they liked the best. Again, constant whispering with your co-counsel while a witness is testifying, constant passing of notes back and forth, is a distraction to the jury and becomes irritating to them. Jurors have commented that when they're told to pay attention to what a witness is saying, but the lawyers seem to be more interested in passing notes to one another, such conduct is aggravating to the jury when they are prohibited from such actions.

3. Conduct outside the courtroom.

Whether we like it or not, the evidence in trial is frequently influenced by a juror's observation of how a lawyer or a witness acts outside the trial. Two quick examples. I had a case involving a very challenging business dispute in which a key witness

was set to testify in the afternoon. As this witness waited for the elevator on the main floor, a woman in a wheelchair was clearly being shuffled aside as others crowded onto the elevator. The witness watched this happen twice and then stepped in and asked the crowd to please move aside so this woman could get onto the elevator. Twenty minutes later I called him as my witness. As he took the stand, juror number seven, sitting in her wheelchair, gave him the biggest smile I'd seen in the courtroom in days. It really didn't make any difference to her what he would say because as far as she was concerned, he was her knight in shining armor. There is no question that once in the jury room she spread the word about what a good and decent person he was, something that was crucial to acceptance of his testimony.

On a more mundane note, don't try a case in which you are talking to the jury about obeying the rules and following the judge's instructions and then let them see you outside the courtroom jaywalking, walking against the light, or disobeying the very rules you are expounding in the courtroom as having to be followed. One final example. I have two good friends who are very high profile plaintiffs lawyers. Years ago they tried a major products liability case against a manufacturer. The defense team was quite bullish on their defense of the case and spent the night before the jury deliberations began at a restaurant laughing and making light of the plaintiff's case. As it turned out, a waiter in the adjacent room happened to be one of the jurors. He heard all of this and saw some of it. Twelve million dollars later, the defense lawyers probably wished they had that night back.

4. Your job as a lawyer is to facilitate the evidence, not to take its place.

We read a lot these days about the whole concept of lawyers as masters of the universe, masters of the courtroom, masters of the story. But in reality, as I said before, the positive influence a lawyer can have on the case is far less than the negative influence a lawyer can have. I recently was discussing this situation with a judge who told me that in a recent case he tried in which he talked with the jury afterwards, he learned that the primary driver of the punitive damage award was the lawyer for the client who received the punitive damages. This was because the jury was so upset with his conduct, his demeanor, and his obnoxiousness that it drove their award of punitive damages. Likewise another judge shared with me a story in which he said that a case had settled during trial and he allowed the lawyers to talk with the jury afterwards in his presence. What the jurors said was that it was good thing the case had settled because their deliberations would have been primarily focused on what an a**hole the lawyer for the plaintiff was. The point of all of this is that whether we like it or not, negative conduct on our part actually does negatively influence your client to their detriment.

Cross-examine witnesses with courtesy and professionalism until proven otherwise. This is a challenge because sometimes our clients want to see us really go after a witness who might be a key witness and whose testimony needs to be attacked and broken down. While this ultimately may be true, from a juror's perspective they will identify with the witness who is there either under subpoena or being compelled to testify as opposed to the lawyer for whom this is home turf. Attacking a witness out of the box is offensive and unsettling to a jury. It instinctively makes them protective of the witness: just exactly the opposite conclusion you want them to draw. There may come a time in cross-examination when it is obvious that a witness is not answering questions and there may come a time, although it is extremely rare, when you actually have to attack a witness. Think of it this way, verbally attacking another human being under circumstances when they are forced to answer questions and you have full control of the situation is upsetting to other human beings who are observing such questioning. A jury trial creates the risk that your momentum going into trial against a particular witness is so strong that you lose sight of the fact that for the jury this is all brand new territory and you have to carefully build up a reason why it is appropriate to attack a witness and then you do so only very carefully and infrequently.

5. Pay attention to who is in the courtroom, particularly if they are your witnesses and pay attention to what they're doing.

As I stated above, the jury not only has the opportunity to view the stage, *i.e.*, the witness stand and the lawyer examining the witness, but the backstage as well; that is, the spectator seats. In the event you have an expert who is sitting in the back of the courtroom for very legitimate reasons or you have witnesses who have not been barred from the courtroom, make sure that these rules of conduct apply to them too. Again, a quick story to prove my point. Several years ago I had a case in which the key witness was an expert for a particular profession. He was nationally renowned and his credentials were impeccable. His direct examination was excellent. I cross-examined him and thought I had done a fairly good job. We got a good result in the case, but after the trial the court allowed us the opportunity to have Tsongas Trial Consulting interview the jury. When it came time to talk about the professional witness whose testimony so concerned me, the jury had the following to say: And then there was Mr. Jones. We watched him sit in the back of the courtroom all week and we kept wondering why he was there. And every day he would take that pencil and he would rub it up one side of his nose and then rub it up the other side of his nose. And then he would frequently put the pencil up his nose! So despite what I thought was a strong cross-examination, by the time Mr. Jones took the stand as far as the jury was concerned, he was the guy who kept sticking a pencil up his nose. It didn't really make any difference what he said, they thought he was doofus. I had another situation in which my witness spent his direct examination and his cross-examination talking about how the defendant investment manager had destroyed his trust, had stolen his money, and had ruptured their friendship. After compelling testimony he got up, got off the witness stand, walked over and with a big grin shook hands with the man whose character he had just skewered. The jury's eyes dilated and people actually sat back in their chairs because his actions where so incredibly inconsistent with what he had been compellingly testifying about.

6. Get the temperature of the judge and pay attention to it carefully throughout the trial.

It really doesn't make any difference whether your trial judge is consistently ruling against you and doing so in a manner that you believe is unfair. As far as the jury is concerned, what he does is right and is fair and correct until proven otherwise. Therefore, with that in mind don't argue with the

judge in front of the jury. Don't make it appear as though you're trying to show the judge you know better than he or she does. This isn't gaining points with the judge and it certainly isn't with the jury either. Juries assume the judge is right and the gracefulness with which you accept his ruling or the lack of gracefulness goes a long way toward impressing a jury that you are professional or not. In this regard treating a judge with appropriate deference should be a given. When a judge or even the jury walks into the room, stand up. When you want to make a point on an objection, stand up. Unless the judge has given you permission in advance then ask the judge's permission before you approach the witness. If you've lost to an objection, thank the judge and sit down. Don't grimace after the court's ruling if it's gone against you. All judges are bothered by this. Some are irritated by this and some even react. One recent experience I had involved a judge who leaned over to one of the counsel as that counsel's opponent was making an argument and said "You've just had your one warning about grimacing or making faces when your opponent is arguing. If you do it again, I'm pulling your pro hac vice admission."

