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In This Issue…

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Tom E. Cooney Receives 2009 Owen M. Panner Professionalism Award

Tom E. Cooney was awarded the Owen M. Panner Professionalism Award for 2009. Judge Panner presented Tom with the Award at the Annual Banquet of the Litigation Institute and Retreat at the Skamania Lodge on March 6, 2009. In his remarks, Judge Panner observed that Tom was not only a respected litigator, but one of the friendliest attorneys the Judge has had the pleasure of working with for many years. He congratulated Tom on the Award and told Tom it was well deserved.

It was especially nice that Tom's wife, Janice, his three children and numerous grandchildren could be present to observe the Award and the remarks of his colleagues that preceded the presentation.

Tom's longtime partner, Mike Crew, told the attendees that over their thirty-six years of association, Tom has always held himself and the members of his firm to the highest ethical standards. Mike indicated that Tom always befriends every lawyer he ever met, including those who were on the opposite side of his many cases. He treats all of his peers with great respect, and Mike observed that it has been his privilege to have Tom as his mentor and partner for virtually all of his career.

U.S. District Court Judge Garr M. King and Tom Tongue also were invited to make some observations regarding their former partner and mentor. Judge King made light of Tom's many Irish stories, but also agreed that Tom is universally liked and respected by his peers. Tom Tongue indicated to the attendees that he had been "warned" that this was not to be a roast, so he wouldn't come right out and say all of Tom's tales were suspect, but he suggested to those gathered that they may have been fondly embellished. Both Judge King and Tom Tongue expressed their gratitude for Tom's mentorship of them as young lawyers, as well as the model of professionalism that all could follow.

Following the Award, Tom was congratulated by many of the attendees, many of whom were members of the plaintiff's bar as well as his colleagues in the defense bar. ❐

FROM THE MANAGING EDITOR

SPONSORSHIP STRATEGY IS THOUGHT-PROVOKING

By
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Considerable controversy has been generated by a 1990 publication entitled *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials*.[1] The authors espouse a novel way of trying cases, which is at least thought-provoking.

Sponsorship strategy is based on the premise that juries treat evidence differently depending on who "sponsors" it. As a result of the sophistication of our society (exposure to televised trials and lawyer programs such as *Boston Legal*, *L.A. Law*, the O.J. Simpson trial, etc.), the public has begun to view lawyers as "hired guns." As a result, juries infer that each side's case can be no better than the evidence offered by its attorney and that a concession by any attorney is to be held strictly against that attorney's client. After all, an advocate presents a biased set of facts and arguments concerning a dispute in an effort to present the most favorable picture possible for his client.

Dennis Rawlinson

This premise leads to a number of meritorious trial practice suggestions and at least one that seems dubious.

Sponsorship strategy encourages counsel to avoid weak, duplicative, unimportant, or inferior evidence. If an attorney offers inferior evidence, the jury will assume that he thought the case was weaker without the inferior evidence than with it. Therefore, if an attorney adds weak evidence to an otherwise strong case, the jurors will devalue the strong case because of their inference that he would have presented the weak evidence only if the other evidence was not by itself sufficient to win. So far, so good.

Likewise, sponsorship theory encourages trying one's case quickly and in a concentrated fashion. In short, develop a simple basic theme and present only what you need to support that theme. The more trouble an attorney appears to have gone to in order to introduce an item into evidence, the more the jury will reduce the weight of the evidence to the disadvantage of that attorney's case. If an attorney calls three witnesses to establish one element of his case when one witness would have been sufficient, the attorney will be penalized. Jurors will view him as "suspect" and not "thorough," and will give no more weight to the three witnesses than they give to the weakest of the three. Again, so far, so good.

Sponsorship strategy may go too far, however, in discouraging counsel from ever mentioning or introducing unfavorable evidence. Such a tactic, according to the authors, concedes that the unfavorable evidence is important and thereby enhances its weight. Such an approach flies in the face of traditional trial strategy, which recommends that attorneys volunteer weaknesses early in the trial or during direct examination of a vulnerable witness. Such a concession is thought to take the sting out of the weakness by presenting it in the most favorable light possible.

Certainly, failing to introduce weaknesses makes sense if the jury never learns of the weaknesses, but if jurors are going to learn of a client's weaknesses anyway, it seems reasonable to disclose those weaknesses first in the most favorable way possible to blunt the impact of hearing them from the opposition.

Sponsorship strategy disagrees! If you introduce unfavorable evidence yourself, you are admitting in no uncertain terms that the evidence is important and relevant and should be given full weight. Thus, you are surrendering arguments against the evidence. If, on the other hand, you do not introduce the evidence, you can later argue that it is not important and not relevant and should be given very little weight—the very reasons that you failed to make the disclosure yourself.

Perhaps in most cases there is a compromise between traditional and sponsorship strategy. First, ask yourself in advance

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if it is reasonable to take the position that the weakness is unimportant and irrelevant and deserves very little weight. For instance, if you fail to disclose in a burglary case against your client that your client was carrying burglar's tools when he was arrested, you may have difficulty arguing that the tools are not important or relevant and deserve little weight. On the other hand, if your client has previously been convicted of tax evasion, you might well be able to argue persuasively that the conviction is not important or relevant or worthy of weight in a burglary case and should not have been mentioned by either side.

Sponsorship strategy forces the reader to challenge both the strategies proposed by the authors and the ones developed by the reader. ❐

Endnote

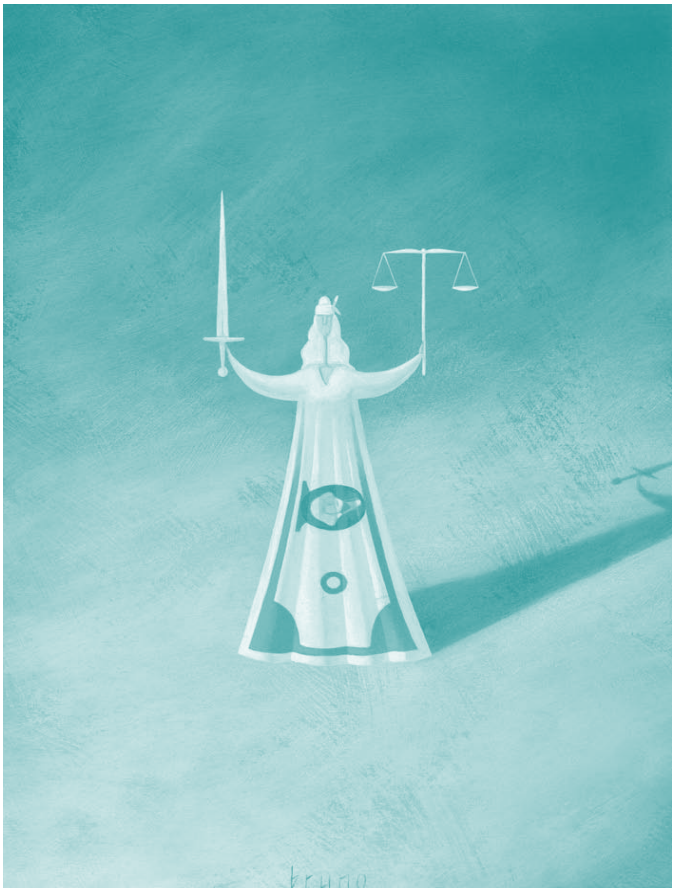
[1] Robert H. Klonoff and Paul L. Colby; Charlottesville: The Michie Company, 1990.

Analyzing the Definition of "Covered Class Action" in the Securities Litigation Uniform Standards Act of 1998

By Brad S. Daniels
Stoel Rives LLP

The year 2008 marked the 10th anniversary of the Securities Law Uniform Standards Act of 1998 ("SLUSA"), a statute passed in the wake of the securities law statutory reforms of the 1990s. SLUSA is a rare statute that precludes certain types of actions entirely.[1] Under its "remove and dismiss" provisions, SLUSA allows certain types of actions to be removed to federal court and dismissed if they are based on state law and allege a misrepresentation, omission, or manipulative device or contrivance in connection with the purchase or sale of a covered security.[2]

Brad Daniels



Although it gives defendants a powerful weapon to wield against securities fraud class or mass actions that are originally filed in state court, SLUSA applies only to cases that are "covered class actions," a defined term that excludes individual actions in which damages are sought on behalf of 50 or fewer persons. As a result, and in an effort to avoid SLUSA preclusion, plaintiffs frequently file one or more actions with 50 or fewer individual plaintiffs. Based solely on the number of named plaintiffs, both plaintiffs' and defendants' counsel may assume that these cases do not fall within SLUSA's scope.

Both the statutory text and recent case law suggest that this approach is incomplete. Recent federal cases, including a case from the U.S. District Court of Oregon, make clear that courts and parties need to look beyond the caption to determine whether the action satisfies SLUSA's definition of a "covered class action." Furthermore, defense counsel must remain aware of SLUSA as the case proceeds, because later consolidation or other procedural events may bring the case within SLUSA's scope.

Background of SLUSA

In 1995, Congress passed the Private Securities Litigation Reform Act (the "PSLRA"), imposing on securities class-action plaintiffs rigorous procedural requirements intended to prevent nonmeritorious claims and to stop plaintiffs from targeting deep-pocketed defendants.[3] For example, the PSLRA established heightened pleading requirements and an automatic stay of discovery pending motions to dismiss.[4] After the PSLRA took effect, however, "a number of securities class action lawsuits…shifted from Federal to State courts…[and] this shift…has prevented [the PSLRA] from fully achieving its objectives."[5] In short, plaintiffs sought to evade the strictures of the PSLRA by filing multiple-plaintiff or class securities fraud

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actions in state court.

