Oregon State Bar

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In This Issue…

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"Through a Glass, Darkly"[1] or the Lawyer Who Ends Up a Client[2]

By Janet Lee Hoffman & Sarah Adams
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"[A]fter a case has been tried and the evidence has been sifted […], a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay."[3]

As litigators we pride ourselves on our ability to take the "sand and clay" we are initially given and develop it to persuade others that our client's position is correct. We view it as our professional duty to use our skill and credibility on another person's behalf. Ultimately, through passion and dedication we end up believing in our client's case, even when our friends and colleagues express skepticism.

The difficulty lawyers face is to know when to step back and question the facts and circumstances when immersed in the work of zealous advocacy. Of course, many lawyers say, "If I have to investigate my own clients before acting on their behalf, I don't want them as clients." Or, put another way, "I am entitled to trust my client and what he has told me."

These sentiments are understandable. But, without such investigation, we risk that the opinion letter we draft, the affidavit we provide, the demand letter we

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FROM THE MANAGING EDITOR

OTHER USES OF DEPOSITIONS AT TRIAL

BY
DENNIS RAWLINSON
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Early in our practice, we master the use of the deposition transcript to impeach the testimony of the witnesses we are examining at trial by reading their prior inconsistent statements at deposition. The mechanics of this use of the deposition transcript are covered regularly in deposition and evidence seminars and treatises.

All of us learn, over time, that there are other uses of the deposition transcript at trial. Three effective uses are (1) as a source for admissions, (2) to refresh recollection, and (3) to introduce prior testimony.

1. Source for Admissions

Assume that the plaintiff, a male employee, has had a sexual relationship with his female manager, that he has boasted about the relationship to other employees, and that the manager has fired him for being unwilling to continue the relationship and for being indiscreet. Plaintiff has filed a wrongful termination action naming the employer and the manager as defendants.

Dennis Rawlinson

The manager has two supervisors, Supervisors A and B. The manager has admitted to Supervisor A that the reason for terminating the employee was his indiscretion. Although the examiner does not know it, the manager has not made a similar admission to Supervisor B.

At Trial, the examination of Supervisor B proceeds as follows:

Q: The reason Ms. Manager fired Mr. Employer was simply because he was not discreet about their sexual relationship, isn't it?

A: That may have been a consideration. After all, there were a lot of rumors that such a relationship existed.

By Defendant's Counsel:

Your Honor, may I ask some questions in aid of objection?

By the Court:

You may.

By Defendant's Counsel:

Q: Mr. Supervisor B, you don't know whether a sexual relationship existed or not, do you?

A: I do not.

Q: You don't have any personal knowledge as to why plaintiff employee was fired, do you?

A: No, I don't.

By Defendant's Counsel:

Objection. Move to strike the answer as speculative.

By Plaintiff's Counsel:

May I offer an exhibit, Your Honor?

By Defendant's Counsel:

May we approach, Your Honor?

By Plaintiff's Counsel:
At Sidebar:

Your Honor, I offer Exhibit 25, which is an excerpt from the deposition of Supervisor A, who was at all relevant times one of Ms. Manager's supervisors. At page 68, lines 4-28, Supervisor A says, "I know Ms. Manager well and I believe she had to fire Mr. Employee because he failed to keep their sexual relationship discreet and that threatened to hurt her chances for further promotion." I am willing to withdraw my question to Supervisor B and instead publish page 68, lines 4-28, to the jury. Supervisor A is a managing agent for defendant employer, and his statement in deposition is admissible to Fed R Evid 801(d)(2)(A) (see also OEC 801(4)(b)(A)).

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By Defendant's Counsel:

Your Honor, Supervisor A's statement is an opinion and should not be admissible.

By the Court:

Admissions are not governed by the rules prohibiting opinions. The statement may be read to the jury.

Assuming that Supervisor A is not available to be called as a witness at the time of trial, reading the admission at this point during the examination of Supervisor B may be an effective method of reemphasizing a point to the jury. If you plan to call Supervisor A and he will admit that the statement was made without impeachment by the deposition transcript, you may be able to make the point twice. If Supervisor A will not admit the statement without being impeached with the deposition transcript, the judge is likely to allow the transcript to be read a second time, even if defendant's counsel is prudent and quick enough to interject an objection based on cumulative evidence.

If you don't like the way the deposition transcript reads, but you are confident that you can get the admission at trial from Supervisor A, then prior to trial you may want to submit a request for admission that states the admission clearly (and, if admitted, the request can be read to the jury and, if denied, a motion for attorney fees can be submitted at trial).

2. Refreshing Recollection

Often, a friendly or even an adverse witness simply has forgotten facts that were testified to during an earlier deposition. When the witness's recollection needs to be refreshed, it can be accomplished by simply handing the deposition transcript to the witness.

Q: Ms. Manager, when was the first time you had sexual relations with plaintiff employee?
A: I don't remember.
Q: Let me show you page 12, lines 9-15, of your deposition transcript. Would you please read that to yourself?
A: Certainly.
Q: Have you finished reading that section of your deposition?
A: Yes.
Q: Based on your review of the deposition transcript, does that refresh your recollection as to when you first had sexual relations with plaintiff employee?
A: Yes, it was Halloween, October 31, 1992.

3. Use as Prior Testimony

Assume that after attempting to refresh defendant Ms. Manager's recollection with the use of her deposition, the attempt fails.

By Plaintiff's Counsel:

Your Honor, I would like to offer Exhibit 20, which is a copy of page 12, lines 9-15, of the deposition of Ms. Manager, and either publish it to the jury or ask the court's permission to read it to the jury.

By Defendant's Counsel:

Objection, hearsay.

By Plaintiff's Counsel:

Your Honor, defendant Ms. Manager has testified to lack of memory. Ms. Manager is therefore unavailable within the meaning of Fed R Evid 804(a)(3) (see also OEC 804(1)(c)). This portion of the deposition qualifies as former testimony pursuant to Fed R Evid 804(b)(1) (see also OEC 804(3)(a)) and is therefore an exception to the hearsay rule.

By the Court:

The exhibit will be received, and you may publish it by reading the questions asked and the answers given at the time of the deposition.

Although in the above scenarios counsel attempted to refresh the recollection of the witness before offering the deposition transcript into evidence, this is not necessary. The deposition could have also been offered pursuant to the recorded recollection exception to the hearsay rule (Fed R Evid 803(5)) (*see also* OEC 803(5)). Former testimony is perhaps a preferable approach, however, because recorded recollection may only be read to the jury, whereas former testimony may be received as an exhibit.

The tools of former testimony, recorded recollection, refreshing recollection, and admissions offer a number of variations to get exceptions to the hearsay rule into evidence. A little imagination and planning can help you to use these tools to maximize the impact of the evidence. ❐

Disqualification in Oregon State and Federal Courts

By Mark J. Fucile
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Disqualification is a long-standing tool available to courts to regulate the professional conduct of the lawyers appearing before them. *See, e.g., Duke v. Franklin*, 177 Or 297, 305, 162 P2d 141 (1945) (discussing a disqualification motion filed in the trial court). It is a remedy that flows both from courts" inherent authority over counsel and from their ability to enforce the rights of the parties to a proceeding. *See generally State ex rel. Bryant v. Ellis*, 301 Or 633, 636-39, 724 P2d 811 (1986). Disqualification is a blend of court-made procedural law and substantive law in the form of the Rules of Professional Conduct.[1] This article surveys both elements of disqualification law in Oregon's state and federal courts.[2]


Mark Fucile

Procedural Law

Although courts in theory can disqualify counsel *sua sponte*, in practice disqualification is much more commonly sought by one of the parties by way of a motion. The procedural rules governing motion practice generally in the court concerned apply with equal measure to disqualification. *See, e.g., Sabrix v. Carolina Cas. Ins. Co.*, No. CV-02-1470-HU, 2003 WL 23538035 at *1 (D Or Jul 23, 2003) (unpublished) (moving party in disqualification bears the burden of proof); *Columbia Forest Products, Inc. v. Aon Risk Services, Inc. of Oregon*, 164 Or App 586, 590, 993 P2d 820 (1999) (ordinarily no attorney fee recovery on successful motion to disqualify). In addition, however, both state and federal courts have fashioned three rules specific to disqualification through decisional law addressing standing, waiver and appeal.

Standing. Generally, the moving party on a disqualification motion must be either a current or former client of the lawyer or law firm against whom the motion is directed. *See State ex rel. Bryant v. Ellis*, 301 Or at 638-39; *Kasza v. Browner*, 133 F3d 1159, 1171 (9th Cir 1998).[3] Exceptions occur when the participation of the lawyer or law firm involved would affect the rights of other parties to the case. *State ex rel. Bryant v. Ellis*, 301 Or at 639 (discussing this alternative basis generally); *see, e.g., Richardson-Merrell, Inc. v. Koller*, 472 US 424, 426-29, 105 S Ct 2757, 86 L Ed2d 340 (1985) (pretrial misconduct resulting in disqualification). Common examples of the exception that are outlined in greater detail later are the lawyer-witness rule (RPC 3.7) and discovery violations that improperly invade an opponent's attorney-client privilege or work product (RPC 4.4).

Waiver. "Waiver" is sometimes used in its classic ethics sense that a client has executed a binding written waiver of an otherwise disqualifying conflict. *See, e.g., Unified Sewerage Agency of Washington County v. Jelco*, 646 F2d 1339, 1345-46 (9th Cir 1981) (law firm argued that client had consented to adverse representation); *see also PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App at 280-88 (former lawyers and their new firm argued that agreement with former client over permissible adverse representations controlled). More commonly, however, "waiver" in the disqualification context is used in its classic procedural sense of the implied abandonment of a known right through delay or other conduct inconsistent with that right. Waiver, therefore, turns largely on the particular facts of an individual case. *Contrast Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F2d 85, 87-88 (9th Cir 1983) (two year delay held waiver) *with Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F3d 1354, 1355 (9th Cir 1998) (two year delay held not waiver). As with other affirmative

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defenses, the party asserting waiver bears the burden of proof on that issue. *See Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F2d 435, 442-43 (9th Cir 1983).

Appeal. Trial court orders granting or denying motions for disqualification are not immediately appealable. *See State ex rel. Bryant v. Ellis*, 301 Or at 640 (["[Normally appeal after judgment will be an adequate remedy[.]"); *Richardson-Merrell, Inc. v. Koller*, 472 US at 440 (where the trial court had ordered disqualification); *Firestone Tire & Rubber Co. v. Risjord*, 449 US 368, 379, 101 S Ct 669, 66 L Ed2d 571 (1981) (where the trial court had denied disqualification). Mandamus relief may be available prior to entry of a final judgment at the discretion of the appellate court involved. *See, e.g., State ex rel. Bryant v. Ellis*, 301 Or at 640; *Unified Sewerage Agency of Washington County v. Jelco*, 646 F2d at 1342-44. Even though in theory available, mandamus remains a discretionary remedy that is used sparingly by both the Oregon Supreme Court and the Ninth Circuit.[4]

Substantive Law

ORS 9.490(1) makes the RPCs binding on all lawyers (both those licensed in Oregon and those admitted *pro hac vice*) appearing in Oregon's state courts. Similarly, District of Oregon Local Rule 83.7(a) adopts the Oregon RPCs as its governing professional rules. Oregon's RPCs contain a choice-of-law provision and the result most often is that Oregon's RPCs typically provide the substantive law on whether an ethics violation warranting disqualification has occurred. The most common substantive grounds advanced by parties seeking disqualification are conflicts, typically current or former conflicts. On occasion, however, other asserted ethics violations form the basis for disqualification motions.[5]

Choice-of-Law. RPC 8.5(b) controls choice-of-law issues and in litigation matters generally finds that Oregon's law as the forum governs unless the conduct at issue or the predominant effect of that conduct occurred in another state. *See, e.g., Philin Corporation v. Westhood, Inc.*, No. CV-04-1228-HU, 2005 WL 582695 at *9-*10 (D Or Mar 11, 2005) (unpublished) (applying an earlier but similar version of the choice-of-law rule formerly found in the Oregon State Bar Rules of Procedure to cross-country lawyer conduct at issue in a disqualification motion). RPC 8.5(b) uses the same general approach to assess controlling law for lawyer civil liability outside the regulatory context. *See generally Spirit Partners, LP v. Stoel Rives LLP*, 212 Or App 295, 157 P3d 1194 (2007).

