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In This Issue...

Joe Richards Receives Professionalism Award

By the Honorable Joel DeVore

The Litigation Section honored Joe Richards of Eugene as the 2017 recipient of the Owen M. Panner Professionalism Award at its annual dinner at the Litigation Institute and Retreat at Skamania Lodge. The decision was celebrated in the remarks of several speakers and in a letter of Judge Panner.

Joe Richards retired at the end of 2016 after a private practice emphasizing litigation, employment or labor law, and school law. In 1955, he left work as a deputy district attorney and joined what became an enduring firm, Luvaas, Cobb, Richards & Fraser, now dubbed Luvaas Cobb. When he retired, Joe was the venerated lawyer for the Eugene School District 4J and other public bodies.

Along the way, Joe served as a state representative (1965-70), chair of the Environmental Quality Commission, chair of the Water Policy Review Board, and president of the Lane County Bar Association. He served his community in his volunteer work of helping minority law students and, for years, by acting as a volunteer attorney through a local senior citizen center.

At the awards dinner, Senior Justice Skip Durham, formerly of the Oregon Supreme Court, recounted trying cases when both were adversaries. Justice Durham recalled Joe Richards as a disconcertingly well-prepared adversary, but nonetheless as a consummate professional and good friend.

Bob Fraser, former president of the Oregon State Bar and a partner of Luvaas Cobb, described Joe as the truest friend that a law partner, or any other person, could ever have.

Joel DeVore, a judge of the Oregon Court of Appeals and also a former partner, described Joe as a quintessential "Oregon lawyer." That is, he said, Joe is trusted by his adversary, is independent, represents disfavored parties, and "is not about bucks."

DeVore said this about the day that Joe became of counsel: "On a Friday, Joe said goodbye to paying clients, and on Monday he showed up again at his office as usual, except that now he was working for Lane County Legal Aid and driving for Meals on Wheels."

Section Chair Dennis Rawlinson presented the Panner award, pointing out past recipients. He closed the evening with observations about the Litigation Section as a means for litigators from differing practices to join together and, at times like this, celebrating the best in law practice.

Jury Selection / Voir Dire Suggestions

By Dennis P. Rawlinson
Miller Nash Graham & Dunn LLP


Dennis P. Rawlinson

1. Compose a short statement of your case.
    a. Make sure that it is evenhanded.
    b. The jury expects you to exaggerate.
    c. Be understated.

2. Volunteer your own prejudice on an issue (e.g., your mother died of cancer from smoking cigarettes, so you could not be a "fair" juror in a case against a tobacco company).
    a. Explore whether there is anything in a person's background that similarly would make it difficult to be fair.
    b. Have the person admit that he or she is better suited to be "fair" in another type of case.
    c. Have the person admit that if he or she were your client, the person would want the juror to voluntarily withdraw because of the risk of bias.

3. Cover the most difficult of your issues (your weaknesses) during voir dire, or your opponent will.
    a. Put your case in its "worst" light, not its best.
    b. Get the jurors' reaction.
    c. Identify your "enemies" now, when you still have the chance to take action.
    d. Get them to admit that they are better suited for another case, or consider a peremptory challenge.
    e. If a juror is against you, thank the person for his or her candor and see whether another juror has a different point of view.

4. The jurors should be speaking, not you (use open-ended questions).

5. Use a town-hall approach. Ask questions that are fast-paced, and jurors can answer by raising their hands or giving one-word answers.

6. Reward jurors who have opinions against your client with praise for their candor, and emphasize the importance of such candor by all jurors; then eliminate the jurors who are against you.

7. Get the whole panel involved with hand-raising, short answers, and quick back-and-forth communications. Have eye contact and speak with each juror who will be on your jury.

8. Get jurors to commit to decide "this case" based on its "facts and law" as the court instructs them, without the influence of jurors' bias from life experiences. Ask the apparently more timid to commit orally. Warn them not to allow panel-member bias to replace "this case's facts and law." Obtain their commitment to "self-police" the jury panel and expose any juror who violates his or her duty to follow the judge's instructions. Remind them of this commitment in closing argument.

9. Use jurors with prior jury experience to reinforce belief in the jury system.
    a. Discuss runaway unreasonable plaintiff verdicts.
    b. Discuss jurors' ability to control unreasonable results in this courtroom, in this city, in this county.
    c. Emphasize the importance of a juror's role, which is more important than the right to vote.

10. Determine who the leaders are and think through who the leaders of the panel will be if obvious leaders are eliminated by peremptory challenges.

11. If representing a defendant, ask the panel whether, simply because a defendant has been named in a claim, anyone believes that the defendant must have done something wrong.
    a. Confirm that all understand that without evidence, all parties are presumed innocent.
    b. Obtain a commitment to require the plaintiff to prove causation and damages as the judge instructs.

12. If representing a defendant, ask the jurors to keep an open mind until you have given your opening, presented your evidence (since plaintiff goes first), and given your closing.
    a. Use the analogy of the "tattletale" sibling.
    b. A parent does not decide "important" issues between siblings without hearing from both.

13. Tell the court and the jurors after you complete your comments that you are pleased with the present panel.

14. Consider juror questionnaires. You must convince the judge that using a juror questionnaire will ultimately save time. Perhaps you and your adverse counsel can agree to time limits if a questionnaire is used. Certain questions are more likely to get candid and accurate answers if they are answered on a juror questionnaire instead of in front of other jurors.

Framed to Win: Storytelling and the 2016 Election

By Charese Rohny

Charese Rohny

The truth alone will not set you free. It must be framed correctly to have any power.[1] We learned in 2016 that, like politicians, trial lawyers need to use language that fits people's worldviews; to frame our message in terms of values; to not kill our persuasive efforts with technical details and data; to confidently reframe our opponent's themes and not just pivot; and to connect with people in order to earn their vote. Regardless of the candidate we voted for in the last presidential election, we all made observations about messaging.

Throughout human history, storytelling has been the most effective form of communication. "And that is unlikely to change, given that experts in neurophysiology affirm that the neural pathway for stories is central to the way the human brain functions ('[t]he human mind is a story processor, not a logic processor,' as social psychologist Jonathan Haidt has written.)"[2] Just as we enjoy watching top level athletes compete, we prefer to watch top level communicators compete. Some of us missed that in 2016, and were frustrated to witness that what we had here was "a failure to communicate."

This article will not discuss the issues related to the raw data and the popular vote. Like the rules of court, our electoral system has rules within which one must operate in order to win. What is noteworthy here is that turnout was lackluster for Democrats in 2016, especially in key swing states like Wisconsin, Ohio and Iowa. However, Republican turnout surged. Like the relationship of candidates to voters, trial lawyers need to connect with supportive jurors, and to move swing voters. This article focuses on the communication in the 2016 election, not the substance or the system.