7. Put on evidence and your case in an efficient, straightforward manner.

One of the biggest problems that trial lawyers have is they don't understand that in the modern world (and probably even 20 or 30 years ago), jurors find a slow plodding presentation of evidence to be mind-numbingly boring. We live in a world of texting (emails being more frequent than phone calls, voicemails being better than letters). Jurors want you to get to the point. Ask a question, get an answer, move on. If it's a very important question, and you need to ask it a different way, consider asking it one more time, but beyond that don't beat things to death in trial, you'll lose the jury. Likewise, if you've got fifty exhibits to prove your point, you'd better think long and hard about whether or not to put all fifty in or whether to focus on your five best. Overkill is not an effective method of trying an efficient case that will keep a jury's attention.

So in summary, although the make-up of your jury, your opening statement, laying out your story, and your closing argument are all critically important, you are really on trial from the minute you get out of your car on the first morning of trial and walk over to the courthouse. You will not be able to tell who among the people that are entering the courthouse with you are prospective jurors. You won't know whether somebody who is a prospective juror for your case is friends with another prospective juror as the trial is going on, you will not be able to tell who is observing you at breaks, outside the courtroom, or while witnesses are testifying. You have no control over those factors. What you do have control over is acting in a thoughtful, professional manner so that your conduct is consistent both in court and out of court and both in the actual trial and on the breaks. I can't assure you that acting like a professional in a thoughtful, courteous, mature way will win the trial, but I can promise that conduct inconsistent with this could lose you the trial.

THE APPLICATION OF SYMBOLIC CONVERGENCE THEORY TO TRIAL PRACTICE: WHAT ARE YOUR JURORS FANTASIZING ABOUT?

By Paul Hood
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Paul Hood

Rhetoric, as an academic field, is the study of persuasive speaking and writing, which is what we are supposed to be doing as lawyers, but it isn't generally what we're taught in law school. While there are exceptions, law school teaches what I call elementary argumentation. I don't mean "elementary" as an insult. I simply mean an argument based on established elements that, if fulfilled, lead to a compelled conclusion, much like a logical syllogism. For example, if you find x, y, and z, you must find the defendant guilty. Elementary argumentation is common to legal thinking and a perfectly reasonable way to teach students as a starting point, but it's an incomplete approach, especially as applied to jury trials.

Before becoming a lawyer, I was a high school debater and then college debater and a two-time top speaker at the college debate state championships in Missouri. I earned a master's degree in communication with a focus on rhetoric and argumentation and later coached a team to a college debate national championship. As a lawyer—like many of my fellow litigators—I have attended presentations and read books and articles on trial techniques. The speakers and authors were typically attorneys and often had no background in academic theories of rhetoric or argumentation, but, again and again, their advice on good trial practice would have found support in academic theories that I studied before law school. I believe this is no coincidence.

Over the course of decades of jury trials, the advice distilled from the experience of top trial lawyers tends to line up with academic theories of argumentation and rhetoric. While the fields of law and academic rhetoric have already mingled to an extent, there is still a great deal more to be said in pursuit of uniting the communities of theory and practice. My purpose in this article is to bring rhetorical thinking to the foreground of trial practice because I believe that a greater appreciation of rhetoric makes existing practical advice more accessible and more effective. In other words, from the perspective of a former debate coach, understanding the "why" (theory) aids comprehension of the "what" and "how" (effective trial practice). I will begin with a brief discussion of rhetorical theory generally and explain core concepts from a particular theory: symbolic convergence.

Basic Principles of Rhetoric

Rhetoric is an old academic discipline. Most introductory courses on the subject start with the contributions of Aristotle. The breadth of this article is obviously more limited than a

complete course on the subject. I will be focusing on more recent approaches in the field. Modern theories of rhetoric are overtly connected to the idea that reality is socially constructed. This does not mean there is no objective or tangible world beyond our perceptions and minds, but it does mean our private mental worlds do not necessarily line up perfectly with an external reality. As a result, people can have very different opinions and perceptions of the world around them.

Three principles of rhetorical theory are closely related to this concept that reality is socially constructed. First, people use symbols to make sense of reality and to communicate. Academics typically use the word "symbols" instead of "words" or "language" because a symbol can be a word, a phrase, a graph, a flag, a hairstyle, a dance, a statue, etc. Second, outside the analytic realms of mathematics, geometry, and similar fields, symbols never correspond to a single meaning. For example, the words "Ronald Reagan" correspond to a particular historical figure, but the meaning of that figure—and of the corresponding words—is different for different people. Third, the different meanings that are attached to a symbol tend to reflect different views of reality. In an academic setting, those different views are called rhetorical visions. For example, the view that Ronald Reagan was a great president who brought down the Soviet Union is a rhetorical vision.

There is much more to rhetorical theory, but these three basic principles provide a good starting point. Consider these concepts for a moment in a litigation context. I do criminal defense work, so I will pick the phrase (symbol) "police officer" to discuss this a bit more. Depending on the issues in a particular criminal case, the meaning of that symbol to jurors can be extremely important, and, as recent events make clear, those words can have very powerful and diverging connotations in different communities. Importantly, our understanding of individual police officers and our experiences with them will shape our understanding of the symbol "police officer." In turn, our understanding of the symbol "police officer" will also shape our opinions of individual officers. Of course, "police officer" is not the only phrase for which this is true. It is just one example, and this same concept of words having many meanings is true—and important—in a civil context as well. Consider the symbols "tort reform," "damage caps," and even "plaintiff," for instance. For different people, those words have different connotations, and those connotations often correspond to different and competing world views (rhetorical visions).

None of this is revolutionary. People use symbols. Symbols have multiple meanings. The meanings correspond to different ways of looking at the world. You already knew this, even if you hadn't dwelled on these concepts. For me, discussing these ideas brings to mind a few sentences from *Moe Levine on Advocacy*. "That is what advocacy is. You're not teaching them. You're reminding them."[1] As I know from being a former debate coach, teaching is sometimes just reminding, but carefully defining and dwelling on concepts of rhetoric that we all sort of already know is useful. It sensitizes us to the notion that a trial is a rhetorical event, and having that sensitivity is valuable.

