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## In This Issue...



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## What Tom Capps Has Taught Me About Effective Communication[1]

*By William A. Barton and Tom Capps*

William A. Barton

Tom Capps

**Bill:** This article is presented in the format of a "coffee cup conversation" between me and my friend Tom Capps. Tom teaches in my Boot Camp for aspiring jury trial lawyers. Out of respect for Tom and his gifts, from this point forward I'll refer to him as my communication coach. He coaches me—a lawyer—my clients, and witnesses to be effective and persuasive. Before I met Tom I'd never had any acting instruction.

In the early 1990's the techniques of theater[2] and psychodrama[3] began to creep into the trial community. It was a natural analogue. Legal education has now acknowledged the proper role of the act of storytelling for the jury trial lawyer. [4]

Tom, before we dive into what you have to offer jury trial lawyers, tell us, without undue modesty, a little about your professional background and how you came to be the unique legal consultant you are.

**Tom:** Bill, my start as a professional actor began by a fluke. I was visiting my Grandmother in Oklahoma City for the summer. My older cousin, the family member who really loved acting, was also visiting that summer.

There was a national talent search out of New York touring the country looking for new talent for Broadway. It was at the height of all the great musicals such as *The Sound of Music*, *Oklahoma!*, *South Pacific*, *The Music Man*, *Oliver!*, and many more. Those musicals used a lot of kid actors, and there was always a big turnover. So, I went with my cousin and Grandmother to his audition where there was what seemed like thousands of kids singing and dancing. I just tagged along; the idea of auditioning or acting never crossed my mind.

After they were all done, one of the casting directors came out to the audience and stood by me and my grandmother. She bent down to me (I was really little for my age which casting directors especially love for kid actors) and asked me why I didn't audition. I was so shy I couldn't answer. My Grandmother said that I just came along with my cousin. She asked if I could sing a song for her. I said "no." She then asked me to sing happy birthday to her because it was her birthday. I very politely whispered the song to her, and that was it.

About a month later they contacted my mother and asked her to come with me to New York all expenses paid to meet with producers and directors for the upcoming season. Of course my mother was in shock; I had never told her about what happened at my cousin's audition. She thought it would be an experience I would never have again and talked me into going, never thinking anything would come of it.

To make a long story shorter, we went, and I got a job acting on Broadway. Consequently I was in several shows over the years because casting directors pass child actors along as they grow and their voices change.

It opened the door for me to train with the very best. Lee Strasburg accepted me into the Actors Studio where I studied method acting for many years. I met and studied with some of the greatest actors who have ever lived. What a childhood.

Early in my professional career I realized that I found teaching much more rewarding than acting. So I started my teaching career running the Tracy Roberts Studio in Beverly Hills and then opened my own studios in L.A. and New York. However, I discovered I really enjoyed going to secondary markets like Dallas, Atlanta, Chicago, Detroit, Houston, Orlando, Miami, Las Vegas, and Charlotte to find the next generation of stars.

I also became a private acting coach for many working actors and would go on the movie sets to help them develop their characters. And, to my surprise, lots of attorneys were also taking my classes. Granted, many of them wanted to be a movie star, but some told me how much the acting classes helped them become better trial lawyers. Okay Bill, is this enough to qualify me as an expert?

**Bill:** Yes, and thanks. Next, I'd like to share a story with our readers. With Tom's support and guidance, I presumed to try my hand in a one person performance of Supreme Court Justice Oliver Wendell Holmes, Jr. (1841-1935). This soon expanded into a shared evening of conversation between Holmes and Justice John Marshall Harlan (1833-1911) with former Oregon Supreme Court Chief Justice Paul De Muniz portraying Harlan. I've now performed Justice Holmes over 20 times in 5 states and before members of the U. S. Supreme Court.

My job is to be effective in court and on stage. It's clear there are skills common to both. A strong beginning and ending, positioning, eye contact, voice modulation, generating and using pauses, emotion regulation, and the effective use of props or exhibits are shared tools of the trades. However, stating the obvious misses the finer points in application.

**Tom:** That's why most courtroom testimony sounds like an after the fact rendition of "this happened, then that." The reason of course is fact witnesses are testifying to what has happened in the past. Your job as a lawyer is to make the past happen NOW, to make it interesting and informative; in other words, to bring it to life!

**Bill:** Easy to say, tough to do.

**Tom:** This might be a good time to talk about what acting tries to do for the viewer. Acting is nothing more than live action "storytelling." Storytelling has long been a part of mankind. All of our past is recorded in some form of a story. Heck, the Bible is just a group of stories about different events and people.