Conflicts. Asserted current or former client conflicts are by far the most common grounds for seeking disqualification of opposing counsel. *See, e.g., State ex rel. Bryant v. Ellis*, 301 Or 633 (seeking disqualification for asserted current client conflict); *Collatt v. Collatt*, 99 Or App 463, 782 P2d 456 (1989) (affirming disqualification for former client conflict); *Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, No. CV-02-818-HA, 2002 WL 31972159 (D Or Dec 5, 2002) (unpublished) (assessing both). Current, multiple client conflicts are governed by RPC 1.7. Former client conflicts, in turn, are governed by RPC 1.9. RPC 1.10 generally imputes one firm lawyer's conduct to the entire firm under the "firm unit rule."

With both asserted current or former client conflicts, the moving party must first show that there was, in fact, an attorney-client relationship between that party and the lawyer or law firm against which disqualification is sought. In Oregon, that determination is a matter of state substantive decisional law rather than the RPCs. The leading case on that point is *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). Under *Weidner*, the test for determining whether an attorney-client relationship exists (or existed) is twofold. The first is subjective: Does the client subjectively believe that the lawyer represents the client? The second is objective: Is that subjective belief objectively reasonable under the circumstances? Both elements of the test must be met for an attorney-client relationship to exist.

Because current clients have very broad rights to prevent "their" lawyer from opposing them on any other matters, disqualification motions based on asserted current client conflicts usually turn on whether a current attorney-client relationship exists. *See, e.g., Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 at *1-*2. Disqualification motions based on alleged former client conflicts, by contrast, usually focus on whether, in the vernacular of RPC 1.9, the current matter is the "same or substantially related" to one the lawyer (or the law firm) handled for the former client. *See, e.g., PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App at 278-288; *Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 at *3.

Other Grounds. Although less common, disqualification motions are also sometimes predicated on other asserted violations of the professional rules, such as: violations of the lawyer-witness rule (RPC 3.7), *see, e.g., In re Kluge*, 335 Or 326, 329-331, 66 P3d 492 (2003) (lawyer was disqualified by the trial court under the lawyer-witness rule in a case underlying a subsequent disciplinary proceeding); and discovery violations, particularly those that improperly intrude on opposing counsel's attorney-client privilege or work product protection (RPC 4.4), *see* OSB Formal Ethics Op. 2005-150 (2005) at 2, discussing *Richards v. Jain*, 168 F

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Supp2d 1195 (WD Wash 2001), where a law firm was disqualified for the unauthorized acquisition and use of an opponent's privilege materials. *See also State v. Riddle*, 330 Or 471, 980, 8 P3d 980 (2000) (discussing the scope of permissible contact with an expert who was formerly retained by an opposing party).

Summing Up

Oregon's courts, like their counterparts nationally, have noted the tension between a party's right to counsel of its choice with the responsibility to supervise the professional conduct of the counsel appearing before them. *See, e.g., Smith v. Cole*, No. CV-05-372-AS, 2006 WL 1207966 (D Or Mar 2, 2006) at *1-*2 (magistrate's findings), 2006 WL 1280906 (D Or Apr 28, 2006) (district judge's order) (both unpublished). When they have concluded that the lawyers' conduct warranted the latter taking precedence over the former, they have used the unique blend of procedural and substantive law to disqualify the counsel involved. ❐

Endnotes

1 In the criminal context, Sixth Amendment considerations also apply.

2 Disqualification closely parallels actions for injunctions by clients (current or former) against their lawyers (current or former) to prevent the lawyers from handling matters adverse to them or assisting with such matters or the revocation of *pro hac vice* admissions based on matters that might have alternatively been framed in a motion to disqualify. *See, e.g., PGE v. Duncan, Weinberg, Miller & Pembroke, P.C.*, 162 Or App 265, 986 P2d 35 (1999) (former client sought injunction against former lawyers and their new law firm); *Tinn v. EMM Labs, Inc.*, 556 F Supp2d 1191 (2008) (seeking to disqualify a lawyer who was not counsel of record from acting as a witness or otherwise assisting one of the parties); *Cole v. U.S. District Court*, 366 F3d 813 (9th Cir 2004) (*pro hac vice* admission revoked in connection with disqualification proceedings).

3 If a current or former client is not a present party to the litigation concerned, intervention is permitted at the discretion of the trial court for the limited purpose of seeking disqualification. *See, e.g., Oxford Systems, Inc. v. CellPro, Inc.*, 45 F Supp2d 1055 (WD Wash 1999); *Commercial Development Co. v. Abitibi-Consolidated, Inc.*, No. C07-5172RJB, 2007 WL 4014992 (WD Wash Nov 15, 2007) (unpublished).

4 In federal cases that would be subject to appellate review by the Federal Circuit, such as patent matters, mandamus relief must also be sought in that court. *Picker International, Inc. v. Varian Associates, Inc.*, 869 F2d 578, 580-81 (Fed Cir 1989). However, because disqualification is a procedural matter not unique to patent cases, the Federal Circuit would apply the law of the Ninth Circuit to a mandamus petition seeking review of a disqualification order from the District of Oregon. *Id.*; *accord Atasi Corporation v. Seagate Technology*, 847 F2d 826, 829 (Fed Cir 1988).

5 Due to varying elements and standards of proof, disqualification findings do not constitute issue preclusion in the event of later Oregon State Bar regulatory proceedings. *See, e.g., In re McMenamin*, 319 Or 609, 879 P2d 173 (1994) (Oregon Supreme Court dismissed disciplinary charges against lawyer who had earlier been disqualified for same conduct).

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Summary Judgment Motions on Discovery-Rule Claims: *An Exercise in Futility?*

By Stephen F. Deatherage
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Since the Oregon Supreme Court first endorsed the discovery rule in 1966,[1] the rule has judicially evolved through a series of logical forward steps. For example, although the rule initially applied only to medical malpractice cases, it has gradually evolved to include most—and arguably, all—tort claims. This means that it's virtually certain that a tort-claim litigant will invoke the discovery rule if a statute of limitations defense is raised.

Stephen Deatherage

What it means to have "discovered" a claim has also evolved. At first, the Supreme Court held that a litigant discovers a claim when it knows or should know that a tort was committed. Later, the Supreme Court clarified that a litigant is deemed to have discovered a claim when it knows or should know facts necessary to support a "right to judgment." Next, the Supreme Court explained that discovery occurs only when a litigant knows or should know facts that would make a reasonable person aware of a "substantial possibility" that a claim exists. Finally, the Court of Appeals considered the meaning of "substantial possibility," and concluded that it means "high degree of certainty."

When the discovery rule is considered in the context of summary judgment motions, the Court of Appeals has held that a trial court cannot rule that a claim is time-barred unless *every rational juror* would be compelled to reach that conclusion—although in a recent opinion considering the issue in the context of a motion for directed verdict, the Supreme Court phrased the issue in terms of what a *reasonable jury* would be compelled to conclude.

Together, the Supreme Court and Court of Appeals have created a summary judgment standard for discovery-rule cases that is almost impossible to meet. Under that standard, a trial court can enter summary judgment on a discovery-rule claim only if a reasonable jury would be compelled to conclude that the litigant had a high degree of certainty about facts that would support its right to judgment by the relevant date.

This article discusses the judicial evolution of what "discovery" means, and how that evolution has made summary judgment motions—in the author's opinion—an exercise in futility in most discovery-rule cases.

A. The early development of Oregon's discovery rule.

The Supreme Court first endorsed the discovery rule in *Berry v. Branner,* 245 Or 307 (1966), a medical malpractice case. In *Berry,* the Supreme Court held that although plaintiff had a claim when her doctor left a surgical needle in her body, the statute of limitations didn't begin to run on that claim until she discovered or reasonably should have discovered the "tort committed upon her person by defendant." *Id.* at 316. The Court pointed

out that the rationale for this "discovery rule" is simple: "To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law." *Id.* at 312.[2]

Twelve years later, the Supreme Court explained—in a products liability case[3]—that a litigant is deemed to know that a tort was committed when a reasonable person would associate "his symptoms with a serious or permanent condition and at the same time perceive [ ] the role" defendant played in causing that condition. *Schiele v. Hobart Corp.,* 284 Or 483, 490 (1978). In other words, under *Schiele,* the statute of limitations doesn't begin to run on a discovery-rule claim until a reasonable person would become aware of the causal relationship between defendant's conduct and the resulting harm.

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B. In the early 1990s, the Supreme Court clarified that a litigant discovers a claim when it knows or should know facts that would make a reasonable person aware of a "substantial possibility" that a "right to judgment" exists.

The next developments in the meaning of the term "discovery" occurred in the early 1990s—when the Supreme Court made two significant changes to the discovery rule. First, the Court held that a litigant doesn't discover a claim until it knows or should know "every fact which it would be necessary for [the litigant] to prove . . . in order to support [its] right to judgment." *Stevens v. Bispham,* 316 Or 221, 227 (1993).[4] Second, the Court clarified that discovery occurs only when a litigant learns "facts which would make a reasonable person aware of a substantial possibility" that a claim exists. *Gaston v. Parsons,* 318 Or 247, 256 (1994).

Taken together, these changes mean that the statute of limitations begins to run on a discovery rule claim only when a litigant knows or should know about facts that would make a reasonable person aware of a "substantial possibility" that a "right to judgment" exists. So from the perspective of discovery-rule-claim litigants, the *Stevens* and *Gaston* decisions marked a welcome shift in evaluating when discovery-rule claims are "discovered."

Since *Stevens* and *Gaston* have guided recent discovery-rule jurisprudence, a brief examination of those decisions will help the reader understand the subsequent judicial evolution of the rule.

The first case involved a plaintiff who took his criminal-defense attorney's advice and pleaded no contest to various criminal charges. *Stevens,* 316 Or at 225-26. That turned out to be a bad idea. Soon after plaintiff began serving his sentence, another person confessed to the crimes and plaintiff's convictions were vacated. So plaintiff sued his attorney, arguing that he would have been acquitted or the charges would have been dismissed if the attorney had represented him adequately. *Id.* at 226.

The criminal-defense attorney moved for and was granted summary judgment based on a statute of limitations defense. 316 Or at 226. On appeal, the Supreme Court noted that it had previously decided that a litigant discovers a claim only when it knows or reasonably should know "every fact which it would be necessary for [the litigant] to prove…in order to support [its] right to judgment." *Id*. at 227 (quoting). Since plaintiff hadn't been harmed until his convictions were vacated (i.e., he had no "right to judgment" before then), his lawsuit was timely and "must be defended on the merits." *Id.* at 238-39.

In the second case, plaintiff received an injection to treat muscle spasms in his lower body. *Gaston,* 318 Or at 251. Soon after receiving the injection, plaintiff noticed numbness and loss of function in his left arm (his only functioning limb), but the doctor who gave him the injection told him that those problems were temporary and that he would regain the use of his arm in six months to two years. Three and one-half years later, plaintiff filed a malpractice claim against the doctor. *Id.*

The doctor moved for summary judgment, arguing that the claim was barred by the two-year statute of limitations. The trial court agreed, and dismissed the claim. But on appeal, the Court of Appeals reversed, and the Supreme Court affirmed that reversal. 318 Or at 250. The Supreme Court concluded that whether a litigant should have discovered its claim more than two years before filing suit depended on whether it knew or "should have known facts which would make a reasonable person aware of a *substantial possibility*" that the elements of a claim existed. *Id.* at 256 (emphasis added). The Court explained that a litigant need not know each element of its claim with absolute certainty, but it must have more than a "mere suspicion" in order to have discovered the element. *Id.* at 255-56.

…the statute of limitations begins to run on a discovery rule claim only when a litigant knows or should know about facts that would make a reasonable person aware of a "substantial possibility" that a "right to judgment" exists.

C. In 2005, the Oregon Court of Appeals interpreted *Gaston's* "substantial possibility" threshold to require a "high degree of certainty" about facts necessary to support a "right to judgment."

According to *Gaston*, the requisite level of certainty needed for a litigant to discover a claim is awareness of a "substantial possibility" that the relevant elements exist. 318 Or at 256. In 2005, the Court of Appeals addressed—in an 8-2 *en banc* opinion—what "substantial possibility" means in the context of discovery rule cases; in other words, how much certainty the available facts must provide before it can be said that a reasonable person "should have" discovered a claim. *Keller v. Armstrong World Indus., Inc.,* 197 Or App 450 (2005), *aff'd,* 342 Or 23 (2006). The Court of Appeals concluded that "substantial possibility" is a demand-

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ing threshold that is crossed only when a litigant learns—with a "high degree of certainty"—about facts needed to support its "right to judgment." *Id.* at 463.

So, in light of *Keller's* interpretation of the meaning of "substantial possibility," *Gaston's* holding can be restated as follows: A discovery rule statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware *to a high degree of certainty* that each of the three elements (harm, causation, and tortious conduct) exists.