Symbolic Convergence Theory

The specific theory of rhetoric I've selected for this article was created by Professor Ernest Bormann of the University of Minnesota. He began publishing on what he would later call "symbolic convergence theory" in the early 1970s.[2] Bormann was inspired in part by the work of Robert Bales, at the time a social psychologist at Harvard. Bales had studied communication patterns in small groups tasked with specific goals. Bales noted that difficult tasks often caused group members to experience anxiety which led groups to communicate through dramatic story telling.[3] Bales used the term "fantasy" to label this process. Bormann expanded on the concept of "fantasy," as I'll explain in a moment, but it's important to understand initially that "fantasy" as used in this area of scholarship does not equate with delusion or something that is purely imaginary. Instead, "fantasy" refers to an abstraction one step removed from immediate experience. Bormann uses the example of a television program interrupting a regularly scheduled broadcast to show live video of unplanned events. To Bormann that contemporary presentation of extemporaneous events would not qualify as a "fantasy" because the video is the "here and now" of the news story. By contrast, a later description of those same events would qualify as a "fantasy" because it is an abstraction from the actual events.[4]

Bormann expanded the concept of fantasy and began publishing on what he called fantasy theme analysis, which he later developed into symbolic convergence theory. While the theory can apply to a variety of communication contexts, it's useful to remember that it grew out of the study of small group communication, specifically task-oriented small groups, similar to juries. The theory relates to how people influence each other through the use of symbols and create communities of shared perspectives and understandings. In the context of symbolic convergence theory, the term "fantasy" refers to a "shared interpretation of events."[5] Bormann compares the power of rhetorical fantasy to "being caught up in a drama" where "emotional investment in a leading character leads to involvement in the story line."[6] According to Bormann, "fantasies" can build into profound shared experiences that move adherents to the fantasy to take action. When members of an audience share a fantasy to a sufficient degree, "they jointly experience the same emotions, develop common heroes and villains, celebrate certain actions as laudable, and interpret some aspects of their common experience in the same way. They thus come to what [Bormann] call[s] a 'symbolic convergence' about that part of their common experience."[7]

Symbolic Convergence Applied to Trial Practice

Let's turn to a well-regarded publication in the field of civil trial practice, Rick Friedman's *Polarizing the Case: Exposing and Defeating the Malingering Myth*. As the title suggests, this book is a guide for plaintiff attorneys on defeating a defense that a plaintiff is faking his or her injuries. It's an impressive work with a wealth of suggestions and insights. In Chapter 1 "Defining the Problem," Friedman spells out his explanation for why the malingering defense has worked. He notes that, as the defense was more commonly used, many plaintiffs' attorneys underestimated its appeal and lost cases or saw verdicts shrivel. Friedman then gives four reasons for the success of the malingering defense, which I shorten slightly: first, corporate

propaganda has smeared trial lawyers and plaintiffs; second, many people think they know someone who tricked the legal system; third, agreeing with the view that the plaintiff is faking the injury is a simple way out of deliberating that saves the jurors emotional and intellectual energy; and, fourth, faking is easy to understand as compared to the medical details of injuries. Friedman also explains the success of the malingering defense this way: "Most of us prefer doing something we are good at over something we are bad at.... [People] prefer to make decisions based on what they already know and understand rather than based on newly-acquired unfamiliar information. No wonder they gravitate to suggestions that this whole messy confusing trial can be decided by looking at the plaintiff's motivations."[8]

By all accounts, Friedman is a brilliant lawyer, and *Polarizing the Case* is evidence for both his talent and intellect, but from a rhetorical standpoint there's something missing from Friedman's explanation in Chapter 1. Look back at the earlier quotations from Bormann about fantasy participants getting caught up in a drama of jointly shared emotions and common heroes and villains. Bormann compares the power of fantasy to people getting caught up in stories with heroes and villains because people really do get caught up in those stories. The structure of a hero-villain drama has a power in our culture, probably in all cultures. Numerous popular movies follow this structure. Think of *Star Wars*. There's a hero, Luke Skywalker, versus a villain, Darth Vader. If *Star Wars* isn't your sort of movie, think of *On the Waterfront*: Terry Malloy—played by Marlon Brando—versus Johnny Friendly. Harry Potter versus He-Who-Must-Not-Be-Named is another example. Movies provide many examples of heroes versus villains, but this structure is obviously not limited to movies. It appears in ancient poems and stories, novels throughout history, and in religion as well.[9]

Now think about a civil lawsuit, where the plaintiff is an injured individual and the defendant is a corporation, a large institution, or a wealthy person. In that scenario, it's hard for a defendant to tap into the power of the hero-versus-villain fantasy. The plaintiff and plaintiff's attorney usually have a much easier time of accessing that fantasy, but the malingering defense flips that around. Under that defense, the plaintiff becomes a liar, a cheat, a crook: the villain. By correlation the defendant is the hero, or at minimum the sympathetic protagonist who must be protected from the scheming villain. From a symbolic convergence perspective, the malingering defense harnesses the power of the hero-villain dramatic structure and is, thus, a predictably powerful argument. This isn't to say that Friedman's explanations don't help to account for the success of the malingering defense, but placing academic rhetorical theory at the forefront of our minds provides an important insight into the success of that defense.

Practice Informed by Rhetorical Theory

This brings me to a short list of practical suggestions. I don't believe these tips are new, but the guidance offered comes from a rhetorical perspective on argument. First, pay careful attention to any effort to define your client. Prepare for it in advance. Watch for it in trial. Have your own definition and supporting material ready to go. In an adversarial setting, jurors are trying to figure out who to root for. Once they decide, that connection is very powerful. As Bormann says, "Those who thwart the protagonist's efforts to achieve laudable goals evoke in the sympathetic participant unpleasant emotional responses and dislike."[10] In simpler terms, jurors root for someone and against someone else.