Seeking to curtail the use of state courts as an avenue for avoiding the PSLRA's requirements, Congress enacted SLUSA in 1998. The stated purpose of SLUSA is "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the PLSRA.[6] Thus, SLUSA advances "the congressional preference for national standards for securities class action lawsuits involving nationally traded securities."[7]

Consistent with that view, Congress completely precluded all mass-plaintiff securities fraud litigation falling within SLUSA's ambit.[8] SLUSA also provides for removal jurisdiction over securities fraud class actions so that actions originally filed in state court may be removed to federal court, and thereafter dismissed.[9]

Congress anticipated that plaintiffs may attempt to avoid the "covered class action" definition. Accordingly, Congress directed courts to interpret the definition broadly:

> [W]hile the committee believes that it has effectively reached those actions that could be used to circumvent the reforms enacted by Congress in 1995 as part of the Private Securities Litigation Reform Act, *it remains the Committee's intent that [SLUSA] be interpreted broadly to reach mass actions and all other procedural devices that might be used to circumvent the class action definition*.[10]

SLUSA's Definition of "Covered Class Action"

SLUSA's definition of a "covered class action" covers three principal situations:[11] (1) the "more than 50 injured persons" scenario involving a single lawsuit in which "damages are sought on behalf of more than 50 persons or prospective class members" and common questions of law or fact predominate; (2) the "class action or its equivalent" scenario involving a single lawsuit in which one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and common questions of law or fact predominate; and (3) the "group of lawsuits" scenario involving any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which (I) damages are sought on behalf of more than 50 persons, and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

Congress defined the numerical SLUSA threshold by the number of persons who were injured by the alleged fraud and on whose behalf damages were sought, not simply by the number of named plaintiffs in the complaint.

The "More Than 50 Injured Persons" Situation

On first glance, determining whether the case falls within the first category appears easy. One need only count the number of plaintiffs in the caption of the complaint. The text of SLUSA's definition of "covered class action," however, indicates that a more subtle analysis is required. The statute is phrased in the passive voice—"damages are sought"—and focuses on the number of "persons"—not "parties" or "plaintiffs." In that way, Congress defined the numerical SLUSA threshold by the number of persons who were injured by the alleged fraud and on whose behalf damages were sought, not simply by the number of named plaintiffs in the complaint.

The text of subparagraph (I) stands in stark contrast to subparagraph (II), which was also passed as part of SLUSA. Subparagraph (II) includes in the definition of "covered class action": "any single lawsuit in which . . . one or more *named parties* seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated."[12] Unlike subparagraph (I), subparagraph (II) is phrased in the active voice and refers to "named parties." Subparagraph (I) is different, and Congress's deliberate choice requires a court to look beyond the number of named plaintiffs to determine whether SLUSA applies.

Although this analysis is more complicated than simply counting named plaintiffs, the alternative opens a loophole that would encourage even more gamesmanship than presently occurs in SLUSA situations. Assume, for example, that 100 named securities fraud plaintiffs realize that they have a SLUSA problem. Ninety plaintiffs voluntarily dismiss their claims and assign them to the existing 10 plaintiffs, who accept the assignments with the understanding that both parties will share in any ultimate recovery. Although this arrangement may reduce

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the number of named plaintiffs from 100 to 10, defendants are in the same practical situation. They face the same claims, for the same damages on behalf of the same injured persons in a trial that will look substantially similar. For SLUSA purposes, the 90 assignors should still be considered persons on whose behalf damages are sought.

Recent federal cases underscore this point. In *Merrihew v. MML Investor Services, Inc.*,[13] plaintiffs originally filed a state securities fraud case on behalf of more than 50 named plaintiffs and 20 John and Jane Does.[14] Perhaps realizing that the case was precluded by SLUSA, plaintiffs subsequently dismissed the Does and five named plaintiffs from the state action, bringing the total number of named plaintiffs down to 49. The five dismissed plaintiffs, however, were spouses of existing plaintiffs, and the existing plaintiff-spouses asserted the same claims, for the same damages, based on the same alleged joint investment accounts and tax liabilities. Furthermore, in response to defendants' motion to join the five dismissed plaintiffs as necessary parties, the five dismissed plaintiffs decided to assign their legal claims to their spouses. The assignments provided, in part, that the assignors would share in any recovery gained as part of the lawsuit. As a result, the removal of the five dismissed plaintiffs from the caption brought the number of named plaintiffs below 50, but did not otherwise materially change the case at all.

Judge Michael W. Mosman allowed removal and granted the defendants' motion to dismiss the case on SLUSA grounds.[15] Judge Mosman recognized that not all persons who have some relationship to the case or to the damages being sought should be counted for SLUSA purposes. In many cases, for example, a person may have been injured by the fraudulent conduct at issue but decide not to seek damages. Similarly, a person may receive the benefit of a damages award, but may not claim to have been injured by the fraud. Persons who both claim to be injured by the fraud and seek a benefit from the damage award in the suit, however, should be counted under the statutory definition. Judge Mosman concluded that the five dismissed plaintiffs satisfied those criteria, not least because, in light of their relationship to existing plaintiffs and the assignments, their claims would still be tried in the principal case as though they were still named plaintiffs.

…a person may receive the benefit of a damages award, but may not claim to have been injured by the fraud. Persons who both claim to be injured by the fraud and seek a benefit from the damage award in the suit, however, should be counted under the statutory definition.

The Third Circuit recently applied a similar analysis in *LaSala v. Bordier et Cie*.[16] In *LaSala*, a bankrupt corporation assigned its claims against two directors to a group of stockholders. For convenience, the stockholders created a trust to take title to and prosecute the corporation's claims. The defendant argued that the number of persons for SLUSA purposes should be measured by the beneficiaries of the trust-assignee, rather than the single entity.[17] The Third Circuit rejected that argument and held that the assignor-corporation, not the assignee-trust beneficiaries, was the "person" on whose behalf damages were being sought. Consistent with the interpretation above, the court held that SLUSA's definition of "covered class action" applied to the original owners of the claim—those injured by the complained-of conduct—not the beneficial owners of the assigned claims.[18]

The "Class Action or Its Equivalent" Situation

The second category of "covered class action" applies to any single lawsuit in which one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and common questions of law or fact predominate. When disputes over the scope of this provision have arisen, courts again have interpreted the definition broadly. The Eleventh Circuit, for example, has held that "prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action."[19] This conclusion is consistent with the statutory text and purpose. This part of the "covered class action" definition is phrased prospectively—"seek to recover"—and, as the court noted in *Behlen*, requiring certification prior to removal would frustrate the objectives of the SLUSA because potentially lengthy and expensive pretrial practice and discovery would occur in state court, regardless of the merits of the action or whether SLUSA ultimately precluded it.

The "Group of Cases" Situation

The third part of the "covered class action" definition covers "any group of

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lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—(I) damages are sought on behalf of more than 50 persons; and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose."[20]

Instituto de Prevision Militar v. Merrill Lynch demonstrates the breadth of this third category.[21] In that case, Instituto de Prevision Militar ("IPM") sued Merrill Lynch and others for their alleged participation in a securities fraud committed by a third party. IPM sued on behalf of itself only. IPM later moved to have its case consolidated for discovery purposes with two other cases arising out of the same fraud, one of which was a class action, that had been filed against Merrill Lynch and other defendants. The district granted IPM's motion, then dismissed IPM's case under SLUSA.

The Eleventh Circuit affirmed. The court explained that IPM's situation satisfied two disputed aspects of the "group of cases" portion of SLUSA. First, unlike the previous two definitions, the "group of cases" provision in SLUSA's "covered class action" definition does not require that common issues of law or fact "predominate," only that the cases "involve" common questions of law or fact.[22] Second, although IPM was suing on behalf of itself only, its case had been consolidated for discovery purposes in the same court with a class action involving over 3,400 class members. Thus, considered together, the cases clearly involved damages being sought on behalf of more than 50 persons.

Focusing on the statutory text, *Instituto de Prevision* is clearly correct. The "group of cases" class-action definition applies not only to cases that are joined or consolidated "for *any* purpose," but also to cases that "*otherwise proceed* as a single action for *any* purpose."[23] Again, Congress used broad language to sweep many cases and situations within SLUSA's ambit. Thus, consolidation for pretrial purposes or even a more limited consolidation for discovery purposes would satisfy the statutory criteria.

Conclusion

SLUSA can be too easily dismissed. Even attorneys who frequently work with SLUSA may assume that securities cases involving 50 or fewer named plaintiffs are presumptively outside the statute's scope at the time of filing and thereafter. Both the statutory text and cases interpreting SLUSA, however, indicate that closer attention should be paid before closing the door on this defense. ❐

Endnotes

1 The Supreme Court describes SLUSA as having a "preclusion provision" because it does not displace state law with federal law, but makes some state law claims nonactionable in state or federal courts through the class action device. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006).

2 SLUSA added identical language to both the Securities Act of 1933 and the Securities and Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. *See* 15 U.S.C. § 77p; 15 U.S.C. § 78bb(f). For convenience, only the provisions added by SLUSA to the 1934 Act are cited in this article.

3 *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81-82, 86 (2006) (summarizing legislative history).

4 *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 127 S. Ct. 2499, 2508 (2007) (explaining goals of PSLRA).

5 H.R. Conf. Rep. No. 105-803 § 2 (1998).

6 *Dabit*, 547 U.S. at 86 (internal quotation marks and citation omitted).

7 *Id.* at 87 (internal quotation marks and citation omitted).

8 15 U.S.C. § 78bb(f)(1).

9 15 U.S.C. § 78bb(f)(2); *Winne v. Equitable Life Assurance Soc'y of the U.S.*, 315 F. Supp. 2d 404, 409 (S.D.N.Y. 2003) ("[T]he analysis for [SLUSA] removal and dismissal is essentially the same.").

10 *In re WorldCom, Inc. Sec. Litig*., 308 F. Supp. 2d 236, 242 (S.D.N.Y. 2004) (first brackets in original) (*quoting* S. Rep. No. 105-182, 1998 WL 226714, at *8 (1998)).

11 15 U.S.C. § 78bb(f)(5)(B).

12 15 U.S.C. § 78bb(f)(5)(B)(i)(II) (emphasis added).

13 08-CV-01223 (D. Or. Mar. 4, 2009).