An Obvious Historic Trend – Democrats are Losing

Despite losses on top of losses, Democrats have continued to double down on data-driven campaigns at the expense of narrative framing and emotional storytelling.[3] As trial lawyers, we often work hard to *not* be overly technical so we don't lose our audience in the data weeds. When watching it play out in politics, it becomes evident as to why it is so detrimental to persuasion. Secretary Hillary Clinton got trampled here (again setting aside the myriad of other substantive economic issues, prejudices, and the previous shortcomings of neoliberal Democrats, which was likely all at play).

In the last four election cycles, Democrats ignored cognitive linguistics and psychology research that shows the most effective way to communicate with other humans is telling emotional stories.[4] Instead, Democrats and many of their allied organizations have increasingly mandated "data driven" campaigns, rather than ones that are message-driven and data-informed. Consequently, the party has suffered historic losses.[5]

Data isn't a replacement for a message; it can be used as a tool to focus and direct one.[6] Microtargeting has become microthinking for the Democrats.[7] During each cycle, Democrats have spoken less, to fewer people, and have had less to say. The results: a loss of over 900 state legislative seats; control of 27 state legislative chambers; a loss of 63 seats and control of the House; a loss of 11 seats and control of the Senate; and a loss of 13 governorships.[8]

Similarly, as trial lawyers, we sometimes overthink and get lost in details and then speak to only a few jurors, when instead our goal should be to use values to frame for our evidence to give our case meaning. It is "the why" of our communication that is what is most important. Microthinking and data can negate our persuasive efforts for many reasons; the most basic reason is that it focuses only on "the what."

People Think Through Frames

Jurors, like voters, think through mental schema or frames. In his 2004 best-selling book, *Don't Think of an Elephant*,[9] George Lakoff applied the analytic techniques from linguistics to politics, explaining that: "all of what we know is physically embodied in our brains," which process language through frames, the "mental structures that shape the way we see the world."[10] Since then, Lakoff has remained politically relevant. A Berkeley linguistics professor, Lakoff predicted that Trump would win with 47% of the vote (the actual total was 46%).[11] He explained then, and now, that the problem, particularly for progressives, is that political candidates rely on PR people and pollsters, and not linguists and neuroscientists.[12] Lakoff repeatedly tells progressives: "voters don't vote their self-interest, they vote their values."[13] Although progressive politicians continue to ignore that advice, as trial lawyers, we can learn from it.

To craft a message to reach people, you should first understand their subconscious worldview.[14] Convincing a swing voter or juror to change a frame is no small task.[15] "Ideas don't float in the air, they live in our neuro-circuitry," Lakoff explains.[16] Each time ideas in our neural circuits are activated, they get stronger. Over time, complexes of neural circuits create a frame through which we view the world. The difficulty with jurors, like voters, is that frames (worldviews) are unconscious.[17]

Contrary to what President Obama believed, frames are not about messaging and giving good speeches (although he was a fantastic speaker).[18] Lakoff explains that President Obama did a lot of things right in 2008 when he was running, but then he dropped it. He understood the idea, but he didn't apply it consistently.[19] President Obama believed he could balance both sides, but wasn't prepared for the cultural wars he encountered.[20] Lakoff believes it was a mistake for Democratic politicians to move toward the center in an effort to reach more moderate voters, while Republicans move further to the right and continue to win.[21] Democrats need to articulate their message in terms of metaphors that voters can understand, and stick to core values.[22]

Frame the Case in Value Terms

Lakoff explains the way we get to people's opinions is to talk about values, rather than specific arguments about specific issues. He believes conservatives are much better at this than liberals, and have been for a very long time. Conservatives and Republicans have a much better track record of crafting political appeals by way of value statements.[23]

For instance, Democrats and progressives know that regulations are protections, but they don't say that.[24] Similarly, that "taxes" are actually "investments" in public resources. Government investment pays for the infrastructure on which private industry and everything else is built, Lakoff explains: "[r]oads, bridges, public education, national banks, the patent office, the judicial systems, interstate commerce, basic science for drug development – all of that is financed by government investments." Yet, Democrats allow Republicans to frame the debate in terms of tax "relief."[25]

For civil trial lawyers in jury selection, a common issue that arises is tort reform. Conservatives have been bludgeoning progressives on what they have framed as "tort reform" – legislation to cap awards in tort cases. To date, it has been perhaps most aggressively fought in Texas, where messaging has included: *litigation lottery, lawsuit abuse, lawsuit abuse tax, frivolous lawsuits, greedy trial lawyers, out-of-control juries, runaway juries, jackpot awards*. These words evoke frames that evoke conservative values:

- You should not get what you have not earned.
- You alone should be responsible for what happens to you.
- You should be disciplined, prudent, and orderly.[26]

Lakoff helped civil justice advocates develop a response by using progressive values, which led to describing conservative Republicans and the relevant corporations as: *the corporate immunity act; corporate raid on responsibility; accountability crisis; closed courts; the new untouchables; rewards greed and dishonesty; protects the guilty, punishes the innocent*.[27] The fundamental progressive values here are:

- We are empathetic; we care about people.
- Be responsible.
- Help, don't harm.
- Protect the powerless.[28]

To do this with your next case, take out a copy of George Lakoff's *Moral Politics*, list the juror values you need to capture, and then:

1. Pick out the relevant core values for your issue.
2. Write down how your position followed from these values.
3. Articulate the facts and their consequences within this moral framing.
4. Define us and them within this moral frame.[29]

"I'm With Her" versus "Make America Great Again"

Of the two, one more starkly communicates values. Trial lawyers know trial themes matter to messaging. Secretary Clinton's primary message was "Not Trump." People who know her describe her as a compassionate person who has devoted her life to serving America. But that perception was too often lost in the negative anti-Trump stump rhetoric.[30]

In contrast, in her book *It Takes a Village*,[31] Secretary Clinton presented a metaphor – American society as a village where everyone is interconnected. "From the moment [children] are born they depend on a host of other 'grown ups'," Clinton wrote, "untold others who touch their lives directly and indirectly. . . . Each of us plays a part in every child's life." Yet in 2016, instead of using that as a narrative to frame these values to voters, the Clinton campaign primarily focused on why Trump was not fit for office, and had emotion-free position papers on health care, jobs, debt-free college, paid family leave, and a multitude of other issues, without any connective thread to tie them together.[32]

All told, between June 2016 and Election Day, over a million ads were run.[33] Clinton out-advertised her opponent, running nearly three times as many ads as Trump.[34] It's the content of the ads that is telling. Nearly three-quarters of Clinton's ads were about Trump's traits.[35] Only nine percent of Clinton ads were appeals to jobs or the economy; this highlights the imbalance of character attacks to a values framed narrative.[36]

The conventional wisdom in civil trials is that the plaintiff counsel should focus on attacking the defendant. However, it is important to learn from the Clinton campaign that in becoming too focused on our adversary, we risk overlooking opportunities for the jury to connect with our client and our substantive values.