Second, work at learning common rhetorical fantasies. Stay in touch with regular people and culture. Some of us were lucky enough to be born among the masses. I'm originally from a small town in southern Missouri. I've worked in a factory on a loading dock. I have farmers and truck drivers in my family. If you don't have a commoner's background, at least get out into the world. Be in touch with people from varying backgrounds. In your normal interactions with people, you've already spotted rhetorical fantasies, but now you have a lexicon for thinking about them. As you become more conscious of rhetorical fantasies, try to spot your own. We all have them. Understanding your own fantasies and rhetorical visions will help you more persuasively interact with the world views of others. I also suggest following local news and listening to talk radio, especially talk radio that you don't agree with. I suggest talk radio specifically because that medium tends to contain a lot of active rhetorical fantasies. I suggest local news because not all culture is national. For example, if you are handling a case in Portland, Oregon involving police treatment of a mentally ill person, you need to know there's a rhetorical fantasy related to that scenario in Portland culture. That doesn't mean everyone in the area shares that fantasy, but in any sizable jury pool some people will likely be influenced by it.

Third, in jury selection, don't try to persuade them. Don't disagree with them. Just listen. As David Ball says, "In voir dire, if more than 10 percent of the words are yours, you are hurting yourself. So shut up."[11] From a symbolic convergence perspective, you want jury selection to trigger relevant fantasy themes. Get those fantasies articulated and figure out which jurors adhere to them. Remember to consider not just what people say but how they say it. Look for body language as well, including among jurors when they are listening to a fellow juror sound off with an especially strong opinion. Ball offers good examples of important rhetorical fantasies—though he doesn't use that term—in Appendix A to *David Ball on Damages 3*, where he presents "poison questions" that may arise during jury selection.[12]

Fourth, when opposing a rhetorical fantasy, build the exception. Unless you are very fortunate, you will have unfavorable jurors on your jury. You should know why that person may be unfavorable and have a strategy for how to deal with that juror. If there is a prominent rhetorical fantasy working against your position, in my experience, your best strategy is probably to build an exception to the fantasy. Because a rhetorical fantasy usually involves a powerful generalization that a juror uses to interpret evidence, argument, and perhaps the case as a whole, you're not likely to change the fantasy in the course of trial, but you can show a juror that your particular case is an exception to the generalization. For example, back in central Missouri when I was still a public defender, I represented a man at trial who was charged with possessing a small amount of crack cocaine. He was black. The three testifying police officers were white. At trial, there was no black person in the jury pool. If I remember correctly, the jury ended up being eleven Caucasians and one Hispanic. Because of the facts of the case, our defense argument had to be that the

arresting officer planted the drugs. There were some odd details that helped that argument along, but that's still a difficult position to take with most jurors. Before trial, my supervisor asked me what the defense would be. I told him the argument and the facts, including the odd ones—which were circumstantial at best. He replied, "Maybe if we were in inner city St. Louis that would work, but not in Boone County." I went to trial with that defense and got a hung jury, 7 for guilty, 5 for not. Two days after the verdict the prosecutor offered a deal on a misdemeanor.

During jury selection, I asked for opinions about police officers. I got fairly common responses. The prospective jurors liked police officers. Some had friends or family who were police officers.[13] I wasn't going to change the jurors' general view of police officers. I can't spell out in this article every detail and trial event that made the outcome possible, but I remained sensitive to a particular goal: removing the arresting officer from the generalized view of police officers as understood by that jury. As a trial attorney, you probably can't change world views possessed by jurors, but you can convince them that a particular person, set of events, or situation is an exception to the general rule. That's as true in the civil context as it is in a criminal trial. In *Polarizing the Case*, Friedman's suggestions aren't about convincing the jury that plaintiffs never fake injuries. His suggestions are about convincing the jury that your plaintiff isn't faking an injury. That's the right focus, building an exception to the generalization.

Fifth, do everything with jury deliberations in mind. As a former debate coach, I view every piece of the trial as building toward the jury deliberating the case. I think of favorable jurors as debaters, and I am equipping them with arguments and evidence for them to use during their discussions with unfavorable jurors. This means that your favorable jurors have to understand your argument well enough to articulate it to the other jurors. If your jurors cannot do that, they won't be able to defend your argument. The other side will have their jurors too, so don't help arm the opposition jurors. In explaining the importance of exercising *invisible* control during cross-examination, David Ball writes, "Visible control of witnesses gives opposition jurors a powerful deliberations argument: 'I know what the witness admitted, but the lawyer forced him to admit it; the lawyer never let the guy say what he wanted to. That's what lawyers do.'"[14] Leaving aside the question of how to exercise invisible control, the broader strategic point is that everything that happens in a trial is leading up to a debate round. Lawyers call it deliberation, but it's a debate round among the jurors. Your task is to persuade some of the jurors to be your debaters and then to equip them with arguments, while not helping the other side to equip theirs.

In Missouri, trial attorneys can request jurors' contact information from the court after a trial for the purpose of interviewing jurors about what happened in deliberations. I would ask one of the investigators from the public defender's office to do the post-trial interviews because the investigators got more honest answers about what had happened. An interview from one trial in particular taught me that jurors will fight for your client, if you let them. The case involved a detailed confession. Our argument had been that the skillful work of an experienced detective produced a false statement from a vulnerable defendant. The jury deliberated for a little over five hours before returning a verdict of not guilty. About three and a half hours into deliberations, the vote had been 10 – 2 for guilty.[15] The two women who were holding out told the other jurors that they would not change their votes to guilty under any circumstances. Eventually, the ten changed theirs.

In this article, I've offered a rhetorical perspective on trial practice. The elementary approach to argument is good, especially as a teaching tool, but supplementing it with rhetorical theory provides a more comprehensive understanding of jury trials. There are a variety of academic theories of rhetoric. I selected symbolic convergence theory because Professor Bormann's core concepts are valuable and relatively accessible. If you want to read more about rhetorical theories, there are textbooks which address many of them, such as *The Rhetoric of Western Thought* or *Communication and Group Decision Making*. You don't necessarily have to study rhetoric in great detail, but keeping a rhetorical perspective in mind will help your trial practice. Even if you don't get a textbook or look up Professor Bormann's work, at least get yourself a copy of *The Adventures of Tom Sawyer* and re-read Chapter 2 on occasion. That's the part where Tom convinces the other kids to whitewash the fence for him. Convincing them isn't the point. It's how he does it that matters.