14 The author represented three related defendants in *Merrihew*.

15 Judge Mosman's dismissal was without prejudice. *See id*. (Order of Dismissal dated March 4, 2009). This article focuses on Judge Mosman's SLUSA decision and analysis. It is not intended to express the views of the author, his clients, or any other person regarding any of the other aspects of the case.

16 519 F.3d 121, 134-35 (3d Cir. 2008).

17 For SLUSA purposes, a corporation is not counted as more than one person unless it is established for purposes of litigation. 15 U.S.C. § 78bb(f)(5)(D).

18 *Id*. at 132-35.

19 *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1093 (11th Cir. 2002).

20 15 U.S.C. § 78bb(f)(5)(B)(ii).

21 546 F.3d 1340 (11th Cir. 2008).

22 *Id*. at 1346 (*quoting* 15 U.S.C. §§ 78bb(f)(5)(B)(i)-(ii)).

23 *Id*. (emphasis added).

Using Depositions During Opening Statements

By David Markowitz & Lynn Nakamoto
Markowitz Herbold Glade & Mehlhaf, PC

> "The purpose served by an opening statement is to acquaint the jurors with the issues, the contemplated testimony and the relationship of the latter to the issues." *State v. Reynolds,* 164 Or. 446, 454, 100 P.2d 593 (1940).
>
> Opening statement is "the privilege of the attorney for each party, if he sees fit to exercise it, and is obviously intended to advise the jury concerning the questions of fact involved, in order to prepare their minds for the evidence to be heard, . . . and how full it shall be, within reasonable bounds, is left to the attorney's discretion." *Lane v. Portland Ry., Light & Power Co.*, 58 Or. 364, 368, 114 P. 940 (1911).

Now that video recordings of depositions are commonplace and the technology for editing and using excerpts of video recordings during trial is readily available and financially feasible, lawyers are not limited to describing the testimony that they expect to elicit during trial during opening statements. Lawyers now can show the jury key testimony directly from witnesses by selecting excerpts from video recordings of depositions. Some court rules even encourage the use of electronic presentations at trial. *See, e.g.*, North Carolina Business Court Rule 16.1 ("Electronic presentations and technologically generated demonstrative evidence should be used to enhance the trier-of-fact's understanding of facts in the action or to further the convenience or efficiency of the litigation process. . . ."). This article focuses on the law governing the increasing use of deposition testimony during opening statements.

A. Rules limiting content of opening statements.

No rule specifically addresses the use of depositions during opening statements. Oregon court rules allow opening statements but do not provide much guidance as to their content. *See* ORCP 58 B(3) (in a jury trial, the "plaintiff shall concisely state plaintiff's case and the issues to be tried" and then the defendant shall "in like manner" state its case); ORCP 58 A (in bench trials, parties have the same opportunity to present opening statements).

The federal rules do not contain a counterpart to ORCP 58, and the District of Oregon has not adopted a local rule specifically addressing opening statements. But, the District of Oregon does require lawyers to adhere to the professional standards required of Oregon lawyers and the Statement of Professionalism it adopted in 2006. L.R. 83.7(a). Both of these sources provide general guidance on content of opening statements.

Guideline 1.9 for lawyers practicing in the District of Oregon states, "We will not knowingly misstate facts

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Depositions During Opening Statements

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or law. We will not knowingly cause a person to form a mistaken conclusion of facts or law." App. to L.R., Form 23. Oregon Rule of Professional Conduct 3.4 places more specific limits on the attorney's statement of the case. Under Rule 3.4(c), a lawyer cannot "knowingly disobey an obligation under the rules of a tribunal," and under Rule 3.4(e), a lawyer cannot "in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . ." *Cf. former* DR 7-106(C)(1) ("In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not [s]tate or allude to any matter . . . that will not be supported by admissible evidence.").

Thus, the professional standard for judging the propriety of an attorney's judgment in placing material in the opening statement is one of objective good faith anchored on the relevance and admissibility of the information, and on adherence to prior court rulings concerning claims or defenses that may be presented at trial and admissible evidence.

Courts recognize that in opening statement, a lawyer may properly discuss in good faith aspects of the case that the lawyer reasonably anticipates proving, even though ultimately it turns out for any number of reasons that the evidence is not admitted or the witness does not appear during trial. *See, e.g.*, *State v. Davis*, 345 Or. 551, 587-88, 201 P.3d 185 (2008) (stating rule). Thus, the trial judge has discretion to control the scope and manner of opening statement, and to determine the good faith of the attorney making the opening statement. *See Blanton v. Union Pac. R.R. Co.*, 289 Or. 617, 622, 616 P.2d 477 (1980) ("the trial judge is in the best position to determine whether inadmissible evidence or improper conduct has such a prejudicial effect upon the jury that it impairs one's rights to a fair trial").

B. Remedies when a lawyer crosses the line.

If your opponent is showing excerpts from deposition testimony by video and you have an objection, you must object immediately and not wait until completion of the opening statement – or risk waiver of the objection. *See Blanton*, 289 Or. at 623 (the defendant waived objection to the plaintiff's opening statement pointing out fault on the defendant's part in a damages case where defendant admitted liability). If the conduct in opening statement creates substantial prejudice to the opposing party, then the trial judge should grant a mistrial. *See State v. White*, 303 Or. 333, 341-42, 736 P.2d 552 (1987) (prosecutor commenting on defendant's exercise of right to remain silent).

Of course, if the attorney deliberately injects inadmissible content into his opening statement, the lawyer may be subject to discipline. *See In re Conduct of Eadie*, 333 Or. 42, 63, 36 P.3d 468 (2001) (discipline of attorney who deliberately injected defendant's insurance coverage into trial despite trial court's warnings). And, the court may assess costs related to the mistrial. *See Tavera v. Southland Corp.*, 188 Or. App. 484, 72 P.3d 124 (2003) (where trial court granted defendant's motion for mistrial and ruled as a condition for continuing the case that plaintiff pay for costs and fees related to mistrial); *see also Frost v. Lotspeich*, 175 Or. App. 163, 174-76, 30 P.3d 1185 (2001) (discussing contempt powers of courts generally).

C. Drawing the line is difficult.

Testimony by parties. One relatively safe area for using excerpts of deposition testimony involves testimony of parties. Because deposition testimony of a party is an admission of a party opponent, ORE 801(4)(b) and Fed. R. Evid. 801(d)(2), courts allow references to relevant testimony during opening statements. *See Thunderhawk v. Union Pac. R.R. Co.*, 891 P.2d 773, 782 (Wyo. 1995) (defendant properly read portions of plaintiff's deposition testimony during opening); *Timsah v. General Motors Corp.*, 591 P.2d 154 (Kan. 1979) (defendant properly commented on deposition testimony of a plaintiff); *Carrasquillo v. City of New York*, 866 N.Y.S.2d 509 (N.Y. Sup. Ct. 2008) (motion *in limine* to preclude defendants from using pretrial deposition testimony of a child party in opening statement and at trial denied); *see also Gillson v. Gulf, Mobile & Ohio R.R. Co.*, 246 N.E.2d 269 (Ill. 1969) (reference in opening statement to contents of letter by party not permitted because it was not a party admission relevant to issues for trial). Even relevant admissions, though, may be objected to under ORE or Fed. R. Evid. 403.

Testimony by non-party witnesses. Although some courts allow visual presentations of relevant testimony by witnesses, *see Spence v. Southern Pine Elec. Coop.*, 643 So. 2d 970, 972 (Ala. 1994) (defendant could properly use blowups of portions of transcripts of depositions of plaintiff's witnesses where they testified at trial in accordance with deposition), using deposition testimony of your own or the other side's witnesses during opening statements introduces hearsay. Although testimony by witnesses in perpetuation depositions taken under ORCP 39 I is not hearsay, ORE 801(4)(c), that still leaves open the question of what is relevant and admissible.

Lynn Nakamoto

In light of the potentially severe penalties for erring, attorneys intending to use deposition testimony during opening statements should get consent of opposing counsel or the trial judge beforehand. ❐

David Markowitz

Minority Shareholder Oppression in Oregon; is it a Legitimate Business Decision?

By Kate A. Wilkinson
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While the doctrine of minority shareholder oppression is intended to address the unique nature of close corporations and the lack of a market remedy for those minority shareholders, in practice the caselaw reveals the reluctance of Oregon courts to second-guess the majority's business judgment. Unlike other jurisdictions, minority oppression in Oregon is not generally measured by its effects on the minority, but on whether the majority shareholders' decisions can be justified as normal business practices.[1]


Kate Wilkinson

Close corporations are unique in that minority shareholders have no readily available market exit. In contrast, a shareholder of a public corporation, unhappy with the majority, can always sell his or her shares on the market. This market exit protects the minority shareholder's investment and guards against oppressive majority actions. In a close corporation, however, the minority shareholder may face great harm from a trapped investment and exclusion from participation in the business. Presumably in response to that harm, the legislature formulated ORS 60.661 which allows for judicial dissolution when those in control of a corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent.

What constitutes minority shareholder oppression?

Over the years, various articulations and definitions of oppression have emerged. Most commonly, oppression is described as some form of "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing * * *."[2] Oppression has also often been equated with a breach of a fiduciary duty.[3] Those in charge of a closely held corporation have fiduciary duties of good faith, fair dealing and full disclosure toward the minority shareholders. A breach of fiduciary duty occurs when the majority shareholders use their control to their own advantage and exclude the minority from the benefits of participating in the corporation.[4]

While the definitions have varied somewhat, caselaw consistently reminds practitioners that oppression is determined on a case by case basis and what matters is examining the pattern and intent of the majority.[5] Few Oregon cases articulate the effect on the minority of those specific facts as an important consideration.[6] Despite the case by case approach and a judicial reluctance to "match facts", some common hallmarks of oppression have developed.