In the final weeks before the election, the candidates seemed to be playing on a field of negative messaging and portrayals, an arena where Trump was much more comfortable than Secretary Clinton.[37] As trial lawyers, we try to anticipate arguments that will be made by the other side. Trump's transparent strategy was to attack and label Secretary Clinton as part of the Washington elite, who are not to be trusted and who needed to be replaced if meaningful change was going to take place.[38] Clinton did not take those attacks head-on, and the corruption allegations were then reinforced by FBI investigations and the WikiLeaks emails. Instead her campaign oftentimes met Trump with a "pivot" to another argument. These deflections only fueled Trump's strategy to paint Secretary Clinton as someone who was not trustworthy.[39]

What is odd, and has been explained through misogynistic biases, is how Trump got away with so much – Trump's repeated indiscretions had become white noise. "A communication expert posited that while one comment might tear a hole in a campaign, repeated indiscretions created a white noise effect for many voters. Like a bed of nails, these comments at some point stopped having a significant detrimental effect. The 'change message' drowned out the white noise in peoples' decision making process."[40]

Certainly, no lawyer seeks to have a style of repeated indiscretions. Yet, what may be the point here is that when you tap into values, the connection with the listener's moral convictions can overcome one's gaffes.

Confidently Reframe Your Opponent's Theme

Reframing is telling the truth as we see it – telling it forcefully, straightforwardly, articulately, with moral conviction and without hesitation.[41] Reframing confidently is key to persuasion. Confidence is a feeling that reflects the coherence of the information and the cognitive ease of processing it. "Declarations of high confidence mainly tell you that an individual has constructed a coherent story in his or her mind, not necessarily that the story is true."[42]

Never Give Up

No matter how bad a particular debate went, or how bad the press was, Trump always acted like he had won.[43] The take-away is not so much to pretend to be confident, but to never give up and to hold your head up. Early in my career, I noticed a distinguished trial attorney, Bill Barton, thanking the judge every time he lost a motion. Whether it was overruled or sustained, whether it was his motion or opposing counsel's, he acted like he had won, thanked the judge in the jury's presence, and respectfully and calmly sat down. A confident trial lawyer doesn't allow losses, however big or small, to beat them down, but instead never gives up.

Keep it Simple

The most obvious communication lesson from the 2016 presidential election: tweets beat policy papers. What trial lawyers should take away from the Trump campaign is what we already know: simple messages work best.[44]

Both trial experts and business experts agree: that in order for the brain to process, communication needs to be simple and without too many details. The Reptile Theory articulated by David Ball and Don Keenan, in *Reptile: The 2009 Manual of the Plaintiff's Revolution*,[45] and the Croc Brain theory articulated by businessman Oren Klaff in *Pitch Anything*,[46] both make clear that if your communication is complicated – abstract language and a lack of visual cues – then it is perceived as a threat.[47] Regardless of whether you agree or disagree with reptile brain "science," the goal is that you want to invoke the listener's moral code and to find the balance between not enough evidence and too much evidence.[48]

People Like People Like Themselves

It has been noted that one of the reasons President Trump won the election is because people in the Midwest, primarily Caucasian, could identify with him, his hats, and his ideals, more so than they could with a woman in a Ralph Lauren pantsuit talking sophisticated analytical smart speak.[49] If you have a client a jury can identify with, or one who is likable and down-to-earth, you have a huge advantage – those cases usually settle.[50]

"The more sophisticated you sound, the less you are accomplishing."[51] Similarly, the more you are like the people, the more the people will like you.[52] During jury selection, it is crucial to be aware who your client is, who your witnesses and experts are, and how they are likely to be perceived.

"A Man Hears What He Wants to Hear"

When a strongly held frame doesn't fit the facts, the facts will be ignored and the frame will be kept.[53] Remember those

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familiar lyrics: "*All lies and jest - still a man hears what he wants to hear and disregards the rest*."[54] It comes as no surprise to judges or lawyers that jurors do not evaluate evidence in a vacuum. What we should evaluate is whether this inability to separate values and personal beliefs from evidence is so pervasive and with such a strong neural signature that people may be unable to set aside beliefs when making decisions or judgments.[55]

A juror's schema or frame will influence the facts that the juror notices and remembers when presented evidence.[56] Even though plain language, "rewritten jury instructions have improved juror comprehension, schema theory, and specifically the perseverance effect, jurors will still apply existing schemas to those rewritten instructions."[57] In one of the few studies examining schemas and jury instructions, a researcher concluded that poor juror comprehension was not the result of poorly drafted instructions, but the result of the jurors' prior knowledge of the law, and preexisting knowledge frameworks (schema) interfering with those instructions.[58]

It's the "I Have a Dream Speech," not the "I Have a Plan Speech"

A business concept explains: "People don't buy *what* we do, they buy *why* we do it."[59] What we do is simply proof of what we believe.[60] With business and leadership, customers and followers do not want to buy something because of "the what" or "the how" of the product or idea; they buy because of "the why." This is what sets apart a company like Apple and a leader like Dr. Martin Luther King.[61]

Remember Dr. King framed his message in terms of values, not in terms of stacking information – he gave the "I Have a Dream Speech," not the "I Have a Plan Speech."[62] We need to frame our cases in a manner that allows jurors to hear our evidence and why we are on the side of justice. We need to believe in the principles and theory of our case. Framing with values is a meaningful art form that we should strive to do well for our clients and to fully engage at our highest level of advocacy. It is what brings power to our truth, and leads us toward justice.

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Persuasive Advocacy is Nothing New

By Stephen F. English


Stephen F. English

Being an advocate does not necessarily make you a good *persuasive* advocate. I am often asked what advice I would give to help advocates become more persuasive. In many ways, there is nothing new under the sun in terms of top quality persuasive oral advocacy. We can go back to the ancient Greeks to get excellent guidelines that, in my opinion, still apply today. Aristotle captured the three elements of powerful advocacy: ethos, pathos, and logos. Contained in this article are what I believe to be the most significant building blocks of good persuasive technique. Applied to a trial setting, these are still very compelling. But we need to step back and start from a more fundamental position. We need to get our audience's attention.

The first rule of persuading a person or a group is to get their attention. A corollary of that, however, is to keep their attention. How important is getting and keeping their attention? Let me give you an example: Clarence Darrow, in one of his more famous cases, was sitting at counsel table smoking his cigar while he watched his opponent give a lengthy, well-reasoned closing argument. A closing argument that ultimately was completely ineffective.

The courtroom was packed but silent. The jury focused. Unfortunately, everyone in the courtroom was watching one thing: Clarence Darrow's cigar. And why? Because before he lit it, he very surreptitiously stuck a long pin in the end so that as the cigar burned more and more ash would accumulate without dropping off. First, only one or two of the jurors noticed. But after a while, all anyone could do was watch as the two inches of ash turned to three, and then four; everybody was waiting for the "ash to drop." It makes no difference how compelling or convincing you are if you do not have your audience's attention.

When functioning as advocates, it is our goal for others to accept what we have told them. Or, at minimum, to persuade others to be critical of what our opponents have told them. Being a persuasive advocate has two components: recognition and availment. Recognition that everything a trier of fact perceives - your appearance, demeanor, words, format of presentation, etc. - is an argument working either for or against you. And availing yourself of these arguments in pursuit of success for your client.