Endnotes

1 Moe Levine, *Moe Levine on Advocacy* 13 (Trial Guides 2009).

2 *See* Ernest G. Bormann, *The Eagleton Affair: A Fantasy Theme Analysis*, 59 Quarterly Journal of Speech, 143-159 (1972).

3 Robert F. Bales, *Interaction Process Analysis: A Method for the Study of Small Groups* 150 (Addison-Wesley 1950).

4 Ernest G. Bormann, *Symbolic Convergence Theory: A Communication Formulation*, 35 Journal of Communication, 131 note 1 (1985).

5 *Id.* at 130.

6 *Id.*

7 *Id.* at 131.

8 Rick Friedman, *Polarizing the Case: Exposing & Defeating the Malingering Myth* 9 (Trial Guides 2007).

9 A more detailed explanation of symbolic convergence theory would also include the concepts of fantasy type and archetypal fantasy, which help the theory account for and explain the power of the hero-villain drama. See Ernest G. Bormann, *Symbolic Convergence Theory and Communication in Group Decision Making in Communication and Group Decision Making* 81, 92-97 (Randy Y. Hirokawa & Marshall Scott Poole eds., 2nd ed. 1996); see also Bormann, *Symbolic Convergence Theory: A Communication Formulation* at 132.

10 *Id.* at 130.

11 David Ball, *David Ball on Damages* 273 (National Institute for Trial Advocacy 3rd ed. 2011).

12 *Id.* at 280-288.

13 There was even a deputy sheriff in the jury pool, though he didn't make the jury.

14 *Ball on Damages* at 213.

15 Fortunately, Missouri law requires a unanimous verdict in a criminal trial.

RECENT SIGNIFICANT OREGON CASES

By Stephen K. Bushong
Multnomah County Circuit Court


Honorable
Stephen K. Bushong

Claims and Defenses

Chapman v. Mayfield, 358 Or 196 (2015)

Plaintiffs sued the Eagles Lodge for serving alcohol to defendant Mayfield when he was visibly intoxicated. After leaving the Eagles Lodge, Mayfield went to the Gresham Players Club, where he shot and injured plaintiffs. The trial court granted summary judgment in favor of the Eagles Lodge, concluding that plaintiffs had not presented evidence sufficient to create a factual dispute as to whether Mayfield's act of shooting plaintiffs was the foreseeable result of the Eagles Lodge's act of serving him alcohol while he was visibly intoxicated. The Supreme Court affirmed. Under *Moore v. Willis*, 307 Or 254, 260 (1988), the "fact that someone is visibly intoxicated, standing alone, does not make it foreseeable that serving alcohol to the person created an unreasonable risk that the person will become violent." The Supreme Court declined to "extend the limits of foreseeability" to permit a jury to decide foreseeability in all cases in which a plaintiff alleges service to a visibly intoxicated person "without permitting a court to evaluate the sufficiency of the plaintiff's allegations in a particular case." 358 Or at 217, 218. Plaintiff's evidence failed to create a genuine issue of material fact because "(1) it described the type of harm at risk too generally, and (2) it did not provide any relevant information that would permit a trier of fact to find that defendant knew or should have known that overserving Mayfield would create an unreasonable risk of the type of harm that plaintiffs suffered." *Id.* at 222.

Rhodes v. U.S. West Coast Taekwondo Assn., Inc., 273 Or App 670 (2015)

Plaintiff, guardian *ad litem* for her six-year old daughter, Victoria, sued the Tigard-Tualatin School District (School District) and others after Victoria was seriously injured at a public swimming pool that the School District operated before transferring the facility to the newly-created Tigard-Tualatin Aquatic District (Aquatic District). Victoria was injured 50 days after the transfer. Plaintiff alleged that the School District was negligent in turning over the pool operation, including inadequately-trained employees and defective policies and management, to the Aquatic District. The trial court granted the School District's motion for summary judgment, concluding that Victoria's injuries were not a foreseeable consequence of the School District's alleged negligence as a matter of law. The Court of Appeals reversed. The court explained that the two "narrow" issues on appeal were (1) "whether plaintiff adequately alleged that the injury to Victoria was a reasonably foreseeable consequence of the school district's conduct, including its conduct in connection with the transfer of the pool operation" (273 Or at 681); and (2) if so, whether "the school district nonetheless cannot be held liable for the injury as a matter of law because of the transfer to the aquatic district." *Id.* The court explained that, under the unique circumstances of this case, plaintiff adequately alleged that "it was foreseeable that the risks of injury created by the school district's negligence would persist after the transfer. Whether that is true is a question for the jury." *Id.* at 684. The court further concluded that "the nature of the transfer would permit a jury to conclude both that the aquatic district was unaware of any existing danger and that it would carry on the operation it its existing state, at least for a time." *Id.* at 688. Judge DeVore dissented. In his view, plaintiff "failed to show that the prior operator of the pool had knowledge or reason to know the dangers that could render it liable for the allegedly incomplete practices or policies of the successor operator." *Id.* at 709 (DeVore, J., dissenting).

Scheffel v. Oregon Beta Chapter of Phi Kappa Psi, 273 Or App 390 (2015)

Plaintiff was raped by a fraternity member at a fraternity party in Corvallis. She sued the Phi Kappa Psi fraternity (Phi Psi) and its local chapter (Beta Chapter) for negligence and other claims. The trial court granted both defendants' motions for summary judgment and dismissed the claims. The Court of Appeals reversed on the negligence and negligence *per se* claims against the Beta Chapter, and affirmed as to the claims against Phi Psi. The court concluded that the evidence was sufficient to create a factual issue on foreseeability. Among other things, plaintiff introduced evidence "that would support a finding that the chapter knew that alcohol-related sexual assaults were a risk in certain circumstances at fraternities on college campuses nationwide, and that . . . the chapter permitted underage members to possess and consume alcohol in private rooms and failed to prohibit access to private rooms during a social event where alcohol was available." *Id.* at 411. The court rejected the Beta Chapter's arguments that, as a matter of law, its conduct satisfied the applicable standard of care (*Id.* at 414), and concluded that summary judgment on the negligence *per se* claim was inappropriate because "there is evidence from which a reasonable factfinder could find that Beta Chapter failed to control access to alcohol in private rooms" in violation of administrative rules that regulated alcohol distribution and consumption at such events. *Id.* at 418. Finally, the court affirmed summary judgment on the claims against Phi Psi, concluding that plaintiff's claims under the *Restatement (Second) of Torts* section 323 (1965) failed because, "even if there is evidence that Phi Psi assumed a duty to the local chapter to 'control alcohol abuse and sexual assault,' *Restatement* section 323 does not recognize a duty to a third party such as plaintiff." *Id.* at 424. Judge DeVore dissented in part. He could not agree "that the law permits a claim of ordinary negligence against the local fraternity. The offense is reprehensible, but on *this* record on the negligence claim, the circle of blame for another's crime should not go further than the offender." *Id.* at 448 (DeVore, J., concurring in part, dissenting in part; emphasis in original).