This "high degree of certainty" threshold avoids forcing potential plaintiffs to choose between two evils: sanctions, attorney fees, and civil liability if they file too early[5]—or forfeiture of their legal rights if they file too late. As such, it's a logical forward step in the continuing evolution of Oregon's common-law discovery rule.

D. Under the "high degree of certainty" threshold, whether a litigant "should have" discovered a claim sooner should rarely be decided on summary judgment.

(1) Discovery rule issues are generally left to the jury.

Trial courts traditionally leave discovery rule issues to the jury because questions regarding reasonableness and diligence are highly fact-intensive and the facts are rarely undisputed:

> Though the summary judgment procedure is freely available in all types of litigation, it is obvious that some kinds of cases lend themselves more readily to summary adjudication than do others. It usually is not feasible to resolve on motion for summary judgment cases involving questions such as when knowledge is discoverable by reasonable diligence of plaintiff and concealment by defendants.

Forest Grove Brick Works, Inc. v. Strickland, 277 Or 81, 87-88 (1977); *see also Gaston,* 318 Or at 256 ("Whether a reasonable person of ordinary prudence would be aware of a substantial possibility of tortious conduct is a question of fact"); *Peterson v. Multnomah County School Dist.,* 64 Or App 81, 85 (1983) (fact question as to whether or not plaintiff discovered or should have discovered claim more than two years before filing suit).

In other words, it's "seldom, if ever, [ ] possible for a judge to determine summarily when the injured person . . . became fully aware that he or she had been victimized. An appraisal of the full testimony is generally called for." *Strickland,* 277 Or at 88 n 9. This is the rule because resolution of discovery rule issues usually depends on inferences that a litigant should have known about a claim at a specific time. But those inferences can be drawn only by the jury and are not an appropriate basis for summary judgment, where all reasonable inferences are made in the non-moving party's favor. *See, e.g., Jones v. General Motors Corp.,* 325 Or 404, 420 (1997).

(2) Summary judgment can properly be granted on a discovery-rule claim only if a reasonable jury would be compelled to conclude that the litigant had a high degree of certainty about facts that would support each element of its claim more than two years before filing suit.

The *Keller* case involved a plaintiff who worked in an auto repair shop in the early 1960s—where he was exposed to asbestos while doing muffler and exhaust work. In the 1980s, after he began experiencing shortness of breath, a doctor told plaintiff that asbestos "might" be the cause of his symptoms, but also said that exhaust fumes and smoking could be the culprits. Five years later, in 1991, plaintiff saw another doctor, who concluded that he had "mild pulmonary fibrosis, possibly related to asbestos exposure." Later that year, plaintiff applied for social security disability benefits, stating that the cause of his lung problems was exhaust fumes, dust, and asbestos. 197 Or App at 454.

In 1994, plaintiff resubmitted his claim for social security benefits, stating that his shortness of breath had worsened and that a doctor had advised him that he should stop working because of his "asbestos lungs." The next year, plaintiff filed a workers' comp claim, asserting that he had "asbestos lung" from asbestos exposure. 197 Or App at 455-56.

Then, in 2000, a new doctor concluded that plaintiff had asbestosis.

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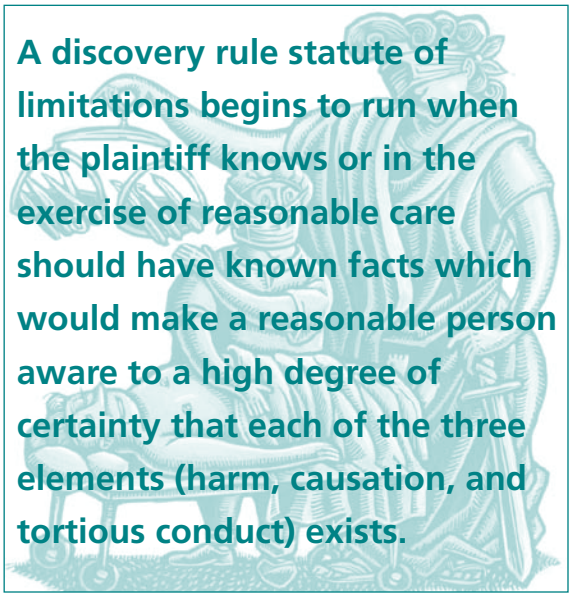

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Later that year, plaintiff sued multiple defendants—two of whom moved for summary judgment, arguing that plaintiff's claims were barred by the two-year statute of limitations. The trial court granted those motions, but the Court of Appeals reversed. 197 Or App at 456, 470.

In reaching its decision, the Court of Appeals concluded that although "a reasonable juror *could* conclude that plaintiff had access to sufficiently certain facts to make him aware of a substantial possibility that his [injury] was caused by asbestos," the court did not agree "that a reasonable juror would be *compelled* to reach that conclusion." 197 Or App at 470 (emphasis in original). Summary judgment was therefore inappropriate.

In *Johnson v. Mult. Co. Dept. Cmty. Justice,* the Court of Appeals went one step further, holding that discovery rule issues may be resolved on summary judgment "only if *every rational juror,* asked whether plaintiff should reasonably have known [by the relevant date] that defendant was probably responsible for her [harm], would answer in the affirmative." 210 Or App 591, 597-98 (2007), aff'd, 344 Or 111 (2008) (emphasis added).

Finally, in *T.R. v. Boy Scouts of America,* the Supreme Court clarified that the discovery rule should be analyzed from the perspective of a reasonable *jury.* 344 Or 282 (2008). In *T.R.,* plaintiff sued the City of The Dalles for abuse he had suffered by a city police officer. After the trial court denied the city's directed verdict motion, "the specific question presented [on appeal was] whether the only conclusion that a reasonable jury could have reached was that plaintiff's knowledge in 1996 should have alerted him to the possibility that the city played a causal role in his abuse, that a reasonable person in plaintiff's circumstances would have investigated that possible role, and that such an investigation would have disclosed facts indicating the city's role." 344 Or at 296. The Supreme Court noted, "Although we agree that a reasonable jury *could* have reached that conclusion, we do not agree that that was the *only* conclusion a reasonable jury could have reached." 344 Or at 297 (emphasis in original).

E. Conclusion.

Under *Stevens* and *Gaston,* as interpreted by *Keller, Johnson,* and *T.R.,* Oregon trial courts can enter summary judgment on discovery-rule claims only if a reasonable jury would be compelled to conclude that the litigant had a high degree of certainty about facts that would support its right to judgment before the statute of limitations cut-off date. In the author's opinion, that standard precludes summary judgment in virtually every case where the discovery rule applies.

But given the Supreme Court's starting point in 1966—where it dismissed as "patently inconsistent and unrealistic" the notion that a claim could be time-barred before a litigant even knows of it—the gradual evolution of Oregon's judicially created discovery rule is not surprising. Whether it creates as many problems as it solves, however, is a question for another day. ❐

Endnotes

1 Although the Oregon Legislature adopted a discovery rule in connection with fraud claims in 1919, this article only discusses the *judicially created* discovery rule.

2 The Supreme Court again relied upon this rationale for the discovery rule in *T.R. v. Boy Scouts of America,* 344 Or 282, 291 (2008).

3 Although *Berry* involved a medical malpractice claim, the Supreme Court based its decision on its interpretation of the word "accrued"—found at ORS 12.010. The Court concluded that the Oregon Legislature, by using the term "accrued" in ORS 12.010, meant to incorporate a discovery rule. *Berry,* 245 Or at 315-16; *Gladhart v. Oregon Vineyard Supply Co.,* 332 Or 226, 231 (2001). So, since ORS 12.010 says that claims must be "commenced within the periods prescribed in this chapter, after the [claim] shall have accrued," a persuasive argument can be made that any claim with a statute of limitations set out in ORS Chapter 12 is subject to a discovery rule. *See, e.g., U.S. Nat'l Bank v. Davies,* 274 Or 663, 669 n 1 (1976) (malpractice); *Oregon Life and Health Ins. Guar. Ass'n v. Inter-Regional Financial Group, Inc.,* 156 Or App 485, 492 (1998) (negligence and breach of fiduciary duty); *Allen v. Lawrence,* 137 Or App 181, 189 (1995) (negligent misrepresentation).

4 The Supreme Court first quoted the "right to judgment" language in *U.S. Nat'l Bank v. Davies,* 274 Or at 666-67 (quoting Michael Franks, *Limitation of Actions* 11 (1959)). But it first adopted that language as Oregon common law in *Stevens v. Bispham.*

5 *See* ORCP 17 (authorizing sanctions for premature or insufficiently supported filings); ORS 20.105 (requiring trial courts to award attorney fees to a defendant "upon a finding . . . that [plaintiff had] no objectively reasonable basis for asserting the claim"); *Roop v. Parker NW Paving Co.,* 194 Or App 219, 237-38 (2004) (noting possible civil liability for filing claims without an objectively reasonable basis).

20 Tips for Trial:

A List of Little Things That Can Make a Big Difference

By Eric L. Dahlin
Davis Wright Tremaine LLP

Civil litigators are well aware of reports of the "death of the civil trial." However, even though the number of civil trials is dwindling, they are not dead yet and thus occasionally civil litigators still have an opportunity to try a case. Because those trials are few and far between for most civil litigators, it helps to have reminders about some of the bumps in the trial road to help us avoid those obstacles.

Eric Dahlin

This article is not intended to address substantive issues of trying a case. Rather, it is intended to be a non-comprehensive list of some of the little things that we can easily forget (or never learned in the first place) that go along with trying cases, simply because the civil litigators amongst us are not trying jury trials at a very high rate. Many, if not all, of the items on the following list are seemingly intuitive and elementary, but sometimes the most basic reminders are the most helpful.

Bring an extension cord. This is a shorthand way of saying "don't assume everything you need will be available in the courtroom; instead, assume you will have an empty room and you need to furnish everything you need for your presentation." Think about everything you might need and make sure you bring it with you, or confirm the court has it. The best Power Point to accompany an opening statement or the most impressive Trial Director cross-examination is going to be for naught if you don't have a way to power your machines. In a recent trial I had out of state, I thought we were fully prepared when my partner asked if we had an extension cord that could be used to power our laptop and projector. The need for an extension cord hadn't even crossed my mind; I just assumed there would be a place at counsel table to plug in our electronics but it turned out that there weren't any outlets near counsel table. Luckily, we brought the extension cord.

Carry a Dictaphone. You never know when a killer question to ask on cross examination or an excellent point to make in closing argument may pop into your head while you are driving, exercising, taking a shower or as you are falling asleep. If you have a Dictaphone within reach at all times you can record that thought and not risk forgetting it.

Sweat the small stuff. It is obviously crucial to be prepared about the law and the facts of your case, but it is also important to be prepared about the so-called "small stuff" that goes into the trial, such as bringing an extension cord, ensuring witnesses know when and where to be, making sure you have enough clean clothes so you don't have to visit the dry cleaner mid-trial, etc. Considering how much work goes into the substantive portion of a trial, it would be a shame to have that hard work undone by not also preparing for the small stuff and have substantive problems (e.g. witnesses

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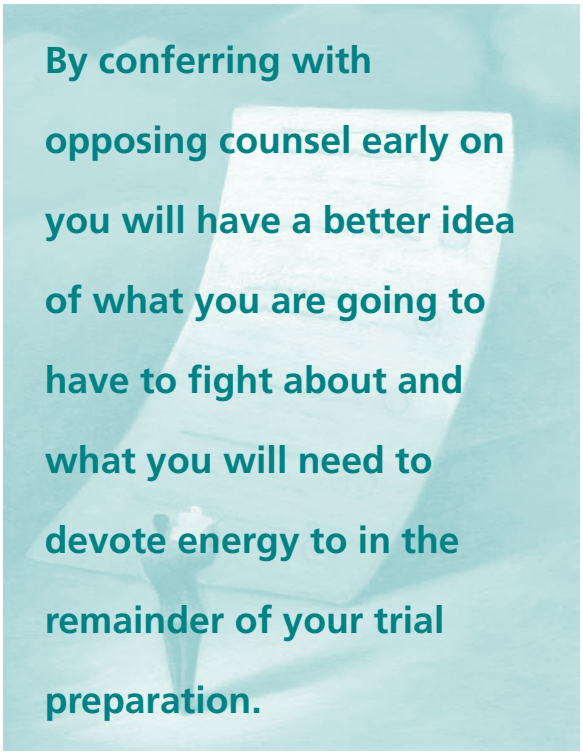
not showing up on time), or having the jury be distracted by something (e.g. by your shoes that are in desperate need of polishing or a witness who did not dress appropriately) or have you be distracted (e.g. if you forgot to make arrangements to have someone cover some of your other cases while you were in trial or you forgot to pay your credit card bill on time). You may want to continually update a list of everything you can possibly think of that might need your attention before or during trial and then methodically work on dealing with each item and checking them off the list.