As mentioned above, Aristotle's three famous elements of effective persuasive advocacy are ethos, logos, and pathos. Ethos is the credibility of the speaker and is determined by an audience's perception that you and your message reflect their communal values. A significant part of developing this perception is portraying confidence and sincerity. You must have confidence that you have something to say that is worthwhile.

How do you develop this type of confidence? You internalize your message. I do not mean just memorizing your words or learning your outline. Internalizing a message is about belief in what you are saying. An easy path to this is finding a common value between you and the message you must communicate. When you can identify a value that you believe in that supports your message, you will be able to confidently and sincerely share your message.

As Aristotle reminds us, believing in what you are saying is only a fraction of the equation. To be persuasive advocates we must have logos as well. What is logos? It is the substance of a persuasive argument; it is an argument in the purest Webster's dictionary sense of the word "argue." "Argue" came from the Latin word "arguere," meaning to make clear or to prove. Logos consists of a claim - that which we believe is true, the support for that claim or truth, and the reasoning that goes from the claim to the support. A persuasive advocate conveys logos by first advocating for the facts and law that they believe, then also by conceding unfavorable facts while illuminating why those facts are not as important as the ones they are emphasizing.

I once had a trial in which I represented a group of successful wealthy investors. I "admitted" to the jury that one of the "truths" that my opponent would undoubtedly raise is that winning or losing that case would not impact the financial status or lifestyle of my clients in the least. I then compared for the jury that truth, which I expected them to hear from my opposition, with my greater truth: "Do you believe that justice in the State of Oregon should have a financial cutoff point, above which you are not entitled to the same consideration as those below that financial cutoff point?" By juxtaposing those two truths myself, I was able to deal with them more effectively than if they were posed directly or indirectly by my opponent.

Finally, how do you tie your persuasion together? You tie it together with pathos, "emotion." If your emotion is honest, everyone else will feel it. The difference between a good speaker/teacher and a great speaker/teacher is "vulnerability." What is vulnerability in this context? It is putting yourself out there, putting yourself at risk, and putting yourself in a position where you feel you have told the audience you are committed to what you are saying. It can be very difficult for us as attorneys to put ourselves in front of a group, a jury, and say, "I very firmly believe this." To show and experience emotion in front of an audience is a challenge for lawyers because it risks embarrassment. It might mean that someone is not going to agree or like you. But pathos isn't just an appeal to emotion. Pathos is the thread that takes your credibility, connects to it your reasoning, and at an unspoken level conveys to the audience the breadth and depth of your belief in what you are saying - it shows your commitment as evidenced by the passion you have for the truth of what you are saying.

Pathos is the element of persuasion that gives meaning to logos; it brings the story to life. Facts alone cannot show my vulnerability; they cannot show you my commitment to my truths. Pathos takes a speech, however well prepared, and transforms it into a persuasive argument on behalf of my client.

Spoliation Sanctions under the New Federal Rule of Civil Procedure 37(e): What Has Changed?

By Peter Hawkes

Peter Hawkes

In December 2015, Rule 37(e)—the federal rule governing sanctions for spoliation of "electronically stored information"—was completely overhauled. At first blush, those changes might appear to increase the risk of sanctions by eliminating the so-called "safe harbor" for electronic information lost "as a result of the routine, good-faith operation of an electronic information system." But in fact, the new rule is substantially *more* forgiving than the prior version for two reasons. First, the "safe harbor" was actually not particularly safe—in fact, it's unclear whether it actually accomplished anything at all. Second, the new rule makes clear that severe sanctions—that is, adverse inference instructions or terminating sanctions—are available *only* if the spoliating party acted with the intent to deprive its opponent of the information. Previously, several jurisdictions—including the Ninth Circuit—permitted such severe sanctions even in the absence of intentional misconduct.

The Old Rule: A Not-So-Safe "Safe Harbor"

Former Rule 37(e), adopted in 2006, provided: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Why was that "safe harbor" abandoned after less than a decade? Largely because it was not clear whether it actually accomplished anything, and it therefore failed to lead to uniform standards for spoliation sanctions within the federal system.

First, the rule had a vague exception for "exceptional circumstances." The rule provided no standards for determining when "exceptional circumstances" existed. The Advisory Committee Report accompanying the rule's adoption did not provide much guidance either, suggesting that "exceptional circumstances" might exist when an "entirely innocent" party suffered "severe prejudice" from the loss of "potentially important" information. Of course, the degree of prejudice and the potential importance of the lost information are largely in the eye of the beholder. Thus, whether the rule applied would depend largely on the inclinations of the judge making the decision and the quality of the parties' advocacy.

Second, the rule excused the loss of electronic information only from the "routine, *good-faith* operation of an electronic information system." One might think that the rule was intended to excuse, for example, a party's inadvertent failure to shut off an automatic purging or deletion feature of its email storage system after it becomes aware of potential litigation. But the Advisory Committee Notes suggest otherwise. As the Advisory Committee explained, "Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. * * * When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" Thus, the failure to suspend email deletion when under a duty to preserve it—even if unintentional—would probably not be considered "good faith" conduct. But if there is no duty to preserve, there would be no basis for sanctions in the first place! Thus, the "good faith" requirement essentially swallowed the rule.

Finally, the former Rule 37(e) only applied to sanctions "under these rules"—that is, sanctions imposed by authority of the Federal Rules of Civil Procedure. The Advisory Committee Notes made clear that "[i]t does not affect other sources of authority to impose sanctions[,]" such as a court's inherent authority. Because, as discussed in greater detail below, the federal circuits have "significantly different standards" for imposing sanctions based on inherent authority, the original purpose of the former rule—to alleviate the burdens on parties to preserve the exploding volume of electronic information—was not being achieved. *See* Advisory Committee Notes to 2015 Amendments to Rule 37(e).

The New Rule: No Severe Sanctions Absent Intentional Misconduct

Under the new Rule 37(e), a court may impose sanctions for the loss of electronically stored information only if (1) the information should have been preserved in the anticipation or conduct of litigation; (2) the information was lost due to a party's failure to take "reasonable steps" to preserve it; and (3) the information cannot be restored or replaced through additional discovery. Moreover, a court may impose the most severe sanctions—presuming (or instructing the jury that it may or must presume) that the lost information was adverse to the spoliating party, dismissing the action, or entering a default judgment—only if "the party acted with the intent to deprive another party of the information's use in the litigation[.]" Fed. R. Civ. P. 37(e)(2). Otherwise, the court is limited to "measures no greater than necessary to cure the prejudice" that the other party suffered from the loss of the information. Fed. R. Civ. P. 37(e)(1).

So what constitute "reasonable steps" to preserve electronic information? While the Advisory Committee Notes are again rather vague, they suggest a sliding scale that depends on the sophistication of the party and the relative importance of the information as compared to the cost of its preservation. Importantly, the Advisory Committee expressly tied the "reasonableness" inquiry to the new emphasis on proportionality under Rule 26(b)(1).