Tomlinson v. Metropolitan Pediatrics, LLC, 275 Or App 658 (2015)

Plaintiffs (the Tomlinsons) alleged that defendant medical providers negligently failed to diagnose their son (Manny) with a genetic condition (DMD), and negligently failed to inform them about that condition. As a result, the Tomlinsons conceived and bore a second son (Teddy), who also suffers from DMD. The trial court dismissed the claims, concluding that (1) no physician-patient relationship existed between plaintiffs and defendants; (2) the Tomlinsons' claim for "wrongful birth" and Teddy's claim for "wrongful life" are not cognizable in Oregon; and (3) the Tomlinsons failed to allege a physical injury or other legally protected interest as a basis for their noneconomic damages claim. The Court of Appeals reversed in part. The court agreed that Teddy's claim failed "because he failed to allege legally cognizable damages." 275 Or at 690. The court concluded, however, that the Tomlinsons had alleged a cognizable negligence claim. The court concluded that the Tomlinsons sufficiently alleged causation by alleging that "but for defendants' failure to diagnose Manny with DMD and inform them of his condition and their reproductive risks, they 'would not have produced another child suffering from DMD." *Id.* at 678. The court further concluded that, even in the absence of a direct physician-patient relationship between defendants and the Tomlinsons, plaintiffs' allegations "are sufficient to plead the existence of a relationship of reliance between defendants and the Tomlinsons that gave rise to a duty to avoid infringing on the Tomlinsons' interest in making informed reproductive choices." *Id.* at 684.

ODOT v. Alderwoods (Oregon), Inc., 358 Or 501 (2015)
Emrys v. Farmers Ins. Co., 275 Or App 691 (2015)

In *Alderwoods,* the Supreme Court considered whether a highway improvement project that eliminated two driveways that had allowed direct access to defendant's property from the highway constituted a compensable "taking" under ORS 374.035 and Article I, section 18, of the Oregon Constitution. The court concluded that "a governing body may—without effecting a taking—restrict an abutting landowner's right of access for the purpose of protecting the safety of public roads, so long as reasonable access to the abutting property remains." 358 Or at 526. In *Emrys,* the Court of Appeals held that the trial court erred in dismissing plaintiff's action for reformation of an insurance contract. The court explained that, contrary to the trial court's understanding, "the antecedent agreement did not have to be one that identified the property to be insured as the property" at the specific address in question. 275 Or App at 698.

Gibson v. Bankofier, 275 Or App 259 (2015)

Plaintiff, as trustee for a family trust, sued a real estate agent (Bankofier) and her company, alleging that defendants were negligent and committed financial abuse under ORS 124.100(2) when Bankofier facilitated real estate investments made by plaintiff's mother (Gibson), acting as the predecessor trustee for the trust. The trial court granted summary judgment in favor of defendants. The Court of Appeals affirmed. The court concluded that the statutory claim failed because "there is no evidence from which a rational finder of fact could conclude that Bankofier 'wrongfully' took or appropriated money or property from Gibson or the trust" as required by the statute. 275 Or App at 275. The court further concluded that the negligence claim failed because "Bankofier's duties as Gibson's real estate agent were limited to those listed in ORS 696.810 and there is no evidence that she violated any of those duties." *Id.* at 286.

Masood v. Safeco Ins. Co. of Oregon, 275 Or App 315 (2015)

Plaintiff sued his insurance carrier (Safeco) for breach of contract after a fire destroyed plaintiff's multi-million dollar home and its contents. After trial, a jury determined that (1) Safeco breached an oral agreement to settle plaintiff's fire loss claim; (2) plaintiff was entitled to recover damages of $2,452,500 on that claim; and (3) plaintiff had willfully misrepresented the value of three built-in components in his home, and Safeco relied on those representations in paying part of plaintiff's claim. After post-trial proceedings, the trial court determined that (1) the oral settlement agreement was void on public policy grounds under *Town of Newton v. Rumery,* 480 US 386 (1987), because the agreement did not confer any benefit to Safeco; (2) plaintiff's misrepresentations voided the insurance contract; and (3) Safeco was entitled to recover the amounts it previously paid plaintiff on the fire-loss claim—more than $9 million—on its misrepresentation counterclaim. The Court of Appeals reversed and reinstated the jury's verdict in plaintiff's favor. The court first explained that the federal common law discussed in *Rumery* does not "stand for the proposition that a settlement is not in the 'public interest' unless a party receives a benefit that exceeds the speculative benefit of litigation." 275 Or App at 341. Even if it did, the court saw "no apparent basis on which to apply the federal common law discussed in *Rumery* to this case—an insurance case governed by Oregon law that does not involve the release of any federal right." *Id.* The court further concluded that the trial court erred in denying plaintiff's motion for a directed verdict on Safeco's misrepresentation counterclaim. The court explained that "the fact that an insurer must, in general, rely on an insured for information about a loss does not establish detrimental and reasonable reliance on a specific misrepresentation." *Id.* at 338.

Loucks v. Beaver Valley's Back Yard Garden Products, 274 Or App 732 (2015)

Wohrman v. Rogers, 274 Or App 846 (2015)

Kiryuta v. Country Preferred Ins. Co., 273 Or App 469 (2015), rev allowed 358 Or 529 (2016)

In *Loucks,* the Court of Appeals held that an employer who fails to pay wages owed to a deceased former employee within the time specified by ORS 652.140(2) is not liable for a penalty under ORS 652.150(1). The court concluded that ORS 652.140 "does not apply to employees who die on the job[.]" 274 Or App at 733. In *Wohrman,* the Court of Appeals held that "members of a dissolved LLC do not become liable for obligations of the LLC solely because they arise from a post-dissolution transaction that was unrelated to winding up and

liquidating the LLC." 274 Or App at 848. In *Kiryuta,* the court held that defendant insurance company could not avoid liability for attorney fees after issuing a "safe-harbor" letter under ORS 742.061(3) because defendant "made allegations in its responsive pleadings that raised issues other than the liability of the driver and the 'damages due the insured[.]'" 273 Or App at 470.