Don't underestimate the amount of time trial preparation takes. A trial takes on its own life and the amount of work seems to grow exponentially as trial approaches. Don't assume you will have time in the days (or even weeks) before trial starts to put together from scratch exhibit lists, jury instructions, legal motions, etc., because invariably things pop up that will demand your time and attention (emergencies on other cases, personal and family issues, responding to the other side's unexpected last-minute filings). The sooner you can start preparing for the trial itself, the better. Don't assume any of this will be quick and easy or that you will be able to cut and paste what you need from a prior case because you may not be able to find anything on point. If you wait until trial is fast approaching to start on these, you likely won't have enough time.

Confer with opposing counsel. Confer with opposing counsel well ahead of time on jury instructions, the verdict form, exhibits and any potential problems in the mechanics of trying the case, even if not required by the local rules. By conferring with opposing counsel early on you will have a better idea of what you are going to have to fight about and what you will need to devote energy to in the remainder of your trial preparation. If you wait until the first day of trial to have any meaningful discussions about jury instructions, verdict form and other key legal issues, you increase the chance that you will not get the instructions and verdict form that you want. If you have an unnecessarily large number of legal matters to deal with at the opening of trial, many of which you could have resolved with a meaningful conference with opposing counsel, the judge may not have the time to fully grasp the impact of the various legal issues and may not realize what are truly the key issues in the case. If so, you run the risk of having the really important items getting lost in the shuffle while the judge does her best to make rulings in the limited time available. If you can at least narrow your disputes for the judge, you will have a better chance of getting an informed and correct decision.



Prepare for opening well in advance. Opening statement may be the most important part of a jury trial. However, in the push to prepare everything else for trial, it is easy to put the opening statement on the back burner and not work on it as much as you should. It is important to make a concerted effort not to leave the preparation of the opening statement until the last minute. In addition to preparing the opening statement early, you may want to consider giving one or more mock opening statements to colleagues, family members or a focus group well in advance of trial. That way, not only will you become more comfortable with your opening, you will have ample time to modify your opening statement based on comments you receive during the mock openings.

Prepare for closing well in advance. You won't have much time once trial has started to work on your closing argument but you can work on your closing before trial even starts. You obviously need to be flexible to see what actually happens at trial, but based on your knowledge of the case from discovery you can have a preliminary outline of your closing put together before trial and you can add to that during trial. Also, after each trial day, it is helpful to identify what exhibits and testimony came out that day that you want to use in closing and have someone work on organizing that for your closing.

Arrive early. Arrive earlier than you think you need to. It's always surprising how much time it takes to get to the courthouse, make it through security, get set up and do any last minute prepara-

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tions, let alone to get mentally prepared to start trial each day. Even if you arrive earlier than you think you need to, you will be surprised at how little time you have before court begins. If you don't arrive early enough, you may have to scramble to get started on time (or even worse make the judge and jury wait for you) and if this happens, you will likely feel rushed and/or flustered, which is never a good way to start a trial.

Double your time estimates for the trial. In a perfect world, you will at best have six hours a day of trial time, but that time could easily shrink in half on some days. There is a seemingly unending list of possible ways to cut in to trial time, such as juror issues (e.g. arriving late, bloody nose during the middle of trial), court scheduling issues (e.g. previously scheduled hearings on criminal matters, emergency hearings), legal issues for your case (e.g. sidebars, motion for directed verdict, arguments over jury instructions), and natural breaks in testimony which lead to an early break for lunch or at the end of the day. So, when giving the judge an estimate of the length of your case, or for scheduling matters for your practice or your personal life, keep this in mind and build in some extra time to your estimate.

Cut in half your trial presentation. Try to cut in half, if possible, what you plan on presenting. We all have a tendency to want to put in every piece of evidence and ask every question that might be somewhat relevant because we don't want to leave anything to chance. But by putting on too much evidence and/or asking too many questions on direct or cross, we may run the risk of having the jurors subjected to information overload, not being able to process the information, or simply being bored and thus unable to pay attention. Figure out what is absolutely necessary and try cutting out the rest. You may be surprised at how much you can cut without losing any substance.

Make a boring case interesting. Figure out a way to make a confusing and complicated (i.e. boring) case understandable and interesting to the jury. If the jurors' eyes glaze over because they don't understand the evidence or are bored by the presentation, the compelling points you hope to make will be lost. Some cases are naturally interesting to the jury, but for those that aren't, work hard at trying to present the case in a way that the jurors can relate to. Every case can be made at least somewhat interesting to the jury – you just may have to work harder to do so if the case is inherently boring.

Use technology and visual aids. Make sure the jury sees and hears the evidence and thus stays involved. If only the lawyer and the witness are able to see an exhibit while it is being discussed, the jury will have a hard time following the discussion and that exhibit may be wasted. If an exhibit is important enough to talk about, it is important enough to show to the jury. There are a variety of ways to show the exhibits to the jury, such as using exhibit notebooks for each juror, projecting the exhibits onto a screen via laptop or an Elmo (overhead projector that can be used with regular paper), or blown up documents on poster board.

Practice, practice, practice. Practice everything in advance and make sure all your equipment is working before you start each day. Visual aids won't do any good if they are out of order or don't work at all. You may also want to sit in the jury box to make sure your demonstrative tools are visible and audible from each seat.

Hope for the best but prepare for the worst; assume your technology will fail. Not everything is going to go as well as planned and there will inevitably be some sort of disaster at some point. You may want to make a list of everything that could go wrong and have a plan in place to deal with each of those items. As wonderful and important as technology is in communicating with jurors, technology also has a tendency of failing at the worst possible time. If you assume your technology will fail and thus have a Plan B for presenting your evidence, you will still be able to continue with your case seamlessly even if the technology fails. A good Plan B is having hard copy backups of all exhibits and demonstrative evidence and/or a backup laptop that is preloaded with your exhibits and demonstrative evidence. A backup projector is also a good idea.

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Oregon State Bar

The Litigation Section

The Oregon State Bar Litigation Section includes civil, criminal and specialty practice litigators within the Oregon State Bar. The Section is the largest within the Bar, and provides services to its members through periodic CLE presentations (including the annual Litigation Institute and Retreat at Skamania Lodge and the biennial practical skills CLE, Fundamentals of Oregon Civil Trial Procedure), as well as publication of the Litigation Journal three times a year. The Litigation Journal provides timely articles and case notes of interest to Oregon litigators. The Litigation Section is committed to professional education, development and collegiality. An annual highlight is presentation of the Owen M. Panner Professionalism Award at the Institute and Retreat. This award is given to a member of the bench or bar who exemplifies the highest professional standards and values. Membership in the Section is open to any Bar member with an interest in litigation. Annual dues are $35.

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Be organized. There is not much time at trial to think; there is just time to react. Therefore, to the extent possible, try to have everything thought of and mapped out ahead of time, and have materials organized in a way that you can easily find what you need.

Learn from your opponent and co-counsel. You can learn quite a bit simply by watching and listening to your opponent or your co-counsel. If they do something that is outstanding, consider emulating that (if that works with your personality). If they make a mistake or do something that does not go over well with the jury, make an effort to avoid that same mistake yourself.

Remind the client that trials are extremely expensive. It is easy to forget how expensive it is to try a case because most civil cases settle before the final push to get ready for trial. The amount of money spent in the weeks leading up to trial and trial itself (both attorney time and expert time) can easily exceed the amount spent the entire year before. Make sure clients realize ahead of time the huge expense of trial so the client doesn't have sticker shock afterwards.

Remind the client (and yourself) that trials take a great physical and emotional toll. Trials are an intense, draining experience for all involved. There is not much time to sleep, eat, exercise, socialize or decompress because the trial consumes everyone's time and emotions. For the client, not only can testifying be nerve-racking, but simply having to listen to the other side attack the client's position can be draining and emotional, especially in a "bet the farm" case. Trials also take a great toll on the lawyer because not only is it draining to have to be "on" and concentrate non-stop during trial, but also because there is so much preparation time before and after the trial day is over that there is little time to devote to the lawyer's other clients, the lawyer's family and friends, and the lawyer's own physical health. You may want to prepare your other clients and family and friends that you are going to be mostly out of pocket during the trial, and may also want to make a concerted effort to make sure you can eat right, exercise and get sufficient sleep.

Be nice. You will undoubtedly feel cranky at some point during the trial because you are tired and overworked or angered by what you perceive are outright lies by an adverse witness or disingenuous arguments by your opponent. Whether you are examining a witness, talking to the court staff, or speaking to the jury, do your best to be professional and not let your crankiness come out. If the jury doesn't think you are being respectful or fair to a witness, the jury may become sympathetic to that witness and may not like and trust you, which could hurt your case. If you are rude to a judicial assistant, that will surely be reported to the judge and you don't want the judge to be upset with you. Further, it goes without saying that you don't want to offend the jury by your treatment of them.

Make your own list. After (or during) trial make your own list of things that you want to remind yourself of before your next trial. We are always going to make mistakes – for many of us the best way to learn is by making mistakes – but we never want to make the same mistake twice. So, by making a list of your own, it might help to prevent you from making the same mistake next time around. ❐

You Want Info From the Feds? You Have an Uphill Battle

By Amy Joseph Pedersen & P.K. Runkles-Pearson
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Can a litigant enforce a subpoena against a federal official? There is no simple answer to this question, and a party who tries to obtain evidence from the EPA, the EEOC, the FTC or any other federal agency should expect strong resistance from the government. This article provides tools for evaluating the legitimacy of that resistance and tips for how to proceed.

The Touhy Doctrine

The first roadblock to subpoenaing documents or testimony from a federal agency is the government's likely contention that *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951), combined with agency regulations, allows the agency to quash the subpoena.

Touhy began with a dramatic confrontation between an FBI agent and an Illinois state judge. Touhy, an inmate in an Illinois state penitentiary, brought a habeas corpus proceeding against his warden alleging that he had been fraudulently convicted. He subpoenaed an FBI agent who he believed had documents supporting his claim. The agent refused to supRunklesply the documents. The judge granted Touhy's motion to compel and ordered the agent to produce the papers. The agent refused the judge directly, in open court, citing a Department of Justice rule that required any employee of the department who was served with a subpoena for department records to "respectfully decline" to produce them unless expressly directed otherwise by the Attorney General. The judge found the agent in contempt of court, and the agent appealed.


Amy Pedersen


P.K. Runkles-Pearson

The U.S. Supreme Court decided that the DOJ's internal rule was properly enacted under a "housekeeping" statute allowing the agency head to "prescribe regulations, not inconsistent with law" to govern the agency. Therefore, it ruled that the agent properly refused to respond to the subpoena and should not be held in contempt. The Court did not decide the underlying question of whether the agency head, the Attorney General, had appropriately directed the agent not to testify. In a concurring opinion, Justice Frankfurter stated that the basis for the opinion was narrowly directed to whether the agency head had the last word in deciding whether to respond – not whether the agency head made the right decision.

Expressing its displeasure with the *Touhy* decision, Congress in 1958 amended the "housekeeping statute" that permits *Touhy* regulations to state that "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301. Surprisingly, the amendment has not significantly influenced the case law in many jurisdictions and may present an opportunity for some creative advocacy in the right case.

Touhy therefore can present a serious obstacle to subpoenaing a federal agency. Most federal agencies have *Touhy*-style rules permitting them to respectfully decline to respond to subpoenas, absent permission from the agency head, and they will almost

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certainly respond to subpoenas with a broad interpretation of *Touhy*, relying on *Boron Oil Co. v. Downie,* 873 F.2d 67 (4th Cir. 1989), or similar cases. *Boron Oil* interpreted *Touhy* as allowing an agency to avoid a subpoena simply by prescribing appropriate regulations. In reaching that conclusion, it relied on a number of policy considerations, such as the need to conserve government resources and minimize government involvement in private (and possibly controversial) matters.