Common oppression factors

One of the most common oppression factors is the non-payment of dividends or distributions.[7] Another common factor is the firing of the minority shareholder from his or her corporate positions. This factors quite heavily in the oppression analysis because in a close corporation, the major benefit is often a paid position with the corporation. Firing a minority

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shareholder dries up income and is often a classic hallmark of oppression.[8]

The majority shareholders' disregard of corporate formalities is often another signal of oppression. Actions such as preventing the minority shareholder from reviewing or receiving corporate records, the failure to notify the minority shareholders of corporate meetings and the failure to hold required corporate meetings may signal oppression.[9] The majority's "siphoning" of corporate wealth in the form of salaries, bonuses and other fringe benefits may also constitute oppression.[10] The majority's breach of its fiduciary duties in the form of usurpation of corporate opportunities may also be problematic.[11]

Oppression for a Legitimate Business Purpose?

However, even in the face of some or all of these factors, the plaintiff must prove that these facts are outside the realm of normal or legitimate business judgment. If the majority's decision can be explained rationally as a reasonable business decision, the court will not find oppression – despite the negative effects of those decisions on the minority shareholders. This approach is plainly seen in the appellate court's most recent minority shareholder oppression opinion.[12]

Remedies

Although the governing statute, ORS 60.661, provides for dissolution, no Oregon court has ever ordered dissolution as a remedy for oppression. Instead, the court retains a great deal of equitable authority to fashion an appropriate remedy. Upon a finding of oppression, the most commonly ordered remedy is a buyout of the minority shareholder's interest, at fair market value with no discounts.[13] On occasion, courts have ordered the payment of dividends over a specific time period. [14] More rarely, the court has included payment of wages with a buyout when the oppression included a pretextual firing from employment.[15]

If the majority's decision can be explained rationally as a reasonable business decision, the court will not find oppression—despite the negative effects of those decisions on the minority shareholders.

Like dissolution, punitive damages are available upon a showing of oppression, yet no Oregon court has ever ordered such damages.

Conclusion

Practitioners should keep in mind that even when a fact pattern contains all the hallmarks of minority oppression – nonpayment of dividends or distributions, firing from employment, disregard of corporate formalities and some breach of fiduciary duty – the plaintiff must show that these are not within the realm of legitimate business decisions. It is likely not enough to show that these facts exist and that they harm the minority shareholder. Despite the statute's presumed purpose of protection of the minority shareholder, the Oregon courts employ a cautious, deferential approach when evaluating whether a majority decision constitutes oppression or whether it can be reasonably explained as within the majority's purview to make legitimate and reasonable business decisions. ❐

Endnotes

1 See generally Douglas K. Moll, *Shareholder Oppression in Close Corporations: the Unanswered Question of Perspective*, 53 Vand. L. Rev. 749 (2000).

2 *Baker v. Commercial Body Builders*, 264 Or 614 (1973).

3 *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 108 (2000) (noting that "in a closely held corporation conduct that violates the majority's fiduciary duties to the minority is likely to be oppressive.") and *Tifft v. Stevens*, 162 Or App 62, 77-78 (1999) (explaining that "we take a holistic approach to the claims of corporate oppression and breach of fiduciary duty, as they are intertwined in essential ways * * *.").

4 *Hayes v. Olmsted & Assoc. Inc.*, 173 Or App 259, 265 (2001).

5 *Id.*

6 *Cooke*,169 Or App at 109 (noting that "[b]ecause many things can constitute oppressive conduct or a breach of fiduciary duties, what matters is not so much matching the specific facts of one case to those of another but examining the pattern and intent of the majority and the effect on the minority of those specific facts.").

7 *Cooke*, *id.* at 106-110 (explaining that the withholding of dividends or other return on one's participation in a business is an essential part of most squeeze out efforts); and *Naito v. Naito*, 178 Or App 1, 24 (2001) ("[b]y failing to provide for adequate dividends or other financial benefits on reasonable terms, [defendant] acted for his own self-interest in derogation of the interests of the minority

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shareholders and therefore failed to act with the fiduciary attitude * * *"). See also *Tifft*, 162 Or App at 79 (1999) (describing the withholding of subchapter S distributions as a tool of oppression).

8 *Hayes*, 173 Or App at 273 and *Cooke*, 169 Or App at 109-11 (noting that an "unusual" termination is often a "devastatingly effective squeeze-out technique.").

9 *Baker v. Commercial Body Builders*, 264 Or App at 637 (1973) and *Hayes*, 173 Or App at 273 (noting the defendants' systematic disregard of the corporation's organic governing documents and failure to observe corporate formalities).

10 *Cooke*, 169 Or App at 112 and *Baker*, *supra* at 629.

11 *Davis v. Brockamp & Jaeger, Inc.*, 216 Or App 518, 537-40 (2007) (explaining that when a corporate opportunity is usurped by the majority shareholder, that breach may constitute minority shareholder oppression).

12 *Id.* In *Davis*, the court reasoned that the defendants had introduced credible evidence to justify the challenged disparate bonuses as reflecting a legitimate business purpose. The court made that determination despite a bonus system that was at least partly subjective or arbitrary, and in the last year challenged by plaintiff, resulted in defendant's bonus being 26.3 times larger than that of the plaintiff. See also *Baker* and *Zidell v. Zidell*, 277 Or 413, 418-421 (1977) (noting that the defendants introduced credible evidence to explain their conservative dividend policy). See generally Moll, *supra*, describing *Zidell v. Zidell* as a pure majority perspective approach wherein the detrimental effects of majority conduct on the minority are completely disregarded.

13 *Hayes*, 173 Or App at 280 (concluding that a fair and reasonable stock price in the context of minority shareholder oppression must be determined in light of the oppression and ordering a stock purchase at the fair value) and *Cooke*, 169 Or App at 114-15 (ordering that the defendant purchase the shares at fair value with no minority or marketability discount). See also *Baker*, 264 Or App at 632-33 (listing various remedies).

14 *Naito* (ordering defendants to implement an agreed-upon dividend policy for the next five years).

15 *Cooke*, 169 Or App at 114-15 (including the plaintiff's unpaid wages since his termination in determining the share value).

Maintaining Client Confidences and Secrets in the Face of Subpoena

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While most attorneys assume that their notes from client and witness interviews, as well as their mental impressions and resulting work product, will be protected from disclosure in all circumstances, counsel must take care to ensure client confidences and secrets are adequately protected in the face of a subpoena.[1]

Numerous scenarios can arise where counsel is served with a subpoena to produce a client file, or to even testify regarding a client's confidential information. Employees, consulting experts, and other professionals retained by counsel, including accountants and public relations firms, may also be subpoenaed for client information. For example, counsel may be subpoenaed to testify regarding the state of mind of a client when a contract is signed or to detail what was said at a meeting between business partners. When a subpoena is issued relating to confidences of a current client, the attorney is in a particularly difficult position because compliance with the subpoena may result in the attorney becoming a witness against her client and the potential destruction of the attorney-client relationship.[2] The following article reflects some of the significant obstacles counsel may face and the best strategies for protecting client information in these circumstances.

Janet Hoffman

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If served with a subpoena for a client's confidential information there are a few steps an attorney should initially undertake. An Oregon attorney should first contact the Professional Liability Fund (PLF). Under current PLF policies, the PLF will provide a consultation for attorneys who have received subpoenas to testify or to provide client files relating to former or current clients. Additionally, an attorney should immediately contact the client to determine whether the client provides consent to the disclosure or whether they desire the confidences to be maintained. Assuming confidentiality is desired, both the attorney and client may separately move to quash the subpoena, with the client as intervenor in the matter.

The question then becomes how to best protect the client's confidences and secrets in the face of a subpoena. The first part of this article outlines the attorney's ethical duty to make all non-frivolous arguments in opposing a subpoena for client confidences, the second part highlights the best legal strategies for prevailing on a motion to quash a subpoena for client confidences, and in conclusion we offer several practical tips for maintaining client confidentiality during the representation so as to have the strongest legal arguments if faced with a subpoena for client confidences and secrets.

Attorney's Ethical Duty to Oppose Subpoenas for Client Confidences and Secrets

At the outset, it's important to review the Oregon ethical duties relating to client confidences and secrets. The duty to protect "confidences and secrets" of the client is one of the most important duties a lawyer owes to a client. It is so important that it has been engrafted into both the Oregon Revised Statutes

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and the Oregon Rules of Professional Conduct. ORS 9.460(5) provides that an attorney shall "[m]aintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the clients of the attorney[.]"

Under ORPC 1.6, a lawyer must not "reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[3] The Oregon Supreme Court has adopted a definition to aid in the interpretation of ORPC 1.6. ORPC 1.0(f) provides:

> "Information relating to the representation of a client denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Notably, ORPC 1.0(f) encompasses both information protected by the attorney-client privilege (client confidences), as well as any other client information that the client has requested be kept confidential and of which disclosure would negatively impact the client (client secrets). Thus, the duty to protect information provided to an attorney extends beyond information protected by the attorney-client privilege, and in fact has been interpreted very broadly by the Oregon Supreme Court to include information in the public record.[4] The Oregon Supreme Court saw fit to provide specifically that this duty encompasses "other information gained in a … professional relationship that the client has requested be held inviolate or the disclosure of which … would be likely to be detrimental to the client." An attorney would therefore violate ORPC 1.6 and 1.0(f) if he or she disclosed this information without the client's consent.

To review the basic legal doctrines protecting client confidences, attorney-client privilege protects confidential communications between attorney and client made in order to obtain legal assistance.