Multi/Tech Eng. Svcs. v. Innovative Des. & Constr., 274 Or App 389 (2015)

Wieck v. Hostetter, 274 Or App 457 (2015)

The plaintiff in *Multi/Tech* sued for breach of contract, *quantum meruit,* and to foreclose a construction lien after it did not receive full payment for the engineering services it provided in connection with the construction of a medical equipment business. The Court of Appeals affirmed judgments in plaintiff's favor on the breach of contract and *quantum meruit* claims, but reversed on the lien foreclosure claim, concluding that plaintiff "failed to provide to [defendant] ACP the notice required by statute to establish a valid lien on ACP's property[.]" 274 Or App at 391. In *Wieck,* the Court of Appeals held that "plaintiffs and defendant entered into a valid and enforceable mutual general release agreement that bars plaintiffs' claim" for legal malpractice. 274 Or App at 476.

AS 2014-11 5W LLC v. Caplan Landlord, LLC, 273 Or App 751 (2015)

The plaintiff, assignee of a promissory note and individual guaranties executed in connection with a $6.9 million loan to defendant Caplan for a real estate project, sued the individual guarantors after Caplan defaulted on the loan. The Court of Appeals, affirming summary judgment in plaintiff's favor, rejected defendants' argument that the guaranty agreements were unenforceable because the loan agreement included long-term financing needed to repay the initial loan that never materialized after the lender bank failed. The court explained that the "mere fact that the guaranty agreements, by their terms, include the permanent financing commitments does not make those promises conditioned on the bank's or its predecessor's provision of permanent financing." 273 Or App at 772. Summary judgment was appropriate because "the guaranties unambiguously provide that defendants unconditionally promised to stand for Caplan's indebtedness to plaintiff." *Id.* at 773.

7455 Incorporated v. Tuala Northwest, LLC, 274 Or App 833 (2015)

MT & M Gaming, Inc. v. City of Portland, 274 Or App 100 (2015), rev allowed 358 Or 529 (2016)

Gattuccio v. Averill, 273 Or App 126 (2015)

In *7455 Incorporated,* the Court of Appeals held that the trial court correctly dismissed plaintiff's claim for a prescriptive easement because plaintiff lacked standing. The court concluded that plaintiff was "seeking to enforce an interest that was not separate from the property or personal to plaintiff, but an interest that was appurtenant to land—land that plaintiff merely leased and did not own." 274 Or App at 844. In *MT & M Gaming,* the Court of Appeals affirmed a trial court's decision that plaintiff lacked standing under the Uniform Declaratory Judgments Act, ORS 28.010 to 28.160, to challenge the validity of permits the city issued to private poker clubs. The court concluded that, even if plaintiff "has shown that it has been economically affected by the city's grant of permits to poker clubs operating in Portland, it has failed to show that that economic effect has any relationship to its present legal interest." 274 Or App at 106. In *Gattuccio,* the Court of Appeals affirmed the trial court's dismissal of elder abuse claims asserted against a licensed investment brokerage, concluding that the statutory scheme "exempts broker-dealers licensed under ORS 59.005 to 59.541 from liability for elder abuse actions" even though the brokerage's employee was convicted of crimes related to financial abuse of an elderly person. 273 Or App at 133.

Procedure

Brownstone Homes Condo. Assn. v. Brownstone Forest Hts., 358 Or 223 (2015)

A homeowners association (Brownstone) settled its construction defect claims against a contractor (A&T Siding). Under the settlement agreement, the parties stipulated to a judgment, and Brownstone gave A&T Siding a covenant not to execute on the judgment in exchange for an assignment of A&T Siding's rights against its insurer. Brownstone then sought to garnish the amount of the judgment from the insurer under ORS 18.352. The insurer resisted the garnishment and moved for summary judgment, contending that the covenant not to execute, obtained in exchange for an assignment of rights, resulted in a complete release of A&T Siding's liability, and by extension, the insurer's liability, under *Stubblefield v. St. Paul Fire & Marine,* 267 Or 397 (1973). The trial court granted the insurer's motion. The Supreme Court reversed, concluding that "although *Stubblefield* is not distinguishable and has not been superseded by statute, it was wrongly decided." 358 Or at 225. Although the court was "mindful of the fact that [*Stubblefield*] has remained the law of this state for more than 40 years" (*Id.* at 245), the court concluded that "the passage of time does not weigh particularly heavily" in the continuing vitality of that decision. *Id.* at 246. For those reasons, the court expressly overruled *Stubblefield.*

Roberts v. TriQuint Semiconductor, Inc., 358 Or 413 (2015)

The defendant corporation (TriQuint) moved to dismiss two consolidated shareholder derivative suits, contending that its corporate bylaws establish Delaware as the exclusive forum for such actions. The trial court denied the motion, concluding that the forum-selection clause, while facially valid under Delaware law, violated Oregon public policy because allowing TriQuint's board to unilaterally adopt a binding forum-selection cause would contravene the shareholders' rights to modify or repeal bylaws adopted by the board. The Supreme Court reversed and issued a peremptory writ of mandamus directing the trial court to dismiss the action. The court agreed with the trial court that the clause was valid under Delaware law, but concluded that the clause did not violate Oregon public policy. The court concluded that "enforcing the forum-selection bylaw in this instance is not 'unfair or unreasonable' under Oregon law." 358 Or at 429-30.