However, the Ninth Circuit has not been as deferential in its interpretation of *Touhy.* In *In re Boeh*, 25 F.3d 761 (9th Cir. 1994), families prosecuting a wrongful death action in federal court against the Los Angeles Police Department sought testimony from an FBI agent concerning his investigation of the incident and the conclusions he drew. The agent declined to testify, invoking the appropriate agency rule. The district court held the agent in contempt, and he appealed. On appeal, the plaintiffs argued (as did the unsuccessful plaintiff in *Touhy*) that the rule violated the separation of powers because it appropriated judicial authority to the agency. The Ninth Circuit, relying on *Touhy,* disagreed with the plaintiffs because it determined that the rule was not a blanket prohibition on agency testimony; it simply removed from the agent the authority to decide whether he would testify. In the Ninth Circuit's view, the plaintiffs could challenge the agency head's decision to withhold testimony – but they could not do so by moving against the agent himself. The court suggested that the plaintiffs could have "succeeded by other means in bringing the Attorney General or the designated 'proper Department official' into court to contest his or her decision not to permit [the agent's] testimony." *Id.* at 764. In a footnote, the court suggested that the plaintiffs might have proceeded by an action under the Administrative Procedure Act attacking the rule directly, or by a mandamus action against the agency head to require giving the agent permission to comply with the subpoena.[1]

Following *Boeh,* in *Exxon Shipping Co. v. U.S. Department of Interior,* 34 F.3d 774 (9th Cir. 1994), the plaintiff took the Ninth Circuit up on its suggestion and brought a separate direct action against several federal agencies to compel production of information related to the Exxon Valdez oil spill. The action attacked the *Touhy* regulation as an impermissible expansion of agency authority, outside the bounds of the enabling housekeeping statute. The Ninth Circuit rejected the agencies' argument that *Touhy* (and the housekeeping statute) provided blanket protection from a subpoena and determined that an agency's resistance to a subpoena was reviewable by a court under the ordinary rules of procedure. It acknowledged the government's legitimate interest in not providing testimony in every civil action, but held that the court should balance that interest against the litigant's interest in receiving the testimony to determine whether the subpoena imposed an "undue burden" under Federal Rule of Civil Procedure 26(c) or 45(c)(3).

Sovereign Immunity and Other Difficulties for State Court Subpoenas

In addition to defenses based directly on *Touhy,* agencies may also raise a sovereign immunity defense to enforcement of a subpoena. The Ninth Circuit has held that a state court has no jurisdiction to subpoena a federal official because of sovereign immunity, *In re Elko County Grand Jury,* 109 F.3d 554, 556 (9th Cir. 1997), but has declined to extend that holding to federal court subpoenas, *Exxon Shipping,* 34 F.3d at 778 ("'The limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause. Such limitations do not apply when a federal court exercises its subpoena power against federal officials.'" (citation omitted)); *see also FBI v. Superior Court of Cal.,* 507 F. Supp. 2d 1082 (N.D. Cal. 2007) (describing in detail the sovereign immunity defense as applied to subpoenas of agencies). Other circuits may recognize a sovereign immunity defense to a federal subpoena to varying degrees. *See, e.g., EPA v. Gen. Elec. Co.,* 197 F.3d 592 (2d Cir. 1999) (finding agency had sovereign immunity against enforcement of federal subpoena, but that government had waived immunity through Administrative Procedure Act).

Litigants attempting to enforce state court subpoenas also face another procedural hurdle. Generally, disputes in state court actions concerning *Touhy* matters are resolved in federal court, after the government removes the case under 28 U.S.C. § 1442(a)(1).[2] Because the jurisdictional basis for removal is the contempt charge, the court may decide whether to adjudicate any remaining issues involving

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the subpoena, such as whether the agency head properly instructed the official to resist the subpoena in the first place. *Swett v. Schenk,* 792 F.2d 1447 (9th Cir. 1986). Thus, a litigant in state court who persists in subpoenaing a federal official may find herself in a pointless proceeding that will not even allow her to debate the merits of the subpoena itself.

The Deliberative Process Privilege

Apart from seeking to avoid a subpoena entirely, federal agencies may seek to withhold specific documents or testimony as protected by the "deliberative process" privilege.

The deliberative process privilege protects a federal agency's predecisional deliberative work in order to foster open communication within agencies. *See Scott v. PPG Indus., Inc.,* 142 F.R.D. 291, 293 (N.D. W. Va. 1992).[3] The purpose of the privilege is "to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Assembly of State of Cal. v. U.S. Dep't of Commerce,* 968 F.2d 916, 920 (9th Cir. 1992) *(citing NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 150-54 (1975); *EPA v. Mink,* 410 U.S. 73, 85-94 (1973)). It is a branch of the executive privilege and "rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequentially suffer." *Dudman Commc'ns Corp. v. Dep't of Air Force,* 815 F.2d 1565, 1567 (D.C. Cir. 1987) (internal quotation marks and citation omitted).

To be protected by the privilege, the information must, in fact, be predecisional. Information that is contemporaneous with the decision, or that is post-decisional, is not protected. (For a general discussion of the difference between pre- and post-decisional information, *see Russell L. Weaver & James T.R. Jones, The Deliberative Process Privilege,* 54 Mo. L. Rev. 279 (1989).)

The deliberative process privilege is qualified, not absolute, and the Ninth Circuit applies a four-part test to determine whether the party opposing the privilege can overcome it. The test balances the opposing party's need for the evidence with the resisting party's need to protect it by evaluating (1) the relevance of the evidence to the lawsuit; (2) the availability of other evidence on the same issue; (3) the government's role in the litigation, if any; and (4) the extent to which disclosure of the information would harm open communications within the agency. *FTC v. Warner Commc'ns, Inc.,* 742 F.2d 1156, 1161 (9th Cir. 1984). Litigants should be aware that the evaluation of need is made on a document-by-document basis and can be time-consuming. *Exxon Corp. v. Dep't of Energy,* 91 F.R.D. 26, 43 (N.D. Tex. 1981) ("[T]he outcome is dependent upon the individual document considered and the role it plays in the administrative process…").

One example of the often unfair application of the privilege is *Lintott v. King County Housing Authority,* No. C04-1288I (W.D. Wash. Jan. 27, 2005). There, the plaintiff claimed that her employer had discriminated against her based on age. She filed a charge with the EEOC before filing her lawsuit. Without any explanation whatsoever, the EEOC issued a determination that there was "reasonable cause" to support the plaintiff's allegations. In the Ninth Circuit, such "reasonable cause" determinations are per se admissible at trial, but an employer cannot offer into evidence EEOC findings adverse to the employee without a showing under Federal Rule of Evidence 403 that the probative value outweighs the prejudicial effect. Compare *Plummer v. W. Int'l Hotels Co.,* 656 F.2d 502 (9th Cir. 1981), and *Bradshaw v. Zoological Soc'y of San Diego,* 569 F.2d 1066 (9th Cir. 1978), with *Beachy v. Boise Cascade Corp.,* 191 F.3d 1010, 1014-15 (9th Cir. 1999). The employer, who presumably understood the adverse effect that the pro-employee finding could have at trial, sought to depose the EEOC investigator and obtain the agency's investigation file. Although there was no Ninth Circuit case on point, the district court followed cases from other jurisdictions and held that the "deliberative process" privilege required quashing the subpoena on the EEOC.

The *Lintott* court recognized the unfairness of its ruling "that plaintiff may use the EEOC's findings as a sword to which defendants have no shield." To ameliorate that result, the court observed that if the matter went to trial, the employer "may" have the right to subpoena the EEOC investigator and "interview" her before trial.[4]

Practice Tips

While the law on these issues is somewhat settled in the Ninth Circuit, the law of other circuits varies

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widely. Practitioners in all circuits should consider the following tips[5]:

- Check to see whether your agency has *Touhy* rules (it almost certainly will). If it does, determine whether rules require a "*Touhy* request" for information separate from a subpoena. This request is directed to the head of the agency. If the agency is willing to provide testimony or documents, you must follow those procedures to obtain it.
- If outside the Ninth Circuit, determine whether the law of the circuit recognizes an agency's authority to prescribe "housekeeping" rules that prevent an agency employee from testifying at all.
- Bear in mind that circuit courts may come to different conclusions depending on (1) whether the agency is a party or a nonparty and (2) if the original action is in state or federal court.
- Consider whether to bring a direct action against the agency itself to settle enforcement issues.
- If the agency invokes the deliberative process privilege, demand a privilege log that delineates the nature of each document withheld so that you can evaluate whether:
  - The withheld document is in fact predecisional,
  - The withheld document actually contains deliberative material, and
  - The privilege can be overcome.
- Seek an in camera review of the withheld documents.

Litigants should weigh the costs of pursuing agency information from the government against the anticipated benefit of putting that information before the judge or jury. Sometimes, it might be worth the uphill battle. ❐

Endnotes

1 In fact, parties have attempted mandamus actions, but with little success. For example, in *Giza v. Secretary of Health, Education & Welfare,* 628 F.2d 748 (1st Cir. 1980), the First Circuit declined to order the agency to provide testimony because it found that the agency had no duty to do so.

2 There are only two requirements for removal under that statute: that the matter involves a claim against a federal official acting "under color of such office," and that the federal officer must raise a colorable defense arising out of his duty to enforce federal law. The purpose of the statute is "to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." *Arizona v. Manypenny,* 451 U.S. 232, 241 (1981).

3 *Kaiser Aluminum & Chemical Corp. v. United States,* 157 F. Supp. 939 (Ct. Cl. 1958), is regarded as the first full examination of the privilege.

4 We don't know why the court specified an interview, rather than a deposition, yet referred to a subpoena.

5 Some of the cases cited in this article mention the use of a Freedom of Information Act ("FOIA") request to obtain documents from the government. Analysis of FOIA issues is beyond the scope of this article, but should be considered by the litigant seeking information from a government agency.

send, or the recommendation we give to withhold from production privileged documents, will be viewed in a different—even criminal—light. When facts that we represented as true turn out to be false, these routine acts of representation could become the grounds for a criminal indictment (against the lawyer and/or the client) or the basis for a disciplinary action by the Bar.

Generally, under Bar disciplinary rules, attorneys are not sanctioned for statements made in reliance on a client's misrepresentation. However, an attorney may face criminal liability for such statements even when the attorney had no knowledge of the client's deception.

Below is a brief survey of the regulations and criminal doctrines that counsel should be aware of when deciding whether it is necessary to obtain more facts before advocating on a client's behalf.

I. Criminal and Regulatory Proceedings

Even if you have no knowledge that your client has given you false information, you are still at risk of criminal prosecution if you make misrepresentations to the court, opposing counsel or third parties in reliance on false information from your client. Prosecutions of lawyers have been brought absent evidence of deliberate misrepresentations, including prosecutions for mail and wire fraud, money laundering, racketeering, obstruction of justice, and perjury, among others.

For example, in *U.S. v. Beckner*, the government charged a former U.S. attorney and prominent trial lawyer with four counts of aiding and abetting his client's wire fraud, obstruction of justice, and perjury. He was convicted on the aiding and abetting counts based solely on actions that most of us would consider routine representation: an argument in a brief that securities law did not apply to certain notes, rejection of an associate's proposal that the firm interview investors, a decision not to produce documents based on assertion of a Fifth Amendment privilege, and a misquoted comment in a newspaper.[4] Indeed, reversing his conviction on appeal, the Fifth Circuit observed that the conviction was based solely on "what trial counsel is supposed to do."[5]

Joseph Collins, an established transactional lawyer at Mayer Brown, is currently facing similar charges for actions he took during his representation of the now-bankrupt commodities broker Refco. The indictment accuses him of preparing misleading documents sent to investors, filing materially false statements with the SEC, and structuring transactions designed to improperly shuffle debt between Refco and third parties for accounting purposes.[6] Mr. Collins faces charges of securities fraud, wire fraud, and filing false statements with federal regulators.

As *Beckner* illustrates, investigations and prosecutions of lawyers based on their representation of clients are not limited to far-fetched or extreme circumstances. To avoid misuse of such actions, the Justice Department instituted internal procedures that govern the investigation and prosecution of attorneys based on their representation of clients.[7] Worrisome to counsel, these procedures contemplate nonprosecution agreements with clients under investigation in exchange for testimony against their attorneys.[8]

A. Mail and Wire Fraud

Although mail and wire fraud are probably the last thing on your mind when you are preparing a letter, e-mail or filing for a client, these federal crimes carry hefty maximum prison sentences and fines,[9] and, as interpreted, do not require an actual intent to defraud or actual knowledge of the misrepresentation.[10] Under Ninth Circuit precedent, both the intent and knowledge elements of these crimes can be shown by recklessness.[11] Nor is it necessary to show that the perpetrator of the fraud expected to profit or benefit personally from the fraud.[12] As a result, mail and wire fraud present surprisingly low hurdles for prosecution and should concern attorneys who communicate with third parties on behalf of their clients.[13]

Consider the following scenarios:

- A lawyer helps a longtime client prepare a letter to one of the client's lenders. The lawyer knows the letter will be e-mailed to the lender who will rely on information in the letter to decide whether to call certain loans to the client. The lawyer does not fact-check the letter, relying instead on the client and its accountant for the facts.