Accordingly, when faced with a subpoena that requires disclosure of client confidences, an attorney has an ethical obligation to limit the subpoena on all available grounds and may not reveal a broad range of information relating to the representation of a client until ordered to do so by a court or appropriate tribunal.[5]

Legal Strategies for Prevailing on Motion to Quash Subpoena

Attorneys typically have several legal bases for opposing a subpoena for client confidences. In addition to relying on the ethical rules prohibiting the disclosure of client secrets, an attorney should also assert attorney-client privilege and work-product protections as appropriate when moving to quash.[6] In arguing that materials or testimony sought are protected by the relevant privilege, protection or ethical rule, counsel may need to request *in camera* review of any underlying documents and attorney affidavits for the judge to make any necessary factual determinations regarding the claims of confidentiality.[7] *In camera* review does not waive any privilege or protection.[8]

Of course, an attorney will be most likely to prevail in quashing a subpoena when all client confidences have been maintained to the greatest degree possible throughout the representation; however, an effective advocate must be prepared to present the strongest legal arguments for maintaining confidentiality. To review the basic legal doctrines protecting client confidences, attorney-client privilege protects confidential communications between attorney and client made in order to obtain legal assistance.[9] In Oregon, attorney-client privilege is established by Rule 503 of the Oregon Evidence Code, while the federal rule is grounded in the common law. It is well-established that "voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else."[10] The privilege is not waived, however, by disclosures made between counsel, counsel's representatives, the client, and client's representatives.[11]

Work product protection shields from discovery tangible and intangible materials prepared by a party or a party's representative in anticipation of litigation.[12] The doctrine encompasses "documents and tangible things" and "opinions and impressions" of attorneys and their representatives.[13] Indeed, because intangible work product often includes attorney opinions, impressions, legal theories and conclusions, it is often afforded heightened protection under both Oregon and federal law.[14]

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Using Attorney-Client Privilege to Maintain Client Confidences

In many instances, there will be a challenge to the privilege when a third party is present during the communication between counsel and client. In that case, an adversary will argue that what is being sought by subpoena has been voluntarily disclosed to third parties and is therefore not protected by attorney-client privilege. For example, an adversary would argue that the presence of the client's brother at the client meeting waived attorney-client privilege as to what was discussed at the meeting.

While Rule 503 protects only those communications that the lawyer and client treat as confidential, the rule and its commentary expressly contemplate that effective representation sometimes requires the inclusion of certain third parties in confidential lawyer-client communications. Specifically, Rule 503 defines "confidential communication" to include those communications between a lawyer and client and other persons "to whom disclosure is in furtherance of the rendition of professional legal services to the client."[15] The rule's commentary expressly anticipates that such other persons will include family members, business partners, and others whose presence during the lawyer-client communication may be necessary to further the interest of the client in the consultation with his attorney, especially when the subject matter of the communication is a matter of joint concern with the other person.[16] Note, however, that the commentary's list of persons that could be considered necessary to the furtherance of legal services is not exhaustive, and arguments could be made that a wide variety of individuals are necessary to best provide counsel with the information counsel needs to effectively represent the client.

Accordingly, practitioners should focus on the necessity of the third party's presence to further the provision of legal services, when arguing that attorney-client privilege has not been waived. Business associates, close friends and family are often necessary to further both (1) the lawyers' receipt of complete information about matters affecting decisions in the representation and (2) the lawyers' provision of legal advice to the client regarding those decisions. Both these purposes are central to the provision of legal advice.[17]

Accordingly, practitioners should focus on the necessity of the third party's presence to further the provision of legal services, when arguing that attorney-client privilege has not been waived.

A similar issue arises when counsel has provided materials containing client confidences to individuals retained by counsel to assist in the furtherance of legal advice, such as accountants, public relations firms and other consulting experts. Adversaries will surely argue that such documents, including drafts of documents ultimately intended for public disclosure, are not privileged. Attorney-client privilege, however, is held to cover communications made to certain agents of an attorney, including accountants hired to assist in the rendition of legal services.[18] As to such agents, "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."[19] Accordingly, "[i]nformation provided to an accountant by a client at the behest of his attorney for the purposes of interpretation and analysis is privileged to the extent that it is imparted in connection with the legal representation."[20] This analysis has been extended in other jurisdictions to include communications between counsel and public relations firms, when the public relations firm had been hired by counsel and had a sufficiently close nexus to the attorney's role in advocating on behalf of the client before a court or other decision-making body.[21]

Using Work-Product Protection to Maintain Client Confidences and Secrets

While attorney-client privilege provides an absolute privilege against disclosure and work-product protection can be overcome by a showing of necessity in some instances, work-product protection can still be used to protect client confidences when attorney-client privilege has been waived by disclosure to third parties.[22] Work-product protection exists not to protect client confidences, as does the attorney-client privilege, but to support the fundamental adversarial nature of our legal system—in other words, one party should not benefit from the work product of another.[23] Because the doctrinal basis for work-product protection differs from that for the attorney-client privilege, work-product protection is not compromised by disclosure to third parties "unless the [disclosure] has substantially increased the opportunities for potential adversaries to obtain the information."[24]

Attorneys will rarely provide tangible work product directly to adversaries. The closer question becomes when an attorney has provided materials related

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to client confidences to a third party and whether that disclosure has made it more likely for a potential adversary to obtain the information.

For example, courts have split on whether materials prepared in anticipation of litigation, but provided to independent auditors to assess litigation risk, waives the work-product protection. In *Medinol Ltd. v. Boston Scientific Group*, the court found that work-product protection for board minutes discussing outside counsel's internal investigation had been waived by the disclosure to auditors because the auditor necessarily performed an independent watchdog function, and therefore no common interest existed between the auditor and company.[25] Conversely, in *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, the court found that disclosure of internal investigative reports to an independent auditor did not waive work-product protection because the auditor was not an adversary or conduit to a potential adversary.[26] The *Allegheny* court noted the different outcome in *Medinol*, and explained that *Medinol* turned on the fact that there was no pertinent litigation purpose in providing the board minutes to the auditor.[27] The *Allegheny* court rejected this approach, and held that no common litigation purpose between the client and the third party was needed, but instead it was enough that "they both seek to prevent, detect, and root out corporate fraud."[28] Notably, the *Allegheny* court also explained that the auditor was under an ethical and professional obligation to maintain confidentiality, and therefore there was little likelihood that the material would be disclosed to a true litigation adversary.[29] Accordingly, when arguing that providing tangible work product to a third party has not waived work-product protection, counsel should focus on any common interest between the client and the third party and the facts surrounding the disclosure, including whether any confidentiality agreement was entered into or was required under the professional standards of the third party.

> "Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness."

The subpoena for counsel to testify as a witness against a client is particularly troublesome, yet there are strong defenses to such a subpoena. Work-product doctrine can be used as a basis to object to any subpoena which would require an attorney to testify regarding her recollection of what was said at a meeting that she attended as a legal advisor. The Supreme Court has pointedly discussed the inappropriateness of turning counsel into a fact witness. As explained in *Hickman*, the work-product privilege safeguards, among other things, "personal recollections … formed by an adverse party's counsel in the course of his legal duties."[30] The Supreme Court has observed that "not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney...."[31] As the *Hickman* Court recognized, forcing an attorney to disclose his recollection of oral statements is disfavored because the impressions are so influenced by the attorney's role that his memory may be inaccurate:

> "[A]s to oral statements made by witnesses to [the attorney]..., whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer."[32]

Further, forcing counsel to play the role as witness interferes with counsel's role as officer of the court. Accordingly, practitioners should zealously defend against such a subpoena and argue that the facts an attorney would be called upon to testify to regarding any client meeting or witness interview are inextricably linked with her mental impressions and other work performed in her role

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as counsel, and are therefore protected work product.

Using Ethical Rules to Maintain Client Confidences and Secrets

Notably, however, an attorney facing a subpoena for client confidences should not abandon opposition to the subpoena because the client has disclosed the confidences to third parties inconsistent with maintaining attorney-client privilege or work-product protection. A client's disclosure of the secrets to others does not waive his counsel's independent duty to preserve those secrets. ORPC 1.6 offers a broader and different protection of confidential communication than does the evidentiary rule of privilege.[33] Waiver or inapplicability of the privilege does not allow the lawyer to disclose other client information that the client has asked be kept secret or that would embarrass or injure the client if revealed.[34]

The Oregon Supreme Court has been consistent in interpreting a lawyer's obligation to maintain confidential information very broadly. In *In re A.*, the Oregon Supreme Court held that information about a person's death, while available in the public record, was nevertheless a secret of the client when the disclosure of the information would prejudice the client.[35] Thus, even public information can fall within the duty under ORPC 1.6 and ORS 9.460(5) under some circumstances. Therefore, any argument that the presence of third parties somehow takes the information shared by a client to their attorney outside of the attorney's ethical duty to maintain a client's confidences should be rebutted if any argument can be made that the disclosure would be prejudicial to the client. As the court noted in *In re A.*, a lawyer's duty to the court "involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity."[36]

Waiver or inapplicability of the privilege does not allow the lawyer to disclose other client information that the client has asked be kept secret or that would embarrass or injure the client if revealed.

Whether a court will find persuasive the argument that ethical rules protect the information sought by an adversary, and therefore any such efforts at compelled disclosure should be rejected, may depend on the context in which the client information is being sought. For example, a pre-existing statutory duty to provide information that is covered as a client secret has been found to trump any ethical rules requiring confidentiality,[37] while a subpoena for an attorney's testimony has been found to be "unreasonable or oppressive" when compliance with the subpoena would potentially destroy the attorney-client relationship based on the relevant ethical rules.[38]

Practical Strategies for Maintaining Client Confidences and Secrets During the Representation

Of course, the best defense to any subpoena for client confidences is to anticipate that current and future adversaries may seek information that an attorney may presume to be protected, including an attorney's recollection of client meetings, witness interviews and internal investigation reports. Well-prepared practitioners will implement case management strategies that contemplate the contours of the applicable legal and ethical doctrines related to confidentiality. As a practical matter, that means educating the client as to the importance of confidentiality, using care when disclosing confidential materials to any third parties, and being aware of the potential for becoming a witness when attending meetings with clients and third parties. Counsel should also clearly define at the outset the purpose behind any third parties' being present at client meetings and whether materials provided to third parties are for the furtherance of legal advice and are intended to remain confidential.

Endnotes

1 By way of caveat, this article is not intended to be applied in instances where information is sought in a criminal case by a criminal defendant. In this case the Due Process Clause, Confrontation Clause, compulsory process rights, and other constitutional guarantees may trump other privileges. *See* Janet Hoffman and Carrie Menikoff, *When the Accused Knocks, the Constitution Answers,* Litigation Journal, Spring 2007, Vol. 26, No. 1.