The most significant aspect of the new rule, however, is its intended exclusivity with respect to the imposition of severe spoliation sanctions. The Advisory Committee Notes indicate

that it was "designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information." The Committee observed that "[i]t therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used." The Committee explicitly rejected cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), which authorize adverse inference instructions upon a showing of negligence or gross negligence, rather than intent, pursuant to a court's inherent authority.

Imposing an intent requirement for the imposition of severe sanctions for the spoliation of electronic information represents a significant change in the law in several circuits. The First, Fourth, and Ninth Circuits all permit severe sanctions pursuant to a court's inherent authority based on a showing of severe prejudice, even in the absence of intentional misconduct.[1] And, like the Second Circuit, the D.C. Circuit and the Sixth Circuit permit an adverse inference instruction upon a showing that the spoliator was merely negligent.[2]

The imposition of a different rule for electronic information leads to a rather odd outcome in those jurisdictions: a party can be subject to severe sanctions for the loss of electronic information only if that party engaged in *intentional* misconduct, but may be subject to those severe sanctions for the loss of any *other* type of evidence upon a showing of mere negligence or gross negligence. It will be interesting to see if those circuits move toward an intentional "bad faith" requirement across the board, which is already the rule followed in most other federal circuits.

Of course, there is another possibility as well: courts may ignore the Advisory Committee Notes and continue to impose sanctions under their inherent authority, even when sanctions would not otherwise be permissible under Rule 37(e). A couple of decisions so far have suggested that approach.[3] However, most courts that have considered the issue have recognized that new Rule 37(e) is the only game in town when it comes to the spoliation of electronic information.[4]

(Endnotes)

1 *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001); *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993).

2 *See Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2011); *Stocker v. U.S.*, 705 F.3d 225, 235 (6th Cir. 2013).

3 *See Cohn v. Guaranteed Rate, Inc.*, 318 F.R.D. 350, 354 (N.D. Ill. 2016) ("The Court also has broad, inherent power to impose sanctions for failure to produce discovery and for destruction of evidence, over and above the provisions of the Federal Rules."); *Internmatch, Inc. v. Nxtbigthing, LLC*, 2016 WL 491483, at *4 n.6 (N.D. Cal. 2016) ("Whether a district court must now make the findings set forth in Rule 37 before exercising its inherent authority to impose sanctions for the spoliation of electronic evidence has not been decided.").

4 *See, e.g., Citibank, N.A. v. Super Sayin' Publishing, LLC*, 2017 WL 462601, at *2 (S.D.N.Y. Jan. 17, 2017) (collecting cases).

What is "Known or Reasonably Available" to an Organizational Deponent?

By David B. Markowitz and Joseph L. Franco

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An organizational deposition under Federal Rule 30(b)(6) or Oregon Rule 39 C(6) is an excellent tool for the noticing party, and a potential hazard for the deponent, because of the requirement that the designee testify to information "known or reasonably available" to the organization. *See* FRCP 30(b)(6); ORCP 39 C(6). The quoted language imposes a requirement that the designee be prepared to testify as to the organization's knowledge on each of the topics identified in the deposition notice. *See Bd. of Tr. of the Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 FRD 524, 526 (C.D. 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).

It is crucial that the organization take seriously its obligation to prepare, as courts frequently impose sanctions when the designated witness is inadequately prepared to testify. Many courts have held that the failure to produce a witness prepared to testify on the designated topics constitutes a non-appearance at the deposition, triggering sanctions under Rule 37(d). *See e.g. Resolution Trust Corp. v. S. Union Co., Inc.*, 985 F2d 196, 197-198 (5th Cir. 1993); *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F3d 275, 303-304 (3rd Cir. 2000). Indeed, one court recently imposed a sanction of $850,000 on a non-party organization due to its failure to properly prepare a Rule 30(b)(6) witness. *See Sciarretta v. Lincoln Nat. Life Ins.*, 778 F3d 1205, 1213 (11th Cir. 2015). In Sciarretta, the non-party organizational deponent selectively prepared its Rule 30(b)(6) designee in a one-sided fashion – preparing the witness with information helpful to the organization, and omitting information that was harmful to its position. *Id.* The organization crafted "a perfect witness for its interests: one who was knowledgeable about helpful facts and dumb about harmful ones." *Id.* After this "perfect witness" testified in deposition and at trial, the Court, on its own initiative, imposed an $850,000 sanction. *Id.* at 1213-1214. The Eleventh Circuit upheld this sanction.

While the enormity of the sanction imposed in *Sciarretta* was due to its unique facts, the case does underscore the importance of thoroughly preparing the Rule 30(b)(6) witness with all information "known or reasonably available" to the organization. Accordingly, it is important to know what courts may consider to be "known or reasonably available" to an organizational deponent.

I. Information in the Possession of the Organization or Known by Current Employees.

As a starting point, a Rule 30(b)(6) or ORCP 39 C(6) designee must be prepared to testify about information presently known within the organization. While this may seem obvious, organizations frequently fail to do so. Often, the organization will prepare at a superficial level and then claim during the deposition that the amount of detail desired by the noticing party is too burdensome. This is a bad strategy, because "[e]ven if the documents are voluminous and the review of those documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed." *Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc.*, 201 FRD 33, 37 (D. Mass. 2001). An after-the-fact contention that the topics were too burdensome will not excuse a poorly prepared witness.

At a minimum, the designee must prepare by reviewing internal company documents, speaking with key company employees, and reviewing any prior witness testimony and deposition exhibits. *U.S. v. Taylor,* 166 FRD 356, 362 (M.D. N.C. 1996). If called for in the deposition notice, the witness must also be prepared to testify as to the organization's interpretation of documents and events, subjective beliefs and opinions, and its "position" as to matters in dispute in the case. *Id.* at 361; *see also In re Vitamins Antitrust Litigation,* 216 FRD 168, 173 (D. D.C. 2003). This may require extensive preparation with counsel, so that the designee will be able to articulate the organization's legal positions on key components of the case.

II. Information Possessed by Former Employees, and Historical Information Susceptible to Research.

An organization's obligation to prepare a witness for a Rule 30(b)(6) or ORCP 39 C(6) deposition is not discharged because the designated topics concern facts from the distant past about which no current employees have knowledge. *Great Am. Ins. Co. of N.Y. v. Vegas Const. Co., Inc.,* 251 FRD 534, 539 (D. Nev. 2008). "Faced with such a scenario, a corporation with no current knowledgeable employees must prepare its designees by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary, interviews of former employees or others with knowledge." *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 FRD 676, 689 (S.D. Fla. 2012). If the organization possesses, or can obtain, historical information that would allow it to educate a witness on the designated topics, it must do so. Even if such information is equally available to the other party, it will not excuse the organization's obligation to use it to prepare a witness. *Great Am.,* 251 FRD at 541.