- A lawyer drafts an opinion letter knowing it will be mailed to investors in his client's business. The letter is designed to calm investors' fears. The lawyer relies on facts about the client's business supplied by the client who the lawyer knows is desperate and under extreme stress at the time. The lawyer knows the client will likely go under if the investors balk.

What is the likelihood that the attorney will be held liable for mail or wire fraud when the facts in these scenarios ultimately turn out to be false or misleading? *The issue turns on what is reckless and what can be inferred from the lawyer's relationship with the client.*

Courts define reckless as a conscious disregard of a substantial and unjustifiable known risk.[14] The question then

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is what quantum of information tips a lawyer off that the situation is not what is being represented by the client. In other words, is the lawyer disregarding information that should lead him to doubt the truthfulness and accuracy of the client's statement? Cases in non-attorney contexts suggest that such things as relying on a client's memory of a key date or other detail without checking to see if the client verified the accuracy of her memory could constitute disregarding a known risk that the client's recollection is inaccurate. Relying on a client's extravagant claims without any further investigation may also constitute a reckless disregard for the truth.[15] In such circumstances, if the lawyer proceeds without investigation and it turns out the client's representation is inaccurate, both the client's and the lawyer's credibility are damaged and both may be subject to fraud charges.

In holding that specific intent to defraud may be proved by a showing of recklessness, the Ninth Circuit has also effectively modified the good faith defense generally available to require some level of investigation or diligence (*i.e.,* no recklessness). Other circuits continue to recognize the traditional good faith defense—*i.e.,* an honest belief in the truth or a showing of honest mistake excuses otherwise fraudulent conduct.[16] Courts in the Ninth Circuit, however, have held that a defendant is not entitled to a good faith instruction because it would be duplicative of a proper instruction on specific intent—in other words, if specific intent is proven, good faith is necessarily disproven.[17] Thus, because specific intent can be proven by recklessness alone, good faith is disproven by recklessness.

Of course, the government can prove actual knowledge of the misrepresentation by circumstantial evidence. Reviewing courts have held that evidence that a lawyer had a particularly close relationship with the client was sufficient to prove knowledge of the client's fraud, despite no direct evidence of the lawyer's knowledge. In one wire fraud case, the court suggested that knowledge of a client's misrepresentation may be inferred by the jury from "an intimate association with the client's activities," such as that of an in-house lawyer.[18] But, in that case, where the lawyer was outside trial counsel, the court concluded that the evidence was not sufficient to support an inference that the lawyer knew about the client's fraud. There, the court observed that the lawyer was not a confidant or everyday advisor to the client, that he specifically disclaimed sophistication in the matters later called into question (SEC matters), and that he sought assistance from other lawyers with expertise in those matters.[19] Similarly, another reviewing court held that a lawyer's act of simply "papering a deal" or acting as a mere "scrivener" was insufficient to infer knowledge of a client's misrepresentation.[20] In contrast, a lawyer's acts of vouching for and promoting his client have been sufficient to support a jury's inference of knowledge.[21]

The line between a lawyer who papers a deal and a lawyer who vouches for a client can be murky, however. In *Schatz v. Rosenberg*, where the court held that merely papering a deal could not support inferred knowledge of the client's underlying misrepresentation, the lawyer had drafted a contract that included client misrepresentations but had not participated in contract negotiations or solicitations. Other courts have held that the evidence was insufficient when the attorney's involvement was limited to revising or reviewing documents[22] or drafting documents where general misstatements contained therein could not be "specifically attributed" to the lawyer.[23] On the other hand, the evidence was sufficient to support an inference of knowledge in *Bonavire v. Wampler*, where the lawyer made personal affirmative representations about the client such as vouching that he was an "honest straightforward businessman."[24]

The risk a lawyer will be held to have knowledge of a client misrepresentation increases the more the lawyer is personally involved in the deal. In *Bonavire*, the court noted that the lawyer not only vouched for the client but also acted as the escrow agent for the parties.[25] When a lawyer is also a friend of, investor in, or partner with the client, or receives fees in the form of shares in the client company, the likelihood of inferred knowledge increases even more.[26] It is no surprise that multiple cases have successfully been brought under those circumstances.[27]

In summary, because the mens rea elements of mail and wire fraud may be satisfied by a showing of recklessness or inferences drawn from the lawyer's relationship with the client or the lawyer's acts of promoting or vouching for the client, a lawyer should conduct sufficient independent investigation and analysis of the client's facts to feel confident in them before presenting them to third parties. The greater the lawyer's connection to the client, the higher the risk to the lawyer if the representations turn out to be inaccurate. Lawyers who have a pecuniary interest in the client's venture, a long-term relationship, a friendship or other particularly close relationship with the client are particularly at risk of being deemed to have acted recklessly or to have knowledge of or motive to participate in the fraud.

B. Other Criminal Statutes

a. Securities Fraud[28]

As is the case under the federal mail and wire fraud statutes, a lawyer can face liability under the state and federal securities laws without actual knowledge of the fraud or misrepresentation. Under federal securities law, the accused must

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have the intent to defraud buyers or sellers of securities and knowledge of the misrepresentation.[29] However, as in the mail and wire fraud context, the Ninth Circuit has held that reckless disregard for the truth satisfies these elements.[30]

Oregon law is more expansive than federal securities law in its scope. In Oregon, the attorney who drafts fraudulent securities offering material can be criminally liable under the Oregon Securities Fraud statute, ORS 59.115(3).[31] Although the statute does not specify the culpable mental state required for a criminal conviction, the Oregon Court of Appeals has affirmed a criminal conviction where the prosecution pleaded and proved knowing misrepresentation.[32] However, the far lesser mens rea of negligence may also be sufficient. Arguably, because the securities statute is outside the criminal code and contains no mental state, ORS 161.605(3) applies, which allows criminal liability based on criminal negligence only.[33] Each criminal violation of the Oregon Securities Fraud statute constitutes a Class B felony punishable by up to 10 years in prison and a $250,000 fine.[34]

b. Obstruction of Justice

Consider the following scenario: A client company asks if it can delete some flippant internal e-mails. No action has been filed against the client, but the client and the lawyer are aware of a weblog that has accused the CEO of insider trading and inflating reported revenue. The client assures the attorney that the accusations are unfounded and were made by a disgruntled employee. Concluding that the e-mails are not relevant to the accusations, are highly prejudicial, and deleting them is consistent with the client's document retention policy, the attorney tells the client that it is all right to delete the e-mails. Ultimately both criminal and SEC actions are brought against the client and, in the face of a government subpoena, the client says, "my lawyer told me I could destroy the records."

Is the lawyer guilty of obstruction of justice? If so, the lawyer could face up to 20 years in prison.[35]

Traditionally, obstruction of justice required a corrupt intent to obstruct a pending official proceeding.[36] Clearly, the lawyer in the above scenario would not be guilty of traditional obstruction. But, as modified by Sarbanes-Oxley, obstruction in many contexts no longer requires a pending proceeding[37] and, where the obstruction is of a federal agency investigation, it no longer requires a corrupt intent.[38] Under the obstruction actions created by Sarbanes-Oxley, it is sufficient that the defendant contemplated the possibility of a proceeding at the time the obstruction occurred.[39] And, in the context of non-pending federal agency proceedings (*e.g.,* SEC investigations), the defendant need not have acted with corrupt intent.[40] Under this laxer standard, the lawyer in the scenario above could face liability because the lawyer knew a proceeding was theoretically possible (in light of the disgruntled employee's complaint on the weblog) and nevertheless recommended deleting the e-mails. Although the lawyer did not intend to destroy relevant evidence, the lawyer intended to delete prejudicial e-mails, thus possibly satisfying the lesser mens rea (*i.e.,* by intentionally impeding fact finding, albeit of irrelevant facts).[41]

A corrupt intent is still required to prove obstruction in other contexts (*e.g.,* judicial investigations and proceedings and pending agency proceedings).[42] The Supreme Court has defined "knowingly corruptly," the mens rea in Section 1512(b)'s witness and jury tampering prohibition, as consciousness of wrongdoing, where wrongdoing is wrongful, immoral, depraved, and evil acts.[43] Despite this, an Oregon attorney was convicted of obstruction (but granted a new trial) based only on circumstantial evidence of knowledge.[44] There, the attorney received a call from a client who was in jail pending a criminal trial. The client asked the attorney to wind up the affairs of a small business unrelated to his crime. The client provided a list of instructions to relay to one of his employees, which included the location of a hidden envelope that he wanted destroyed. The attorney passed on the information and was subsequently arrested and prosecuted for obstruction of justice. The attorney argued that he thought he was legitimately helping his client secure his property and business assets in anticipation of a lengthy sentence; he testified that "none of the flags were up," that he thought the letter was a love letter. The government's theory of criminal intent was that any reasonable person, especially an attorney, would have known he was being asked to impair or destroy evidence when someone in jail calls him and requests that something be destroyed. The government did not argue that the attorney assisted in the destruction of the envelope to advance any personal interest of the attorney.[45]

A financial stake in the client's business can be particularly problematic if the attorney is later accused of obstruction. Not only can the financial interest provide evidence of corrupt intent, it may provide a basis for viewing otherwise routine acts of representation as obstruction. In *U.S. v. Cueto*, a federal agent working undercover as a corrupt state liquor agent had solicited a bribe from the client as part of a sting operation on the client's illegal gambling operation. The attorney reported the corrupt state agent to the state, asked the state prosecutor to file charges against the agent, and subsequently filed a civil complaint in state court alleging the agent was corrupt. Referring to the attorney's financial interest in the client's illegal gambling

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operation, the court concluded that the attorney's motions and filings constituted obstruction.[46]

The law does provide a safe harbor under 18 U.S.C. § 1515(c): an attorney cannot be prosecuted for providing lawful, bona fide, legal services. But this safe harbor may provide little help when corruptly impeding legal process is by definition unlawful and otherwise legal motion practice can be "corrupt" in the wrong context. Particularly in agency investigations, where corrupt intent is not required, the risk that an attorney's presumably lawful, bona fide advice (*e.g.,* that a client need not produce a privileged document) may constitute obstruction is worrisome.

II. Bar Disciplinary Proceedings

The Oregon Rules of Professional Conduct prescribe the ethical standards for Oregon lawyers. Under the Rules a lawyer cannot assist a client in illegal conduct (Rule 1.2); a lawyer cannot make a materially false statement or omission of fact or law to a third person (Rule 4.1); a lawyer cannot knowingly make a materially false statement to a tribunal (Rule 1.6); and, broadly, a lawyer cannot engage in conduct involving dishonesty or misrepresentation (Rule 8.4).[47]

The Rules of Professional Conduct do not directly address whether or to what extent an attorney must investigate the accuracy of a client's statements. The Rules require actual knowledge of a misrepresentation, but recognize that knowledge may be inferred from the circumstances.[48] Mere recklessness by an attorney as to the accuracy of his own statement will not subject him to discipline, however.[49]

Clearly, an attorney has actual knowledge when the client has informed the attorney of a fact.[50] The question is what circumstances trigger an inference of knowledge. In the following two examples, actual knowledge was not inferred from the circumstances:

- Upon hearing his client's mother testify that his client was not the father of her child, an attorney got "an inkling" that paternity was in question and believed further investigation was warranted. Later, without conducting any independent investigation, the lawyer prepared and filed an affidavit for his client, in which the client averred that he was the father. The court concluded that the evidence did not establish that the lawyer knew he was making a misrepresentation and therefore the conduct did not constitute disciplinable conduct.[51]
- After conducting only a "cursory" review of a filing, an attorney filed bankruptcy schedules that contained material errors. The attorney considered his role in the filing to be minimal; he did not prepare the filing, sign it, or review the attached bankruptcy schedules for accuracy. He also had not participated in the client's business operations. The court concluded that the evidence did not establish that the attorney acted "knowing that his conduct was culpable" and therefore the conduct was not disciplinable.[52]

However, the court did conclude that the following evidence was sufficient circumstantial evidence of a knowing misrepresentation in a letter drafted by an attorney to constitute disciplinable conduct: (1) the lawyer had participated in the negotiations underlying the representations in the letter; (2) the lawyer personally vouched for the information in the letter (the letter began with a statement that the accused lawyer's signature was intended to confirm the representations contained in the letter); and (3) the lawyer admitted that he had read the letter in its entirety with an eye toward confirming the truth of the legal matters it contained and the representation at issue was conspicuously listed and legal in nature.[53]

In summary, a mere suspicion or inkling of a client misrepresentation is not sufficient to trigger a duty to investigate under the Rules. Nor do the Rules generally sanction reckless or careless reliance on client representations.[54] As in the criminal context, however, knowledge may be inferred where a lawyer has vouched for the client or the representation at issue.