2 *See In re Bergeson*, 425 F.3d 1221, 1226 (9th Cir. 2005) (noting that the district court found that the attorney-client relationship would be destroyed if the attorney were forced to testify at grand jury be-

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cause the attorney would become a witness against her client, in violation of ORPC Rule 3.7).

3 ORPC 1.6(b) provides:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
(2) to prevent reasonably certain death or substantial bodily harm;
(3) to secure legal advice about the lawyer's compliance with these Rules;
(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(5) to comply with other law, court order, or as permitted by these Rules; or
(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve information relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

"many authorities have concluded that the duty of confidentiality compels lawyers who are faced with a subpoena or request for client information to assert on behalf of the client all non-frivolous claims that the information is protected from disclosure"

4 *See* Section B.3, below, for further discussion of the Oregon Supreme Court's broad interpretation of "information relating to the representation of a client."

5 *See* ABA Formal Op. 94-385 (1994); Helen Hierschbiel, *Client Information Subpoenas*, Oregon State Bar Bulletin, June 2008 (noting that although Oregon has no relevant case law or ethics opinions directly on point "many authorities have concluded that the duty of confidentiality compels lawyers who are faced with a subpoena or request for client information to assert on behalf of the client all non-frivolous claims that the information is protected from disclosure" and it is safe to assume the same is true in Oregon).

6 Although not the subject of this article, counsel for clients under criminal investigation should additionally assert, as applicable, their client's state constitutional right to counsel under Article I, section 11 and the related federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments when moving to quash a subpoena for client confidences, whether the subpoena stems from civil or criminal proceedings.

7 *Frease v. Glazer*, 330 Or. 364 (2000) (*in camera* review is appropriate where the applicability of a privilege or privileges is at issue).

8 *Frease v. Glazer*, 330 Or. 364 (2000) (stating that *in camera* review does not destroy privilege).

9 *Fisher v. United States*, 425 U.S. 391, 403 (1976), citing 8 J. Wigmore, *Evidence* § 2292; *see also* OEC Rule 503.

10 *Westinghouse Elec. Corp. v. Republic of the Philippines,* 951 F.2d 1414, 1427 (3d Cir. 1991); *see also* OEC Rule 511.

11 *See* OEC Rule 503(2)(a)-(e).

12 *See* ORCP 36B(3).

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13 *See* Kirkpatrick, *Oregon Evidence*, §503.14[1] (5th ed. 2007) (work product includes communications in anticipation of litigation whether or not reduced to writing); *State v. Bockorny*, 125 Or. App. 479, 485-86 (1993) (*Bockorny I*) (protection applied to attorney's discussions of opinions and theories), *on recons*. 126 Or. App. 504 (*Bockorny II*), *rev. den*. 319 Or. 150; (1994). *See also Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947) (recognizing work-product privilege for memoranda, statements and mental impressions of attorneys); Wright & Miller, *Federal Practice and Procedure*, § 2024 (2d ed. 1987) (West 2008) ("'[i]t is clear from *Hickman* that work product protection extends to both tangible and intangible work product'") (quoting In re Cendant Corp. Securities Litigation, 343 F.3d 658, 662 (3d Cir. 2003)).

14 *See* ORCP 36B(3) ("the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney … concerning the litigation" even when substantial need and undue hardship are shown); Wright & Miller, *Federal Practice and Procedure*, § 2024 (since intangible work product includes thoughts and recollections of counsel, it is often eligible for the special protection accorded opinion work product).

15 OEC 503(1)(b). The definition in its entirety reads: "'Confidential communication' means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.*

"the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney…concerning the litigation" even when substantial need and undue hardship are shown

16 *See* OEC Rule 503, comment ("The rule allows some disclosure beyond the immediate circle of lawyer and client and their representatives without impairing confidentiality, as a practical matter. It permits disclosure to persons 'to whom disclosure is in furtherance of the rendition of professional legal services to the client,' contemplating that these will include a 'spouse, parent, business associate, or joint client.'"); *see also Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (holding that presence of adult defendant's father in conference between defendant and attorney to provide "support and guidance" was consistent with intent to make communications confidential and therefore did not destroy privilege).

17 *See State v. Jancsek*, 302 Or. 270, 274 (1986) ("Lawyers can act effectively only when fully advised of the facts by the parties whom they represent[.]"); *State v. Durbin*, 335 Or. 183 (2003) ("The purpose of the … privilege 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'") (quoting State *ex rel OHSU v. Haas*, 325 Or. 492, 500 (1997) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

18 *United States v. Kovel*, 296 F.2d 918 (2d Cir.1961).

19 *Id.* at 922.

20 *United States. v. Schwimmer,* 892 F.2d 237, 243 (2d Cir. 1989).

21 *See In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F.Supp.2d 321, 326 (S.D.N.Y. 2003) (holding that confidential communications between public relations firm and counsel were protected by the attorney-client privilege to the extent that they took place for the purpose of giving or receiving legal advice); *but see Calvin Klein Trademark Trust v. Wachner*, 124 F.Supp.2d 207 (S.D.N.Y. 2000) (holding that a draft press release and accompanying memo requesting comment from counsel prepared by public relations firm was not expert or legal advice and was, therefore, discoverable).

22 Note, however, that the majority view is that a non-party to current litigation cannot assert work production in that litigation. *See* Wright & Miller, *Federal Practice and Procedure*, § 2024 (Documents prepared for one who is not a party to the

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present suit are wholly unprotected by Rule 26(b)(3) even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit.).

23 *See* Wright & Miller, *Federal Practice and Procedure,* § 2024.

24 *Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 661-62 (D. Nev. 2007) (internal quotation marks omitted); *see also United States v. MIT*, 129 F.3d 681, 687 (1st Cir.1997) (stating that "work product protection is provided against 'adversaries,' so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection").

25 214 F.R.D. 113, 116-17 (S.D.N.Y. 2002).

26 229 F.R.D. 441 (S.D.N.Y. 2004).

27 *Id.* at 446.

28 *Id.* at 448.

29 *Id.*

30 *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

31 *Id.* at 510-11.

32 329 U.S. at 512-13.

33 *See State v. Keenan/Waller*, 307 Or. 515, 519 (1989).

34 *See In re Lackey*, 333 Or. 215, 227 (2002) (stating that "even if the information was no longer privileged because of its prior, authorized disclosure ... it still could be held a "secret" if the client had requested that it be held inviolate or if the disclosure would be embarrassing or likely be detrimental to the client.").

35 276 Or. 225 (1976).

36 *Id.* at 237 n.2.

37 *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995).

38 *In re Bergeson*, 425 F.3d 1221 (9th Cir. 2005).

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Protective Orders Deconstructed

By Brian Campf
Brian S. Campf, PC

Just as there is no such thing as a "standard contract," in civil cases there is no such thing as a standard protective order. Good protective orders are tailored to the specific circumstances of a case and are not recycled from one lawsuit to the next. This article addresses some considerations that may be helpful for your next protective order.

When is discovery confidential?


Brian Campf

"The public generally can gain access to litigation documents and information produced during discovery." *Fischer v. City of Portland*, 2003 WL 23537981 at *2 (D Or Aug 22, 2003). A protective order restricting public access to discovery materials can arise by a private agreement between the parties, by the parties submitting a confidentiality agreement to the court for approval, or upon a motion. Courts may, for good cause, make an order restricting such disclosure in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *See* Fed.R.Civ. P. 26(c) and ORCP 36(c).

One method in those rules for providing such protection is to require that "a trade secret or other confidential research, development, or commercial information" (FRCP 26(c), ORCP 36(c)) "not be revealed or be revealed only in a specified way" (FRCP 26(c)) or "not be disclosed or be disclosed only in a designated way." (ORCP 36(c)).

Protective orders are not always necessary. Not every case involves a trade secret or confidential research, development or commercial information (and even then there is often ground for disputing whether the material must be confidential), or material that deserves protection from public viewing like social security numbers. Protective orders should always be resisted if no genuinely confidential discovery is at issue.

Avoid protective orders that define confidentiality with vague or overly broad categories like "private information" or "sensitive documents." They offer no guidance or predictability as to what is protected. Tying the scope of a protective order to the rules of civil procedure and to specific categories that undeniably require protection gives it a credible and defensible foundation. The consequence of an overly broad order is lengthy and costly motion practice to declassify improperly categorized discovery.

The order should be narrowly tailored if the parties know in advance the particular documents that require protection. If not, the nature of the discovery may require a producing party to make a good faith confidentiality determination within the scope of the order for each document as it reviews them. The least restrictive approach should always be used. *See Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F 3d 1122, 1137-38 (9th Cir 2003) (Oregon district court abused its discretion by maintaining a seal on summary judgment motions and supporting materials as well as other materials originally filed under seal when the district court could have required redaction with minimal effort).

An order that designates all responsive discovery as protected without any review or determination of good cause

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by parties or the court is disfavored and should be rejected because it "robs public documents of their public character." *Blanchard and Co., Inc. v. Barrick Gold Corp.*, 2004 WL 737485 at *6 (ED La Apr 5, 2004) ("insofar as the defendants' proposed order addresses *all* discovery, shielding it from public disclosure or restricting its use to this litigation, the defendants' position is without merit and not supported by either the applicable rules or the prevailing jurisprudence.").

Who may make a confidentiality designation?

A party with standing should always be able to invoke the order. Litigants should discuss the efficiencies of permitting non-parties to designate records under the order if third party discovery is expected.

How is confidential information so designated?

The order must explain how confidential material is to be identified, for example by a stamp of "Confidential" or "Confidential: Subject to Protective Order." To ensure full disclosure, the order should provide that the marking shall be affixed in a manner that does not obscure any written material. For discovery that cannot be marked as confidential without obscuring text or for some other reason, the parties should agree to a procedure whereby the material is produced for inspection unmarked, but is nonetheless treated as confidential.

When should discovery be marked confidential?

Discovery should be marked confidential before it is produced. Should discovery be produced prior to the entry of a protective order, the order should include a provision that permits the re-designation of such material as confidential within a specified time frame of the order's entry.