Alfieri v. Solomon, 358 Or 383 (2015)

Plaintiff brought a legal malpractice claim based on his attorney's handling of an employment discrimination action that was settled after mediation. The trial court granted defendant's motion to strike substantial portions of the complaint, concluding that the allegations were confidential and inadmissible under Oregon's mediation statutes, ORS 36.220 and 36.222. The trial court then dismissed the complaint with prejudice. On appeal, the Supreme Court construed the mediation statutes narrowly. The court first concluded that "mediation" includes "only that part of the 'process' in which a mediator is a participant. Separate interactions between the parties and their counsel that occur outside of the mediator's presence and without the mediator's direct involvement are not part of the mediation, even if they are related to it." 358 Or at 395. Second, the court concluded that the term "mediation communications" includes "only communications exchanged between parties, mediators, representatives of a mediation program, and other persons while present at the mediation proceedings, that occur during the time that the mediation is underway and relate to the substance of the dispute being mediated. Private communications between a mediating party and his or her attorney outside of mediation proceedings, however, are not 'mediation communications' as defined in the statute, even if integrally related to a mediation." *Id.* at 404. Finally, the court concluded that "ORCP 25 A was intended to operate as an exception to the general rule in ORCP 23 A that a party may amend once as a matter of right before a responsive pleading has been served." *Id.* at 412. After a court has granted a motion under ORCP 21, "a plaintiff may no longer amend as a matter of course, but must seek leave of the court to do so." *Id.*

Pearson v. Philip Morris, Inc., 358 Or 88 (2015)

Greenwood Products v. Greenwood Forest Products, 357 Or 665 (2015)

In *Pearson,* the Supreme Court held that the trial court correctly declined to certify a class consisting of approximately 100,000 individuals who purchased at least one pack of Marlboro Light cigarettes over a 30-year period. The court explained that, under ORCP 32, "a trial court's role in deciding to certify a class is to make a preliminary forecast of how the adjudication of the issues at trial likely will play out." 358 Or at 136. In this case, the trial court "correctly determined that plaintiffs did not carry their burden to show that, on the element of reliance, common issues prevailed over individual ones." *Id.* In *Greenwood,* the Supreme Court held that the trial court did not err in denying defendants' motion for a new trial under ORCP 64 B(45) based on a claim of newly-discovered evidence. The court explained that, "irrespective of whether the proffered evidence was newly discovered and material for defendants, defendants failed to exercise reasonable diligence to produce the evidence at trial[.]" 357 Or at 667.

Swank v. Terex Utilities, Inc., 274 Or App 47 (2015)

Lucht v. Mulino Hangar Café & Roadhouse, LLC, 273 Or App 571 (2015)

Concienne v. Asante, 273 Or App 331 (2015)

In *Swank,* the Court of Appeals held that the trial court erred in dismissing plaintiff's complaint for lack of personal jurisdiction under Oregon's long-arm rule, ORCP 4. The court concluded that the trial court had jurisdiction based on defendant's "service and solicitation activities carried on within Oregon, from which plaintiff's claim . . . arose and to which it relates[.]" 274 Or App at 65. In *Lucht,* the Court of Appeals held that the trial court abused its discretion in dismissing the complaint *sua sponte* for failing to meet a court-imposed deadline to bring the case at issue. The court concluded that the trial court's "subsequent grant of leave to amend the complaint took the ability to comply with that condition out of plaintiff's hands." 273 Or App at 574. In *Concienne,* the Court of Appeals concluded that an amended complaint "relates back" to the original complaint under ORCP 23 C "in spite of plaintiff's failure in the original complaint to allege specifications of fault[.]" 273 Or App at 341.

Evidence

Washington Federal Savings and Loan v. Cheung, 275 Or App 618 (2015)

Plaintiff lender sued for the deficiency owed after foreclosing on properties securing a construction loan. The jury found that the "fair value" of the foreclosed properties was $2.6 million, and the trial court entered judgment for the balance owed on the loan, less $2.6 million. The Court of Appeals reversed and remanded for a new trial. The court concluded that (1) "the trial court erroneously admitted three exhibits comprising settlement communications within the meaning of OEC 408" (275 Or App at 620); and (2) "that error likely prejudiced defendant by coloring the jury's assessment of the fair value of the properties." *Id.*

Rowen v. Gonenne, 274 Or App 803 (2015)

Plaintiffs brought a medical negligence claim against defendants after bleeding following polypectomy surgery left plaintiff Franklin Rowen paralyzed from the waist down. After a jury returned a verdict for defendants, plaintiffs appealed, contending that the trial court erred in (1) admitting into evidence a "benchmarking study" concerning post-polypectomy bleeding; (2) excluding evidence of a 2010 study identifying risk factors in post-polypectomy bleeding; and (3) allowing defendants to cross-examine a vascular surgeon about the lack of bleeding in an earlier surgery. The Court of Appeals affirmed. The court concluded that the fact that the "benchmarking study" bore a notation indicating that it had been routed to the medical center's Quality Management Committee did not compel a finding that it was a written report "prepared for" a peer review body within the meaning of the "peer review" privilege under ORS 41.675. 274 Or App at 816. The court further concluded that the trial court did not abuse its discretion in excluding the 2010 study under OEC 403 because the study "ran the risk

of misleading the jury into thinking that the reasonableness of Gonenne's conduct should be evaluated in the light of information that was not available at the time that he operated on Rowen." *Id.* at 818. Finally, the court concluded that the trial court did not abuse its discretion in admitting testimony about the prior vascular surgery because the evidence was not offered or received for the purpose of demonstrating the standard of care, and was probative of causation and "whether Rowen's medical history should have put defendants on notice" that he was susceptible to bleeding problems. *Id.* at 819.

Miscellaneous

Qwest Corp. v. City of Portland, 275 Or App 874 (2015)

Moorehead v. TriMet, 273 Or App 54 (2015)

In *Qwest,* the Court of Appeals concluded that a "utility license fee" imposed by the city "does not conflict with ORS 221.515(1), because it is not a privilege tax for the use of the city's rights-of-way as contemplated by that statute." 275 Or App at 896. The plaintiff in *Moorehead* sued for personal injuries after she slipped and fell on a MAX train one rainy evening in Portland. The jury returned a defense verdict, concluding that TriMet had not been negligent. On appeal, plaintiff contended that the trial court erred in giving TriMet's requested instruction and failing to give her requested jury instruction—a modified form of UCJI 46.12—pertaining to foreign substances on the floor of a business. The Court of Appeals affirmed, rejecting plaintiff's contention that foreign substances on floors are unreasonably dangerous as a matter of law, and concluding that, if "the trial court had adopted plaintiff's view of the law and had only given an instruction based on UCJI 46.12, the jury would not have been able to consider TriMet's theory of the case, which was supported by evidence and recognized under the law." 273 Or App at 71.

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