III. Information Known by Parent, Subsidiary or Sister Organizations.

Under some circumstances, courts may consider information known by affiliated organizations to be "reasonably available" to an organizational deponent. A number of courts have held that when a party organization has legal control over an affiliate, or as a practical matter has access to an affiliate's documents, then the party organization may be required to testify in a Rule 30(b)(6) deposition as to matters known by the affiliate. In *Murphy v. Kmart Corp.*, 255 FRD 497, 508-509 (D. S.D. 2009), the court ordered Kmart to testify in a Rule 30(b)(6) deposition as to matters known by Kmart's parent, Sears Holdings Corporation, and sister company, Sears, Roebuck and Company. The court reasoned that the evidence showed Kmart had "sufficient control over or access to" its parent and sister companies' information. *Id.* at 509. In *Ethypharm S.A. France v. Abbott Laboratories*, 271 FRD 82, 96 (D. Del. 2010), the court required a parent company to testify in a Rule 30(b)(6) deposition as to information possessed by its wholly owned subsidiary because the parent had "legal control" over the subsidiary.

The court in *Sanofi-Aventis v. Sandoz, Inc.*, 272 FRD 391 (D. N.J. 2011) addressed this same issue on a more nuanced factual record. In that case the plaintiff pharmaceutical manufacturer, Sanofi-Aventis, sought a Rule 30(b)(6) deposition of defendant Sandoz, Inc. regarding information known by Sandoz' foreign sister company, Lek Pharmaceuticals. *Id.* at 393. Earlier in the case, Sandoz demonstrated the ability to produce documents and even witnesses from Lek when it suited Sandoz' purposes. Nevertheless, Sandoz refused to prepare its own corporate witness to testify about information known by Lek. *Id.*

In analyzing the issue, the court considered the "control" standard that governs the scope of Rule 34(a) document production. Under that standard, the court noted that "control" by the deponent organization over its affiliate could be established in one of two ways. First, control may exist if the deponent has the "legal right, authority or ability to obtain documents upon demand." *Id.* at 394. Second, "control" may also be shown "when the litigating corporation either can secure documents from the related entity to meet its business needs *or acted with it in the transaction that gave rise to the suit*." *Id.* (emphasis in original). The court held that the legal right to obtain information upon demand was not required. *Id.* at 395. As to the second way control could be shown, the court concluded that Sandoz had demonstrated an ability to secure documents from Lek, and that Sandoz and Lek acted together in the transaction at issue in the lawsuit. *Id.* at 395-396. Accordingly, the court compelled Sandoz to produce a Rule 30(b)(6) witness prepared to testify about information possessed by its foreign sister company Lek. *Id.* at 396.

Because it is not the norm for an organizational deponent to be required to testify about the knowledge of an affiliate, if the noticing party wants such information, it should make the request explicit in the topics contained in the deposition notice. Conversely, if an organization receives a notice that may call for information from an affiliate, the organization should seek clarification from the noticing party well before the deposition. If the parties cannot agree upon the proper scope of the deposition, a protective order may be necessary since mere written objections offer no protection.

IV. How to Handle a Notice That is Too Broad.

Given the scope of information that may be encompassed by the "known or reasonably available" standard, it is not uncommon for a party who receives an organizational deposition notice to believe some aspect of the notice is too broad. In that event, do not make the mistake of merely serving written objections under the misapprehension that they will excuse the obligation to fully prepare for each of the noticed topics. Instead, counsel should narrow the notice through the conferral process, and if that does not work, move for a protective order. "The proper procedure to object to a Rule 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order." *Beach Mart, Inc. v. L & L Wings, Inc.*, 302 FRD 396, 406 (E.D. N.C. 2014). The authors discuss this topic in detail in a previous article. *See* David B. Markowitz and Joseph L. Franco, *Preparing, and Responding to, the Rule 30(b)(6) Notice*, OREGON STATE BAR LITIGATION JOURNAL, Spring 2015, at 14-16.

V. Conclusion

The obligation to prepare a Rule 30(b)(6) or ORCP 39 C(6) designee with information "known or reasonably available" to the organizational deponent should be taken seriously. Compliance with that standard may require preparation from sources within and without the organization. Counsel for the recipient of an organizational deposition notice should promptly confer with opposing counsel to clarify any ambiguities in the notice, and attempt to limit topics that are overly broad or unduly burdensome. Normally counsel can come to an agreement. If not, then counsel for the organizational deponent should promptly move for a protective order.

Recent Significant Oregon Cases

By Stephen K. Bushong

Honorable
Stephen K. Bushong

Multnomah County Circuit Court

Claims and Defenses

Smith v. Providence Health & Services, 361 Or 456 (2017)

Plaintiff suffered permanent brain damage from a stroke. He sued his doctors, alleging that they negligently failed to take proper steps to address his complaints of stroke symptoms, causing him to lose a chance for treatment that, in one-third of the cases, reduced or eliminated complications following a stroke. The trial court granted defendants' motion to dismiss. The Supreme Court reversed. The court concluded, on an issue of first impression, that "a loss of a substantial chance of a better medical outcome can be a cognizable injury in a common-law claim of medical malpractice in Oregon." 361 Or at 485. The court explained that plaintiff's loss-of-chance theory was not foreclosed by *Joshi v. Providence Health System*, 342 Or 152 (2006), because this case involved a claim for common-law medical malpractice, while *Joshi* presented a wrongful death claim governed by ORS 30.020. *Id.* at 464. After reviewing the conflicting results in other states, the court concluded that "a limited loss-of-chance theory of recovery should be recognized in common-law negligence cases involving medical malpractice in Oregon." *Id.* at 482.

Robbins v. City of Medford, 284 Or App 592 (2017)

Plaintiff was seriously injured when he was hit by a car while crossing a street in the crosswalk. He alleged that the City of Medford negligently placed the crosswalk in that location and omitted safety features from the intersection's design. The trial court granted the city's motion for summary judgment, concluding that the discretionary immunity provision of the Oregon Tort Claims Act, ORS 30.265(6)(c), bars plaintiff's claims. The Court of Appeals affirmed in part and reversed in part. The court first explained that, to resolve the immunity issue, it must "consider the city's entitlement to discretionary immunity with respect to each act or omission alleged to be negligent." 284 Or App at 596. The court concluded that there were genuine issues of material fact regarding two specifications of negligence related to the crosswalk location, so the city is not entitled to summary judgment on discretionary-immunity grounds on those specifications. *Id.* at 600. The court further concluded that the city was entitled to summary judgment on immunity grounds on three specifications of negligence related to the intersection's design because the uncontroverted evidence in the record "establishes that the crosswalk's design—including the safety features that it does and does not have—is the product of a policy decision" made by the city's public works director. *Id.* at 601.

Western Prop. Holdings v. Aequitas Capital Management, 284 Or App 316 (2017)

Plaintiff, the borrower on a secured loan, sued the lender for breach of the duty of good faith and fair dealing and negligence. Plaintiff alleged that defendant blocked a potential sale of patents pledged as collateral for the loan that would have covered the debt, choosing instead to foreclose on the collateral, resulting in in a smaller recovery. The trial court granted defendant's motion for summary judgment; the Court of Appeals affirmed. The court concluded that defendant did not violate the duty of good faith and fair dealing because plaintiff could not have had a reasonable expectation that defendant would "facilitate a sale of the patents instead of foreclosing on the loan." 284 Or App at 330. The court further concluded as a matter of law that plaintiff and defendant "were not in a 'special relationship' regarding the sale of the collateral or the servicing of the loan that imposed heightened duties on defendant." *Id.* at 333.