Some protective orders provide that the inadvertent production of confidential information does not waive confidentiality so long as the producing party gives timely written notice after the error is found.

Confidential information may be disclosed through deposition testimony or documents used at depositions. The protective order should provide a means for designating the relevant parts of the transcript and its exhibits as confidential. One approach is for the order to state that confidential portions of testimony must be designated as confidential by a statement on the record during the testimony or by written designation within a certain number of days after receipt of the transcript.

What if you forget to mark something confidential?

Confidential documents will occasionally slip through and be produced unmarked. Some protective orders provide that the inadvertent production of confidential information does not waive confidentiality so long as the producing party gives timely written notice after the error is found. Such a document should then be marked as confidential and re-produced. In that event, the order should protect the receiving party by adding that it is not a violation of the order for a party who receives unclassified discovery to treat it as non-confidential up until the time that the producing party notifies it in writing of its confidential status.

Claims of re-classification due to inadvertent production must be challenged where the facts cast doubt upon the validity of the assertion. One might ask, for example, is the claim of inadvertent production really the result of a sloppy production and not a legitimate error? Is the claim of inadvertent production actually a pretext for retrieving a damaging document? *See Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336 (1992) (defendant employer waived attorney-client privilege as to letter its attorney voluntarily gave to plaintiff employee in response to discovery request in absence of evidence that disclosure was mistaken, inadvertent, or unauthorized by the client).

What if only part of a document is confidential?

Sometimes only a portion of a document or a transcript is confidential. Marking an entire page confidential may violate the order in its letter or its spirit. Therefore, the order might provide that where practical a confidentiality designation shall be made only to the specific portion of the discovery material that falls within the defined scope of the order. As a result, only the specific portion of the writing that is designated as confidential will be accorded confidentiality.

Will confidentiality create restrictions on discovery?

To make it clear that a confidentiality assertion will not cut off discovery, the order should explain that no one who could invoke the order can refuse to produce discovery or testify on the ground that doing so would reveal information that is confidential under the order.

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How can a confidentiality designation be disputed?

The protective order must provide a means of challenging a confidentiality designation. An effective way of addressing this is to state in the order that the receiving party shall notify the producing party of the dispute in writing. If the parties cannot resolve the dispute after conferring, then the disputing party may file a motion seeking a ruling on the issue. The order should require that the disputed document remain protected until the matter is resolved.

Who has the burden if a confidentiality designation is disputed?

This is one of the most important provisions of a protective order. The order should always specify that the party asserting confidentiality over discovery has the burden of proving the need for such treatment in the event of a challenge to its confidential designation. *See Confederated Tribes of Siletz Indians v. Weyerhaeuser Company*, 340 F Supp 2d 1118, 1122 (D Or 2003) (stating rule that the party that wants an exhibit kept under seal has the burden of justifying that action, especially when there has been no prior individualized judicial determination regarding each exhibit).

Can a confidential document lose its confidential status?

A document loses its confidential status if the designating party declassifies it or if the court orders it declassified. To avoid confusion, the order should require declassified discovery to be re-produced with a new bates number and without a confidential marking. If declassification of discovery occurs by court order, its confidentiality should continue under the protective order until a certain time has passed to allow for an appeal of the ruling.

Two key loss-of-confidentiality issues are (a) Do documents submitted to the court under seal lose their confidential designation if they are attached to a dispositive motion? and (b) Do confidential documents lose their confidentiality if the party asserting the confidential designation reveals the protected information in open court, whether in a trial or as part of any other proceeding?

If declassification of discovery occurs by court order, its confidentiality should continue under the protective order until a certain time has passed to allow for an appeal of the ruling.

Documents attached to a dispositive motion should be treated as non-confidential absent compelling reasons to the contrary because dispositive motions adjudicate substantive rights and are substitutes for trial. *See Foltz,* 331 F 3d at 1135-36; *Rufer v. Abbott Laboratories*, 154 Wn 2d 530, 535, 114 P 3d 1182, 1192 (2005) (any records that were filed with the court in anticipation of a court decision, dispositive or not, should be sealed or continue to be sealed only when the court determines that there is a compelling interest which overrides the public's right to the open administration of justice); *Biovail Laboratories, Inc. v. Anchen Pharmaceuticals, Inc.*, 463 F Supp 2d 1073, 1081 (CD Cal 2006) (noting in dicta that even if the protective order did not provide that documents used as exhibits and/or offered into evidence not under seal in pre-trial activities are excluded from its confidentiality protection, public policy requires that exclusion).

As for disclosures of confidential discovery material in open court, the open courts provision of the Oregon Constitution provides that evidence admitted in a trial cannot be kept secret. Or Con, Art I, §10. *See Oregonian Pub. Co. v. O'Leary,* 303 Or 297, 300-303 (1987) (open courts provision may not be waived by parties; it prevents secrecy in state court adjudications).

A protective order entered in a Multnomah County case balanced the consequences of open court disclosure by providing that confidential documents lose their confidentiality if the party asserting the confidential designation reveals the protected information in open court, but allowed the proponent of confidentiality an opportunity to make a separate application to the court to re-invoke the prior confidentiality designation. The court would apply the standards and factors articulated in *Confederated Tribes of Siletz Indians*, 340 F Supp 2d at 1123-24 (making post-trial rulings on what exhibits sealed during trial would remain sealed) to determine whether the information should be re-designated as confidential under the protective order.

How should confidential documents be filed with the court?

The protective order should adopt the local rules for filing confidential documents under seal. Any court submission attaching confidential discovery material or deposition testimony referencing it should be filed under seal unless the court orders or the parties agree to a different procedure. Where appropriate, a motion can then be made

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to unseal the underlying motion and its confidential attachments (a summary judgment motion and its exhibits, for example). To reduce the need for sealed filings, the order should state that it does not violate the order to generally describe the nature or subject matter or category of information that is marked confidential without disclosing its specific confidential contents.

What if you discover a confidential document through other means?

If you obtain a document from a third party and it is not confidential, but in the context of the lawsuit the producing party provides that same document with a confidential designation, must you treat the document from the third party as confidential? A discovery response asserting confidentiality cannot transform information freely available outside of the litigation into confidential material. Therefore, the order should state that it does not restrict the use of any material obtained without restriction outside of the lawsuit that the producing party designated as confidential within it.

To whom may confidential information be disclosed?

The protective order should identify to whom confidential information may be revealed. Generally, this includes the named parties to the action and their employees; counsel of record and other lawyers and staff employed at their firms; the court, the jury (if applicable), and court staff; court reporters and videographers who record testimony in the case; expert witnesses or expert consultants assisting a party; deposition and trial witnesses in the case and, if applicable, their counsel; and any other person with the prior written agreement of the designating party. An acknowledgment can be attached to the order for third parties like experts and consultants to execute agreeing to its terms. In addition, an attorney's eyes only ("AEO") provision that screens certain people from highly confidential information is sometimes used to protect trade secrets or other highly secret information.

To reduce the need for sealed filings, the order should state that it does not violate the order to generally describe the nature or subject matter or category of information that is marked confidential without disclosing its specific confidential contents.

If sharing relevant discovery with collateral litigation of a similar nature would avoid duplicative discovery, the order should permit it so long as the same or a similar protective order binds in each case those with access to the discovery. *See Foltz*, 331 F.3d at 1131-33 (advocating access to discovery materials to meet the needs of parties engaged in collateral litigation in order to advance judicial economy by avoiding duplicative discovery). The collateral court will control specific discovery disputes applicable only to the collateral suit without running up against another court's protective order. *Id.* However, shared discovery may be objectionable if it offends another principle like limitations on discovery in the collateral litigation. *Id*.

What if confidential records are subpoenaed?

The protective order should address what is to occur if records are subpoenaed in connection with another proceeding. One approach is to require the party to whom a subpoena is sent to wait a certain number of business days before complying with the subpoena and, upon receipt of it, to send by a specified method a copy to the entity that produced the confidential subpoenaed records in order to give them a chance to object within an agreed amount of time.

The case is over. Now what?

The protective order should explain what is to happen to confidential documents at the end of the case. A sensible approach is to permit counsel to maintain their pleadings files intact and to certify in writing that all other confidential material has been returned or destroyed. The order should specify that anything confidential that is not returned to the producing party remains subject to the terms of the order.

What if the parties cannot agree on a form of order?

Contentious areas can include the scope of confidentiality under the order, the effect on confidentiality of the producing party disclosing confidential information in a dispositive motion or in open court, and whether confidential discovery may be shared with collateral litigation. Once conferring has narrowed the issues, the parties can seek the court's direction by filing competing orders together with briefs describing the disputes.

The next time you receive a "standard" protective order for your signature, pause and consider what kind of order your case requires, if any, and what terms the proposed order includes and omits. Time spent assessing these issues and litigating them when necessary will facilitate the "discover" in discovery and reduce conflict going forward. ❐

Recent Significant Oregon Cases

Hon. Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

Vaughn v. First Transit, Inc., 346 Or 128 (2009)

Hall v. Douglas County, 226 Or App 276 (2009)

The plaintiff in *Vaughn* was injured while riding on an airport shuttle bus. She alleged that the bus driver negligently caused her injuries when he "unnecessarily, suddenly and unexpectedly slammed on the vehicle's brakes to avoid a small rodent in the roadway," causing plaintiff to be "thrown against a metal luggage rack, striking her shoulders and face." 346 Or at 133. Plaintiff sued the bus driver and his employer, First Transit, Inc. Defendants moved for summary judgment, contending that they were "agents" of the Port of Portland (Port), and under the Oregon Tort Claims Act (OTCA), the sole cause of action by a person injured by the tort of an agent of a public body is an action against the public body only. *Id.*, citing ORS 30.265(1). The trial court granted the motion, but the Supreme Court reversed. The court explained that, "when the OTCA makes a public body liable for tort claims based on the conduct of an 'agent' of the public body, it does not mean all tort claims involving *any* agent of a public body, but only those for which the agent's principal would be liable under common-law standards of vicarious liability." 346 Or at 140 (emphasis in original). In this case, defendants did not demonstrate that they were "agents" of the Port because the contract between the Port and First Transit "does not provide that the Port has the right to control the physical manner in which First Transit employees carried out their driving duties." *Id.* at 142.