III. Practice Tips

Traditionally, the Oregon Bar has enjoyed a congenial relationship with state and federal prosecutors. Many of the cases discussed above come from other jurisdictions. However, to protect both themselves and their clients, lawyers should undertake reasonable precautions to assure that the representations they make to third parties on their clients' behalves are accurate.

In relying on your client's statements, especially under exigent circumstances and tight time constraints, you will provide the maximum protection to your client and yourself if you step back and question the facts, viewing them as critically as the lawyer on the other side would. Talk to the key players, review the main documents and determine for yourself if what you are being asked to say or do on your client's behalf makes sense in terms of the big picture. This assessment does not undercut the lawyer's duty of zealous advocacy. Rather, it allows the lawyer to better serve the client. Your client may not always have the clearest sense of the facts or what statements are in their best interest, especially when they are betting their company's or their financial future. It is easy to rush in and advocate for a factual position that—with time to investigate—turns out to be inaccurate. Such misrepresentations imperil both the client's and the lawyer's credibility and create possible criminal exposure. It is best in the words of the old

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cliché to "Stop, Look and Listen" to all the facts before crossing the street.

Of course, even after taking the precaution of stopping, looking and listening to the facts, a lawyer may still unwittingly act as a spokesperson for a client misrepresentation—whether in court or to the press, shareholders, potential investors, or some other third party. Recent fraud and obstruction cases provide examples of steps lawyers can take to minimize the risk that routine acts of representation will result in prosecution and conviction. For example, you should keep detailed log notes of your clients' statements, the investigations you conduct, and the expert opinions you obtain. You should carefully avoid stepping over the line from advocacy to vouching. If you do become aware your client has implicated you as the lawyer in a fraud or has committed perjury or violated a discovery rule, you must counsel your client of the need to immediately correct the misrepresentation or violation and you must insure the misrepresentation or violation has in fact been corrected. If your client refuses to grant you authority to correct the misrepresentation or violation, you should withdraw. In any event, if you believe your client intentionally used you to perpetrate a fraud, there is a conflict of interest that warrants withdrawal. During a judicial proceeding, when a misstatement occurs, counsel must take steps to immediately correct the misstatement or move to withdraw. If not allowed by the court to withdraw, counsel must ensure that the misstatement is not integrated as part of trial counsel's advocacy. Lawyers with personal, financial, long-term, or other close relationships with their clients should undertake these steps with extra care. ❐

Janet Hoffman

Sarah Adams

Endnotes

1 1 Corinthians 13:12.

2 Thanks and credit also go to Erin J. Snyder and Adam Gibbs for their assistance with preparation of this article.

3 *Nix v. Whiteside,* 475 U.S. 157, 190 (1986) (Stevens, J. concurring).

4 *U.S. v. Beckner,* 134 F.3d 714 (5th Cir. 1998). Donald Beckner's client was under investigation by the SEC for fraudulently soliciting investments. The SEC obtained a preliminary injunction preventing the client from soliciting funds unless he used his own assets for security. In apparent compliance, the client continued fund raising by granting collateral mortgages on his residence. In response to suggested irregularities, Mr. Beckner took corrective action, but did not interview investors. Later, after learning that his client was improperly withholding investor files from the SEC, Mr. Beckner withdrew from the representation.

5 134 F.3d at 721. Mr. Beckner was tried *three times* for wire fraud based on these actions before his conviction was reversed on appeal.

6 Indictment, *U.S. v. Collins,* Cr. 01170-LBS-1 (S.D.N.Y. Dec. 17, 2007).

7 *See, e.g.,* United States Attorney's Manual (USAM) at 9-2.032, 9-13.420 (notice, search warrant and subpoena requirements); Dec. 10, 1999 Blue Sheet from Assistant Attorney General James K. Robinson (recusal considerations); Department of Justice Criminal Resources Manual at §§ 2306-2307 (civil and criminal forfeiture requirements related to attorneys' fees).

8 USAM at 9-2.032. *See U.S. v. Wallach,* 935 F.2d 445, 458 (2d Cir. 1991) (overturning conviction of lawyer based on perjured client testimony).

9 18 U.S.C. §§ 1341 and 1343. The statutory maximum for mail and wire fraud is 20 years and/or a $250,000 fine (30 years and/or $1 million fine if a bank is involved).

10 The mail and wire fraud statutes expressly require a scheme to defraud using the mails or wires and a specific intent to defraud. *Id.* §§ 1341 and 1343.

11 *See, e.g., U.S. v. Munoz,* 233 F.3d 1117, 1136 (9th Cir. 2000); *U.S. v. Beecroft,* 608 F.2d 753, 757 (9th Cir. 1979). Of course, evidence of willfulness would also suffice for conviction. Such willfulness is found where there is a "high probability" of fraudulent conduct coupled with a deliberate avoidance of the truth. *U.S. v. McDonald,* 576 F.2d 1350, 1358 (9th Cir 1978).

12 *See, e.g., DeMier v. U.S.,* 616 F.2d 366, 369 (8th Cir. 1980) (*citing Calnay v. U.S.,* 1 F.2d 926 (9th Cir. 1924)).

13 In *Collins*, the four counts of wire fraud are based on four e-mails: one from the law firm's Chicago office to its New York office, attaching a redline version of a letter from the client to an investor, and three others from the law firm to representatives of investors. Indictment at 51-52, *supra* note 6. Although the indictment alleges intent to defraud and knowledge of misrepresentations, it does not reveal what facts the government will rely on to prove those elements.

14 *U.S. v. Albers,* 226 F.3d 989, 995 (9th Cir. 2000) (recklessness is deliberate disregard of a substantial and unjustifiable known risk); *Farmer v. Brennan,* 511 U.S. 825, 837 (1970) ("The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.").

15 *See U.S. v. Petry,* 67 Fed. App'x 433, 434 (9th Cir. 2003) (defendant's failure to confirm terms of his restraining order prior to buying a handgun was reckless); *U.S. v. Cusino,* 694 F.2d 185, 187 (9th Cir. 1982) (inventor's failure to confirm claim that invention amplified energy by a 9:1 ratio was reckless).

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16 *See, e.g., U.S. v. Alkins,* 925 F.2d 541, 550 (2d Cir. 1991); *U.S. v. Williams,* 728 F.2d 1402, 1404 (11th Cir. 1984) (failure to give jury instruction that good faith is a complete defense is error where any evidentiary basis exists for defense). Where good faith is recognized as a complete defense, the prosecution has the burden of disproving the defendant's good faith.

17 *See, e.g., Cusino*, 694 F.2d at 188; *U.S. v. Shipsey,* 363 F.3d. 962, 967 (9th Cir. 2004).

18 *Beckner*, 134 F.3d at 720.

19 *Id.*

20 *Schatz v. Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991).

21 *Bonavire v. Wampler*, 779 F.2d 1011, 1014-15 (4th Cir. 1985).

22 *Renovitch v. Kaufman,* 905 F.2d 1040 (7th Cir. 1990).

23 *Friedman v. Arizona World Nurseries, Ltd.,* 730 F. Supp. 521, 533 (S.D.N.Y. 1990)

24 779 F.2d at 1014.

25 *Id.* at 1016.

26 There is no express prohibition on such intermingling of business and professional relations between attorney and client. The Oregon Rules of Professional Conduct prohibit an attorney entering into a business transaction with a client where their interests will be adverse (ORPC 1.8(a)). The Rules also prohibit acquiring a proprietary interest in ongoing litigation (ORPC 18(i)).

27 *See, e.g., U.S. v. Wolf*, 820 F.2d 1499, 1503 (9th Cir. 1987); *U.S. v. Olano,* 62 F.3d 1180 (9th Cir. 1987).

28 For a detailed treatment, *see* Marc I. Steinberg, *The Corporate/Securities Attorney as a "Moving Target,"* 46 WASHBURN L. J. 1 (Fall 2006).

29 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5.

30 *U.S. v. Tarallo,* 380 F.3d 1174, 1188-89 (9th Cir. 2004). Attorneys may also be liable under the Securities Exchange Act in SEC enforcement actions and third-party civil actions. 17 C.F.R. § 240.10b-5. Although the Supreme Court reaffirmed last term that there is no private cause of action for aiding and abetting securities fraud, secondary actors such as attorneys can be *primarily* liable under the Act in both the civil and enforcement contexts. *Stoneridge v. Scientific-Atlanta,* 128 S.Ct. 761, 771 (2008). Moreover, attorneys can be liable for aiding and abetting securities fraud in the SEC enforcement context. Primary liability can attach to a lawyer who makes a directly attributable statement (such as in an opinion letter) or who drafts an SEC document that the client subsequently files, even if the filing is not signed by or attributed to the lawyer. *S.E.C. v. Wolfson,* 2008 WL 4053027 at *10 (10th Cir. Sept. 2, 2008). In enforcement actions under section 10b-5, the SEC must prove that the lawyer (or other secondary actor) caused misstatements or omissions to be made with knowledge that those misstatements would reach investors. *Id.*

31 O.R.S. 59.115(3). To prove a violation or civil liability under the Oregon securities fraud statute, the prosecutor or plaintiff need only prove that the defendant made a negligent misrepresentation or omission (as well as the other elements of the offense); no intent to defraud is required. *State v. Pierre,* 30 Or. App. 81, 86 (1977).

32 *State v. Jacobs,* 55 Or. App. 406, 414 (1981).

33 *See id.* (observing without further discussion that prosecutor elected to bring criminal charges pursuant to O.R.S. 161.105(3) provision); *see* O.R.S. 165.105(3) ("the culpable commission of [an offense defined by a statute outside the Oregon Criminal Code] may be alleged and proved, in which case criminal negligence constitutes sufficient culpability").

34 O.R.S. 59.991, 59.995, 161.605, and 161.625.

35 *See* 18 U.S.C. § 1519 (providing for fines and a maximum prison term of 20 years); *see also id.* § 1512(k) (penalty for conspiracy to commit Section 1512 obstruction subjects conspirators to same penalties as those prescribed for the underlying offense).

36 Under the traditional obstruction statute, 18 U.S.C. § 1503, a grand jury authorized investigation (*U.S. v. Aguilar,* 515 U.S. 593 (1995)) or civil suit (*U.S. v. Lundwall,* 1 F.Supp.2d 249 (S.D.N.Y. 1998)) must be underway at the time the obstruction occurred. The defendant also has to know or have notice of the proceeding. *U.S. v. Frankhauser,* 80 F.3d 641, 650 (1st Cir. 1996).

37 18 U.S.C. §§ 1512(f) and 1519.

38 *Id.* § 1519 (including knowingly destroying a document with the intent to impede an investigation).

39 *Id.* §§ 1512(f) and 1519 (no pending proceeding required); *see also Arthur Anderson LLP v. U.S.,* 544 U.S. 696, 707-708 (2005) (holding that Section 1512 obstruction, which imposes liability for knowingly corruptly obstructing a non-pending official proceeding, requires that the proceeding must have been contemplated by defendant).

40 18 U.S.C. § 1519.

41 *See id.* § 1512(f)(2) (the document need not be admissible or free from a claim of privilege).

42 *See, e.g., id.* §§ 1503 (corrupt intent required to obstruct pending judicial proceedings), 1505 (corrupt intent required to obstruct administrative and congressional proceedings and inquiries) and 1512(c) (corrupt intent required to obstruct pending or non-pending judicial proceedings).

43 *Arthur Andersen*, 544 U.S. at 705; *see also id.* at 705 n.9 (observing that defini-

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Recent Significant Oregon Cases

Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

Loosli v. City of Salem, 345 Or 303 (2008)

In *Loosli,* the Supreme Court addressed the "economic loss" doctrine, which precludes recovery for economic losses on a negligence claim in some circumstances. Plaintiffs wanted to start a used car business, and obtained the City of Salem's approval of the required DMV dealer certificate. After plaintiffs invested time and money into starting the business, the city notified them that local land use ordinances prohibited them from operating a used car dealership at that location. Plaintiffs sued to recover their economic losses, alleging that a city planner negligently certified on the DMV certificate that the proposed dealership satisfied local land use ordinances. The trial court granted summary judgment in the city's favor, holding that the economic loss doctrine precluded recovery. The Supreme Court affirmed. The court acknowledged that liability for economic harm "must be predicated on some duty of the negligent actor to the injured party beyond the common law duty to exercise reasonable care to prevent foreseeable harm." 345 Or at 308, quoting *Onita Pacific Corp. v. Trustees of Bronson*, 315 Or 149, 159 (1992). In determining whether a relationship gives rise to such a duty, the court stated that section 552 of the *Restatement (Second) of Torts* (1977) "provides a good starting point for the analysis when a party has been negligent in obtaining or communicating information." 345 Or at 311. The court noted that whether section 552 stated a "black letter rule" of Oregon law divided the court in *Conway v. Pacific University,* 324 Or 231 (1996), but the court found it unnecessary to revisit that issue because plaintiffs' claims against the City of Salem did not satisfy one of the criteria stated in section 552. 345 Or at 311-12. The court assumed that a statute "imposed a duty on the city to provide the certification on plaintiffs' DMV application." *Id.* at 313. However, a comment to *Restatement* § 552(3) "makes clear that a person who provides information pursuant to a statutory duty is liable only to the specific class of person whom the statute is intended to benefit." *Id.* The court concluded that the city "owes plaintiffs no duty under ORS 822.025(6) to protect their economic interests" because the city's certification was provided for the benefit of DMV, not plaintiffs. *Id.* at 312-13.