Kaste v. Land O'Lakes Purina Feed, LLC, 284 Or App 233 (2017)

Plaintiffs contracted with defendant to provide feed for plaintiffs' dairy cows. After eating the feed, some cows died, and many others suffered from a variety of health problems. Plaintiffs sued to recover damages totaling $750,000, asserting claims for breach of contract, breach of warranty, negligence and strict products liability. A jury found for plaintiffs on all claims, awarding $89,197.73—the cost of the feed—on the contract and warranty claims, and $750,000 on the tort claims. The trial court entered judgment totaling $750,000 and awarded plaintiffs their attorney fees. The Court of Appeals affirmed. First, the court concluded that plaintiffs adequately pled and proved contract damages sufficient to allow the contract claims to go to the jury because "the jury permissibly could find that plaintiffs had been damaged in an amount equal to the purchase price of the feed" since the feed could have had no value given its toxicity. 284 Or App at 240. Second, the court concluded that the contractual provision barring recovery of consequential damages "reasonably can be interpreted to apply only to plaintiffs' contract claims," making it ambiguous as to whether it applies to plaintiffs' tort claims. *Id.* at 247. Third, the court concluded that the trial court "did not err when it did not require plaintiffs to make an election of remedies" because the court correctly instructed the jury that non-overlapping measures of damages applied to the contract and tort claims. *Id.* at 249. Fourth, the court concluded that the trial court did not abuse its discretion in granting leave to amend to assert a claim for attorney fees under the contract, because defendant "drafted the contract that gave rise to plaintiffs' entitlement to fees on the contract claims and, for that reason, could not have been unfairly surprised by the fact that plaintiffs ultimately invoked that provision in connection with their contract claims." *Id.* at 250.

Hernandez-Nolt v. Washington County, 283 Or App 633 (2017)

Plaintiff sued her employer, Washington County, for wrongful discharge, contending that she was constructively discharged when her supervisors created a hostile work environment after plaintiff truthfully complied with a federal auditor's request for information about the county's management of a federal program. The trial court granted the county's motion for directed verdict, concluding that plaintiff failed to establish that she was fulfilling an important public duty—a required element of a wrongful discharge claim—when she responded to the federal audit. The Court of Appeals affirmed, but on alternative grounds raised but not decided in the trial court. The court concluded that plaintiff had presented no evidence from which a reasonable inference could be drawn that the supervisors "were intentionally creating or maintaining an *objectively* intolerable work environment . . . or that plaintiff resigned from the county as a result of that environment[.]" 283 Or App at 643 (emphasis in original).

Featherstone v. Capoferri, 283 Or App 552 (2017)

Plaintiff James Parker (Parker) and two others brought an employment discrimination claim against defendant Service Employees International Union Local 503 (SEIU). The trial court granted SEIU's motion for summary judgment, concluding that Parker was not employed by SEIU and therefore was not entitled to bring an employment discrimination claim against the union. The Court of Appeals reversed, concluding that there was a genuine issue of material fact regarding whether plaintiff was SEIU's employee in light of evidence in the record "pertaining to Parker's compensated service as a member of SEIU's bargaining team[.]" 283 Or App at 555-56. The court declined to address an alternative basis for affirmance offered by SEIU, concluding that addressing SEIU's contention on appeal would require the court "in the first instance, without development of the record or legal arguments below, to decide a significant issue of first impression." *Id.* at 557.

Procedure

Barrier v. Beaman, 361 Or 223 (2017)

Plaintiff brought a medical malpractice claim, seeking damages for physical injuries suffered as a result of foot surgery. After plaintiff produced his medical records and testified at a discovery deposition regarding his medical care and treatment, defendants sought to depose the health care providers who had treated plaintiff. Plaintiff objected under OEC 511 on the grounds of the physician-patient privilege. The trial court granted defendants' motion to compel; the Supreme Court issued a peremptory writ of mandamus directing the trial court to vacate its order. The court concluded that "by answering questions about his treatment at his discovery deposition, plaintiff did not 'offer'—and thereby voluntarily disclose—that testimony so as to waive his privilege." 361 Or at 225.

Barrett v. Union Pacific Railroad Co., 361 Or 115 (2017)

Figueroa v. BNSF Railway Co., 361 Or 142 (2017)

In both cases, plaintiffs sued railroad companies for injuries sustained outside Oregon, and the trial courts denied defense motions to dismiss for lack of general jurisdiction. The Supreme Court issued peremptory writs of mandamus in both cases, directing the trial courts to vacate its orders. In *Barrett*, the Supreme Court held that (1) under *Daimler AG v. Bauman*, 134 S Ct 746 (2014), a corporation is "at home" and thus subject to general jurisdiction in the state where it is incorporated and the state where it has its principal place of business; (2) a substantial and continuous business presence within a state is insufficient to give rise to general jurisdiction over an out-of-state corporate defendant; and (3) Section 56 of the Federal Employee Liability Act (FELA) does not confer personal jurisdiction over an out-of-state corporate defendant. In *Figueroa*, the Supreme Court added that the railroad did not impliedly consent to jurisdiction in Oregon by appointing a registered agent to receive process in Oregon pursuant to ORS 60.731(1).

Long v. Farmers Ins. Co., 360 Or 791 (2017)

ORS 742.061 requires an insurer to pay its insured's attorney fees if the insured obtains a "recovery" that exceeds the amount of any tender made by the insurer within six months from the filing of the proof of loss. In this case, the trial court denied the plaintiff insured's petition for attorney fees, concluding that, to constitute a "recovery" within the meaning of the statute, an insured must obtain a judgment that exceeds a timely tender. The Supreme Court reversed. The court concluded that the fact that the insured did not obtain a judgment memorializing the insurer's pre-judgment voluntary payments to cover the loss "does not make ORS 742.061 inapplicable." 360 Or at 805. The court clarified the meaning of its prior decision in *McGraw v. Gwinner*, 282 Or 393, 400 (1978): "A declaration of *coverage* is not sufficient to make ORS 742.061 applicable; an insured must obtain a *monetary* recovery after filing an action, although that recovery need not be memorialized in a judgment." *Id.* (emphasis in original).

Benavente v. Thayer, 285 Or App 148 (2017)

Plaintiff sued defendant, alleging that defendant negligently caused her to sustain injuries in a motor vehicle accident. Plaintiff then accepted defendant's ORCP 54 offer of judgment for $32,000. The offer required plaintiff to satisfy any Personal Injury Protection (PIP) liens and any other third-party interests against the recovery. Defendant then deposited the settlement amount with the court and asked the court to resolve any PIP or other lien disputes through the ORCP 31 interpleader process. The trial court granted defendant's request to use the interpleader process, and eventually entered a supplemental judgment awarding defendant $2,000 in attorney fees and releasing the balance of the deposited funds to plaintiff. The Court of Appeals reversed, concluding that the trial court erred in allowing defendant to utilize the ORCP 31 interpleader process and awarding defendant attorney fees. The

court explained that, "once a claiming party files an accepted offer of judgment under ORCP 54 E, there is nothing for the court to do but to enter what the parties have agreed upon[.]" 285 Or App at 156 (internal quotes omitted).