Judge Bushong

The plaintiff in *Hall* alleged that his employer (Douglas County) violated Oregon's Whistleblower Law, ORS 659A.203, when the county imposed disciplinary sanctions after plaintiff reported that he was "repeatedly subjected to physical abuse by a coworker and was subjected to a sexually hostile work environment by a supervisor." 226 Or App at 278. Plaintiff contended that his disclosure constituted evidence of "mismanagement" that was protected by the statute. Under *Bjurstrom v. Oregon Lottery,* 202 Or App 162, 173 (2005), a whistleblower claim for disclosing "mismanagement" "must involve more than mere routine complaints regarding a public employer's policies. Instead, such a claim must relate to serious misconduct that is of public concern and that does or could undermine the employer's ability to perform its mission." *Id.* at 282. The trial court granted the county's motion for summary judgment, concluding that plaintiff's disclosures did not involve "mismanagement" within the meaning of the statute. The Court of Appeals reversed, concluding that plaintiff's allegations "do not merely concern workplace policies or practices with which plaintiff disagreed. Rather, they involve the kind of conduct that a jury could reasonably find would be of public concern and would have the potential to undermine defendant's ability to fulfill its public mission." *Id.* at 283.

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Recent Significant Oregon Cases

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Brice v. Hrdlicka, 227 Or App 460 (2009)

Clemente v. State of Oregon, 227 Or App 434 (2009)

Mason v. Mt. St. Joseph, Inc., 226 Or App 392 (2009)

In *Brice*, the Court of Appeals affirmed a judgment specifically enforcing an oral agreement for the conveyance of real property. The court concluded that, under the doctrine of part performance, a court "may enforce an agreement that would otherwise violate the statute of frauds if three requirements are met." 227 Or App at 465. "First, the party asserting part performance must provide preponderating evidence of an agreement that is clear, certain and unambiguous in its terms. Second, there must be evidence of conduct unequivocally and exclusively referable to the contract. Finally, there must be equitable grounds for enforcing the agreement, such as facts justifying the avoidance of unjust enrichment or relief from fraud." *Id.* at 466-67 (internal quotes and citations omitted).

In *Clemente*, plaintiff sued for intentional infliction of emotional distress (IIED), alleging that she was "subjected to an insensitive, mean-spirited supervisor who might have engaged in gender-based, discriminatory treatment[.]" 227 Or App at 443. The trial court granted defendant's motion for summary judgment on the IIED claim. The Court of Appeals affirmed, concluding that defendant's acts "do not qualify as an extraordinary transgression of the bounds of socially tolerable conduct" as required to prevail on an IIED claim. *Id.* at 440. The court explained that, although "deciding the contours of social norms is precisely the sort of inquiry that is appropriately undertaken by a jury, in the context of an IIED claim, the court, functioning as a gatekeeper, performs that role in the first instance." *Id.* at 442. The court noted that, "[i]n every case in which this court or the Supreme Court has allowed an IIED claim asserted in the context of an employment relationship to proceed to a jury, the employer engaged in conduct that was not only aggravating, insensitive, petty, irritating, perhaps unlawful, and mean—it also contained some further and more serious aspect." *Id.* at 442-43. In this case, the employer's treatment of plaintiff "did not amount to *aggravated* acts of *persecution* that a jury could find beyond all tolerable bounds of civilized behavior." *Id.* at 443, quoting *Hall v. The May Dept. Stores*, 292 Or 131, 139 (1981) (emphasis in original).

In *Mason*, the personal representative of Mason's estate alleged that Mason died as a result of exposure to asbestos on a construction project for General Electric Co. (GE) in 1968. Plaintiff's claims would be barred by the 10-year general negligence statute of ultimate repose (ORS 12.115) unless the statute of limitations applicable to "product liability civil actions" applied. To be timely under that statute, a "product liability civil action" must be "commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the asbestos-related disease and the cause thereof." 226 Or App at 398, quoting ORS 30.907 (2003). In order to qualify as a "products liability civil action" within the meaning of the statute, GE would have to be a "manufacturer, distributor, or seller" of asbestos-containing products. 226 Or App at 398, citing ORS 30.900. Plaintiff contended that GE was a "distributor" because it "directed Mason's employer to use" asbestos-containing products (*Id.* at 399), but the court concluded that "in making a solitary and noncommercial reuse of asbestos-containing products, GE did not act as a 'distributor' of those products." *Id.* at 400. GE manufactured asbestos-containing products (not used on the construction project), but the court concluded that "manufacturer" under the statute "does not include *any* manufacturer of the type of product at issue; it means a manufacturer of the product who is otherwise liable for its condition." *Id.* at 402 (emphasis in original). GE was not liable as a "seller" under the statute (or for acting "in concert" with a "seller") because "there is no allegation from which it can be inferred that GE sold the asbestos-containing products or that the John Doe defendants acted as GE's agent *in selling* the asbestos-containing products to the construction contractors, creating potential liability in GE as a seller." *Id.* at 405 (emphasis in original).

Procedure

McCollum v. Kmart Corporation, 228 Or App 101 (2009)

MBNA America Bank v. Garcia, 227 Or App 202 (2009)

Wilson v. Walluske Western Ltd., 226 Or App 155 (2009)

The plaintiff in *McCollum* alleged that she was injured when she slipped and fell on a "slippery foreign substance" on the floor of a K-Mart store. 228 Or App at 103. The trial court denied plaintiff's pretrial motion to compel production of reports of similar incidents, granted defendant's *in limine* motion to exclude plaintiff's testimony regarding her encounter with another customer who fell at the store that night, and denied plaintiff's request for an *in camera* review of the incident report involving that customer. At trial, a loss prevention manager for defendant testified that he was "not aware" of anyone else slipping and falling on the substance the night plaintiff was injured. The jury returned a defense verdict, and plaintiff moved for a new trial. In connection with the new trial motion, the court reviewed *in camera* a

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five-page incident report describing the slip and fall of another customer (West) at the same store 10 minutes after plaintiff fell. The trial court granted plaintiff's motion for a new trial under ORCP 64, concluding that there was an "irregularity" in the proceedings. The Court of Appeals reversed, finding that "there was nothing irregular in the process by which the parties presented, and the court decided, the motion *in limine* and the request for *in camera* inspection…It may well be that the trial court, with the benefit of hindsight based on its post-trial reading of the West incident report, wished that it had ruled differently in the first instance. But that does not render its consideration and disposition of the pretrial matters procedurally 'irregular.'" *Id.* at 113.

The plaintiff bank in *MBNA America*, sued to recover on debts incurred in defendant's name on credit cards fraudulently obtained by defendant's former wife. The bank submitted the matter to arbitration as provided in the credit card contract. Defendant, on the recommendation of his former wife, retained a man named Barlow "who falsely represented that he was an attorney and who, in the arbitration and in several federal court cases, raised a number of obviously bogus claims and defenses, the result of which was an arbitration award against the defendant, duly confirmed by a judgment in circuit court." 227 Or App at 204. The trial court then granted relief from judgment under ORCP 71 C, and the Court of Appeals affirmed. The court explained that a court "may grant relief under ORCP 71 C based on extrinsic fraud, but will deny it if the fraud is intrinsic." *Id.* at 207. The fraud perpetrated by defendant's former wife was intrinsic—and thus, did not justify relief—because "whether she fraudulently opened a credit card account in defendant's name goes to the merits of the case—that is, to whether defendant is liable for the debt incurred and is bound by the agreement to arbitrate." *Id.* at 208. However, the fraud perpetrated by Barlow was extrinsic because it "did not involve a fraudulent representation as to any matter that was at issue in the case; rather, it was a fraudulent representation that prevented defendant from having a genuine attorney present his case[.]" *Id.*

The plaintiff in *Wilson* sued his employers for disability discrimination in violation of the Americans with Disabilities Act (ADA). After a jury returned a verdict in favor of defendants, plaintiff appealed, contending that the trial court "erred when it instructed the jury that, even if plaintiff proved that discrimination was a 'motivating factor' in defendants' decision to discharge him, defendants could nevertheless prevail if they proved that they would have made the same decision even without any improper motivation—that is, that they would have fired him anyway." 226 Or App at 157. Plaintiff submitted a proposed jury instruction regarding the causation element of his ADA claim, took exception to the instruction given by the court, and argued on appeal that court's instruction—though correct as to liability for damages—was "impermissibly overbroad and implicitly misleading because it did not inform the jury that…the 'same decision anyway' defense did not preclude all liability under the ADA." 226 Or App at 162. Defendants did not assert that the assigned error was unpreserved for appellate review, but the Court of Appeals stated that it was "enjoined, as a prudential matter, to determine independently whether plaintiff adequately raised and preserved his present contention before the trial court." *Id.* The court then declined to address plaintiff's challenge to the trial court's causation instruction as unpreserved. The court explained that, under ORCP 59 H, to preserve instructional error, a party "must provide the trial court with an explanation of his or her objection that is specific enough that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted." *Id.* at 163, quoting *State v. Wyatt*, 331 Or 335, 343 (2000). Plaintiff's exception was insufficient because it "did not alert the trial court to the alleged defect in the causation instruction that plaintiff urges on appeal." *Id.*

Miscellaneous

State v. Gaines, 346 Or 160 (2009)

In *Gaines*, the Supreme Court addressed whether the 2001 amendments to ORS 174.020 changed the methodology for interpreting statutes adopted in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993). The court concluded that the first step "remains an examination of text and context." 346 Or at 171. The court went on that, "contrary to this court's pronouncement in *PGE*, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step—consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis." *Id.* at 172. The court explained that legislative history "may be used to confirm seemingly plain meaning and even to illuminate it; a party also may use legislative history to attempt to convince a court that superficially clear language actually is not so plain at all—that is, that there is a kind of latent ambiguity in the statute." *Id.* But "[w]hen the text of a statute is truly capable of only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different." *Id.* at 173. ❐

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