Judge Bushong

Waldner v. Stephens, 345 Or 526 (2008) *Hughes v. Wilson*, 345 Or 491 (2008)

In *Waldner*, the Supreme Court held that the one-year statute of limitations in ORS 12.125 for actions arising under a rental agreement or the Oregon Residential Landlord Tenant Act (ORLTA) did not bar tenants' negligence claim against their former landlord. The court read the statute "as applying only to claims that are directly authorized by the ORLTA, *i.e.*, claims that seek damages or injunctive relief *as provided in the ORLTA* for a violation of either the rental agreement or some requirement imposed on landlords or tenants only by a provision of the OR-

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LTA." 345 Or at 542 (emphasis in original). In *Hughes*, plaintiff was injured when his motorcycle collided with a car. He sued Wasco County, alleging that brush alongside the county road obscured motorists' vision, causing the accident. The trial court granted summary judgment to the county, holding that it was immune from liability under ORS 30.265(3)(c), Oregon's discretionary immunity statute, based on its policy decision to rely on landowners to notify the county that brush needed to be cleared instead of doing its own inspection. The Supreme Court reversed. The court explained that "[m]erely weighing costs and benefits and making a decision, even if that decision might qualify as a permissible discretionary decision, is not sufficient to entitle a government to immunity. The government must also demonstrate that it took the action necessary to effectuate that decision." 345 Or at 501. Here, "the county did not establish that it had informed landowners that it was relying on them to signal the need for brush removal." *Id*. at 502.

Knepper v. Brown, 345 Or 320 (2008)

The plaintiff in *Knepper* alleged that Dex Media, Inc. (Dex) fraudulently misrepresented a doctor's qualifications in a Yellow Pages advertisement. The ad stated that the doctor was "Board Certified" without disclosing that his board certification was in dermatology, not plastic and reconstructive surgery. Plaintiff sought to recover damages after the doctor botched her liposuction surgery, resulting in pain and physical deformities. The jury awarded plaintiff $1.5 million. Dex argued on appeal that it was entitled to a directed verdict or judgment notwithstanding the verdict because there was no evidence that the Yellow Pages ad caused plaintiff's injuries. The Supreme Court affirmed the jury's verdict, holding that (1) "some notion of proximate cause" is a required element of a fraud claim (345 Or at 329); (2) "that notion of proximate cause or proximate injury is equivalent to the concept of 'reasonable foreseeability'" as used in *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 17 (1987), and *Buchler v. Oregon Corrections Div.*, 316 Or 499 (1993) (345 Or at 329-30); and (3) plaintiffs' damages in this case "might be expected to result from their reliance on Dex's misrepresentation" (*Id.* at 331). The court explained that "[a]n advertisement that misrepresents a medical provider's qualifications self-evidently creates a risk that a consumer who seeks treatment from the provider in reliance on that misrepresentation will suffer an adverse result that would not have occurred if the provider's qualifications had been as represented." *Id.*

Taylor v. Ramsay-Gerding Construction Co., 345 Or 403 (2008)

The plaintiffs in *Taylor* noticed that the exterior walls of their hotel in Lincoln City were discolored by rust. The walls were part of a stucco exterior siding system manufactured by ChemRex, Inc. (ChemRex). Plaintiffs sued ChemRex for breaching a written five-year warranty given to them by Mike McDonald, ChemRex's territory manager for Oregon. At trial, ChemRex moved for a directed verdict, arguing that "there was insufficient evidence for the jury to find that McDonald had authority to act for ChemRex in giving the warranty." 345 Or at 408. The trial court found no evidence that McDonald had actual authority, but allowed the jury to determine whether he had apparent authority. The jury returned a verdict in plaintiffs' favor, and ChemRex appealed. The Supreme Court affirmed, noting that, "[f]or a principal to be bound by an agent's action, the principal must take some affirmative step, either to grant the agent authority or to create the appearance of authority. An agent's actions, standing alone and without some action by the principal, cannot create authority to bind the principal." *Id*. at 410. The court explained that "[a]pparent authority requires that the principal engage in some conduct that the principal 'should realize' is likely to cause a third person to believe that the agent has authority to act on the principal's behalf." *Id.* "[I]nformation that has been channeled through other sources can be used to support apparent authority, as long as that information can be traced back to the principal." *Id*. at 411. The court concluded that "there is sufficient evidence in the record to support the jury's finding that McDonald acted with apparent authority when he warranted the stucco system to plaintiffs." *Id.*

Evidence

Marcum v. Adventist Health System/West, 345 Or 237 (2008)

In *Marcum*, the Supreme Court addressed the standards for admission of expert medical testimony in a medical malpractice case. Plaintiff experienced symptoms of pain, swelling and discoloration immediately after a chemical called "gadolinium" was injected into her hand. Plaintiff proffered testimony of a medical expert that "the gadolinium, instead of going into the vein, went into an area of the hand outside the vein, a circumstance called 'extravasation.'" 345 Or at 240. The trial court excluded the testimony because the expert "had failed to identify a scientifically valid cause of the injury—one that linked plaintiff's exposure to gadolinium to the vasospastic disorder that she experienced." *Id*. at 242. A divided Court of Appeals affirmed, but the Supreme Court reversed. The court noted that its prior cases on the trial court's "gatekeeper" role "provide limited guidance" because those cases "involved the admissibility of specific *techniques* or *tests*, the validity of which turned on

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scientific principles." *Id*. at 245 (emphasis in original). In contrast, "the issue [in *Marcum*] is the scientific basis for the causation testimony, rather than the scientific basis for a particular technique or method." *Id*. at 246. In many instances, the court noted, a medical expert cannot identify "with certainty" a single cause, but instead "a number of *potential* causes will be 'ruled in,' each of which has some percentage of likelihood of having caused plaintiff's condition[.]" *Id*. at 248 (emphasis in original). When "ruling in" a potential cause, "a trial court should insist that the causation theory be 'biologically plausible,' that is, that the exposure *could* have caused plaintiff's injury." *Id*. at 249 (emphasis in original). "[A] particular possible cause should not necessarily be excluded on the grounds that the expert cannot describe the precise mechanism of causation or point to statistical studies of cause and effect." *Id.* The court concluded that the jury should have been permitted to hear the expert opinion in this case because plaintiff "made an adequate showing of a scientifically valid basis for 'ruling in' gadolinium as a potential cause of her symptoms as well as for 'ruling out' a number of the other possible causes of her injury." *Id*. at 252-53.

Kennedy v. Eden Advanced Pest Technologies, 222 Or App 431 (2008)

The plaintiff in *Kennedy* hired defendants to apply non-toxic pesticides to his property after he saw carpenter ants in his yard. Plaintiff experienced nausea and sleeplessness after the pesticides were applied. Plaintiff later discovered that defendants applied toxic chemicals after they ran out of the non-toxic product. Plaintiff sued, alleging fraud, negligence, trespass and other claims. At trial, plaintiff proffered the testimony of Dr. William Rea, who diagnosed plaintiff with "chemical sensitivity" and related conditions, and concluded that exposure to defendant's pesticides exacerbated those conditions. The trial court excluded Dr. Rea's testimony, concluding that it did not qualify for admissibility under *State v. O'Key*, 321 Or 285 (1995). The court noted that the American Medical Association (AMA) and other professional organizations do not recognize "chemical sensitivity" as a valid medical diagnosis, and virtually every court that previously addressed the issue refused to allow Dr. Rea and his associates to testify as experts on "chemical sensitivity." 222 Or App at 450-51. The Court of Appeals reversed. The court first noted that, when all the evidence was considered, "the most that can be said is that there is a controversy in the medical community about whether chemical sensitivity…is a valid diagnosis." *Id*. at 447. The court concluded that, "the competing views between the two schools of scientific thought did not authorize the trial court in its gatekeeping function to exclude plaintiff's evidence…because each school of thought reaches a conclusion that is 'biologically plausible[.]'" *Id*. at 450 (citing *Marcum v. Adventist Health System/West*, 345 Or 237, 248-49 (2008)).

The fact that no other court had allowed expert testimony on "chemical sensitivity" did not matter, the court explained, because under Oregon law, "the proper inquiry is not whether…chemical sensitivity is a 'valid' diagnosis or is recognized by other jurisdictions; rather, we must, on the record in this case, 'decide whether truthfinding is better served by admission or exclusion.'" *Id*. at 451 (quoting *O'Key*, 321 Or at 299). The court stated that, regardless of what other courts have done, it has "an obligation to independently construe the relevant provisions of the Oregon Evidence Code." *Id*. The court noted "the Oregon legislature's strong policy to aid the trier of fact to understand the evidence presented at trial in the context of the parties' theory of the case" and concluded that "the legislature intended controversial evidence like Rea's testimony to be presented to the jury." *Id*. at 451-52. "In Oregon, we trust juries to be able to find the truth in the classic 'battle of the experts.'" *Id.* at 452.

Procedure

McDowell Welding & Pipefitting v. US Gypsum Co., 345 Or 272 (2008)

Elliott v. Progressive Halcyon Ins. Co., 222 Or App 586 (2008)

Snider v. Production Chemical Manufacturing, Inc., 221 Or 593 (2008)

In *McDowell*, the Supreme Court held that "Article I, section 17, of the Oregon Constitution did not require the trial court to try either defendants' counterclaim [for specific performance of a settlement agreement] or their affirmative defense [release based on settlement] to a jury." 345 Or at 287. In *Elliott*, the Court of Appeals concluded that "the limitation stated in ORCP 54 E(3) [limiting right to recover costs and attorney fees if result is not more favorable than pretrial offer of judgment] does not constrain the trial court's ability to impose a sanction under ORCP 46 C for a party's failure to respond to a request for admission." 222 Or App at 595. In *Snider*, the Court of Appeals held that (1) it lacked jurisdiction to review an order denying defendant's petition to compel arbitration because defendant failed to file an interlocutory appeal within 30 days of the order as required by ORS 36.730 (221 Or App at 599); and (2) defense counsel's statement that defendant did not have any exceptions to jury instructions "other than what has already been commented" did not preserve its claim that the court erred in failing to give requested jury instructions because "it did not cogently present for the trial court's consideration the alleged deficiencies in the instructions." 221 Or App at 603. ❐

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tion of knowingly corruptly may not apply to Section 1503 or 1505, where the word "corruptly" is not modified by the word "knowingly") and 707 ("corrupt" conduct cannot be innocent).

44 *U.S. v. Kellington,* 217 F.3d 1084 (9th Cir. 2000).

45 *Compare U.S. v. Cueto,* 151 F.3d 620, 631 (7th Cir. 1998) (facts showing attorney's financial interest in client's illegal operation established corrupt intent to obstruct investigation of that operation).

46 *Id.*

47 ORPC 1.2, 4.1, 1.6, and 8.4(a)(3) respectively. ORPC 8.4(a)(3) does not specify a mental state. However, this rule—almost identical in substance to former DR 1-102(A)(3) and (4)—has been interpreted to require knowledge. *See, e.g.*, Formal Opinion No. 2005-34, *In re* Hoffman, 14 D.B. Rptr. 121 (2000).

48 ORPC 1.0(h).

49 *See, e.g., In re Skagen,* 342 Or. 183, 203-204 (2006) (recklessness as to accuracy of billing statement not dishonest conduct under ORCP 8.4).

50 *In re Hawkins,* 305 Or. 319, 324 (1988) (client told attorney of factual errors on consent form, which the attorney did not correct prior to filing).

51 *In re Trukositz,* 312 Or. 621, 630-632 (1992).

52 *In re Conduct of Cobb,* 345 Or. 106, 125 (2008).

53 *In re Conduct of Fitzhenry,* 343 Or. 86, 105-06 (2007).

54 *Cobb*, 345 Or. at 125 (discussing DR 1-102(A)(3) and observing that careless or reckless conduct may bring exposure to other forms of liability, but is insufficient to trigger discipline).