Reeves v. Plett, 284 Or App 852 (2017)

Plaintiff landlord failed to show up for trial in an FED case. After waiting 33 minutes, the trial court dismissed the case. One week later, plaintiff moved for relief from judgment under ORCP 71 B(1), contending that its failure to appear resulted from a calendaring error. The trial court granted relief; the Court of Appeals reversed. The court explained that, after a party fails to appear for a scheduled trial due to a calendaring error, the party "must show that it acted in some reasonable way to avert that type of consequential error." 284 Or App at 857. Here, plaintiff's evidence "did not suffice to meet his burden of establishing that landlord had a reasonable excuse for failing to appear at trial." *Id.* at 858.

DeWolf v. Mt Hood Ski Bowl, LLC, 284 Or App 435 (2017)

Plaintiff brought a wrongful death action after his daughter, Taylur, died following a crash while snowboarding on the Dog Leg run at Mt. Hood Ski Bowl. During discovery, plaintiff sought records regarding injuries at Ski Bowl over 10 ski seasons. Defendant objected to the scope of the request, and the trial court ultimately ordered defendant to produce documents limited to injuries on the Dog Leg run during the two years before Taylur's death. Before trial, plaintiff moved to exclude evidence and argument about defendant's claims of 40 years of safety. The trial court denied the motion on the condition that defendant produce documents related to defendant's contention that there have been no injuries on the Dog Leg run for whatever period defendant claimed regarding its history of safety. Defendant did not produce any records; at trial, defendant called witnesses who testified that there had been no accidents similar to Taylur's on the Dog Leg run, or anywhere else at Ski Bowl, during the 40-year history of the run. After a jury returned a defense verdict—and the media reported on the case—a witness contacted plaintiff's counsel regarding a serious injury that he had suffered on the Dog Leg run a year after Taylur's crash. The witness had sent a letter notifying defendant of his accident; that letter had not been produced in discovery. The trial court then granted plaintiff's motion for a new trial. The Court of Appeals affirmed. The court concluded that defendant's failure to produce the letter regarding the other injury "violated the court's *in limine* order. That violation, in turn, constitutes misconduct by a prevailing party under ORCP 64 B(2)." 284 Or App at 452.

Kastle v. Salem Hospital, 284 Or App 342 (2017)

The trial court granted defendant's motion to dismiss plaintiff's medical negligence claim, concluding that the claim was barred by the statute of limitations in ORS 12.110(4). The Court of Appeals reversed. The court concluded that the complaint "does not establish, on its face, that plaintiff discovered or reasonably should have discovered his injury, its tortious cause, and those persons who may be responsible" more than two years before filing suit. 284 Or App at 356. The court explained that, because the complaint "does not show that the statute of limitations had run, plaintiff was not required to have pleaded delayed discovery to avoid an assumption that it had run." *Id.*

Evidence

Bergstrom v. Assoc. for Women's Health of So. Ore., 283 Or App 601 (2017)

Plaintiff brought a medical malpractice action for injuries suffered by her infant sustained during the birthing process. The trial court excluded as irrelevant and beyond the scope of the pleadings an expert witness's testimony that defendant's ultrasounds of the fetus before birth were of poor quality and improperly analyzed, leading defendant to incorrectly measure the size of the fetus. A jury returned a defense verdict; the Court of Appeals reversed and remanded for new trial. The court concluded that the expert testimony "supports the proposition that defendant 'knew or should have known that plaintiff was at significant risk of having a macrosomic [very large] baby.'" 283 Or App at 607 (quoting plaintiff's complaint).

Miscellaneous

Hunters Ridge Condo. Assn. v. Sherwood Crossing, 285 Or App 416 (2017)

After default judgments were entered against a subcontractor in a construction defect case, plaintiff brought a garnishment proceeding against the subcontractor's insurer pursuant to ORS 18.782 to recover the amounts awarded by the default judgments. The Court of Appeals held that (1) the trial court erred in granting summary judgment for the insurer based on a policy exclusion because the exclusion was ambiguous; (2) the trial court did not err in denying summary judgment for plaintiff because there were disputed questions of material fact regarding the applicability of other policy exclusions; and (3) the trial court did not err in denying the insurer's motion for partial summary judgment regarding coverage for attorney fees and costs because the policy was ambiguous. The court then addressed the insurer's constitutional challenge to the statute, concluding that (1) "the legislature intended to preclude a jury trial on disputed issues of fact in a hearing conducted under ORS 18.782" (285 Or App at 444); and (2) "to the extent that ORS 18.782 forces parties in a garnishment proceeding to litigate factual questions underlying an insurance-coverage dispute to the court, the statute is unconstitutional as applied" because it violates the parties' right to a jury trial under Article I, section 17, of the Oregon Constitution. *Id.* at 447.

Kramer v. City of Lake Oswego, 285 Or App 181 (2017)

Plaintiffs challenged a city ordinance and policy that limits the public's access to Oswego Lake, contending that the ordinance and policy—which limited use of a city-owned swim park to city residents—were preempted by the public-use and public-trust doctrines and violated Article I, section 20, of the

Oregon Constitution. The Court of Appeals held that (1) the trial court "did not err in failing to declare whether the entire lake is 'public'" (285 Or App at 196); (2) the public-trust doctrine "does not impose on the state (or upland landowners) an obligation to provide public access over uplands to reach navigable waters" (*Id.* at 212); and (3) because there is a rational basis for the swim-park rule, it "does not violate Article I, section 20[.]" *Id.* at 215.

Lunsford v. NCH Corp., 285 Or App 122 (2017)

In an earlier opinion in this case, 271 Or App 564, 566 (2015), the Court of Appeals held that the statute of ultimate repose for products liability claims, ORS 30.905(3)(b), does not violate either the remedy clause of Article I, section 10, of the Oregon Constitution, or the jury trial clause of Article I, section 17. On remand from the Supreme Court, the court adhered to that ruling, concluding that the Supreme Court's opinion in *Horton v. OHSU,* 359 Or 168 (2016), did not change the result. The court explained that *Horton,* by overruling *Smothers v. Gresham Transfer, Inc.,* 332 Or 83 (2001), effectively restored *Sealey v. Hicks,* 309 Or 387 (1990), "as controlling precedent regarding Article I, section 10." 285 Or App at 126. This effectively left the court "no room . . . to reach a different conclusion." *Id.* at 129. The court further explained that *Horton*'s "slight rephrasing of the jury trial guarantee does not alter our conclusion that *Sealey*—and now *Horton*—forecloses plaintiff's Article I, section 17 challenge[.]" *Id.* at 129-30.

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