Somewhere down the line, the storyteller began to take on the personalities of the characters in the stories being told. Instead of just talking or narrating, suddenly you had live action and maybe even multiple voices or persons within the developing story. Thus, acting was born.

Think about what you do, Bill. You are a storyteller. David Ball's book, *Theatre Tips*[5], is an excellent read for every lawyer. He talks about the importance of the lawyer developing the trial story; however, we all know that having a good story is just the start.

We recently started working on your Justice Holmes presentation. You began by seriously costuming your character, which helped you to "get into character." Then you developed a powerful set of stories but, even with the costume and stories, something was still lacking.

I worked to help you start believing you had actually lived (as Oliver Wendell Holmes in first person) the very events you were describing to the audience. For example, you were shot twice during the Civil War. Your description of being wounded must communicate the full truth of your five senses. As an example, the first thing you might say is that you realized the pain in your gut and, then, how you couldn't breathe. Next is the sight of blood splattering on your face, feeling its warmth against your skin. The last thing you might remember is the taste of blood as you fade from consciousness.

Now, I've never been shot before; however, the idea behind "method acting" is you must experience the action you're portraying in order to accurately recreate it. Our life experiences are obviously limited; as an example, I have never died but, professionally, I might need to help an actor recreate the reality of death without having actually experienced it. Method acting is about creating the perception of an experience through the five senses: sight, sound, smell, taste and touch. "SSSTT" is what it's professionally called.

So, when you "recreate" being shot, what the audience sees is the result of you working your five senses into sharing the complete experience of being shot. That is how and why great actors get lost in their performances. They make us believe their character was really shot, even though our common sense tells us otherwise.

It takes serious training to be able to do this on cue, be it take after take on a movie set, or night after night on the stage. However, lawyers, clients and witnesses can apply the techniques of method acting to help them persuasively relive the details.

Remember, the testimony of your clients and witnesses has actually happened. So, for them, it is the truth; it's their truth.

**Bill:** After trying my hand as Justice Holmes, I better appreciate the work necessary to get into character and then to stay there. I also understand that relaxation is another important part of it all.

**Tom:** Absolutely. Some actors relax to concentrate; others concentrate to relax. But, in the end, it takes both. I have always said that if you're not nervous before a presentation, then it probably doesn't mean much to you; yet, you can't appear nervous.

Change your nerves into positive energy. We call it "performance energy." These are all learned techniques, and there are many. My job is to find the one that works best for you every time. However, you must practice it so you can do it when needed.

Hard work is a big part of being the best attorney (or actor) you can be. I know this sounds like a lot added to everything else you must do to prepare for court, but, like most endeavors, the extras make the difference between good and great.

**Bill:** I must always speak "the truth" of the person I represent, and do it in an authentic, interesting and compelling manner. As a lawyer this requires that I take off my personal mask and learn to walk a mile in my client's shoes.

**Tom:** Teaching acting skills isn't an easy sell to many in the legal community. Some think it's blasphemous to employ "acting" techniques. They believe acting is a form of pretending or lying because they think the actor presents a false representation of reality. Compare this with the witness who is sworn to only tell the truth.

The oath means every witness is sworn to tell only what they honestly believe happened. People aren't cameras or recorders and, while they are honest, they might be inaccurate. That's why cases get tried. Every lawyer's had trials with contradictory testimony, even from eyewitnesses. So, whose version is the jury going to believe, who's most credible, and why?

If you're going to be an effective jury trial lawyer then your witness, and especially your client, must be persuasive. Every aspect of the trial should advance your client's story.

**Bill:** I've always maintained that the jury lawyer is probably the most important witness in a jury trial, albeit unsworn. We "testify" at least four times: jury selection, opening, cross, and closing.[6]

**Tom:** I agree. It's not easy testifying before a jury of strangers. The lawyers I teach have increased the effectiveness of their delivery and that of their clients and witnesses. Lawyers say they "coach" their clients; it's called the same thing in Hollywood.

The big difference is your audience, meaning the jury, is going to vote whether your client is guilty or innocent, credible or not. And, by the way, in the movies we can do retakes, but that's not true in court. Unpersuasive testimony can be disastrous. An actor is going to get good or bad reviews. This, too, can be costly. That's why they invest in good coaching.

**Bill:** So, let's be specific. What did you do in my last Justice Holmes performance to help me present the Justice more effectively that also helps me be a more effective jury trial lawyer?

**Tom:** No disrespect Bill, but you've spent your legal career talking. Great actors and orators live in the pauses; it's the amateurs who can't tolerate the silences; they rush to fill them. We looked for ways to personalize and humanize the Justice, thereby inviting the audience into his life and work. We tightened your presentation with a concise opening and closing driven by themes that are interesting to modern audiences, and of course we built in a few measured pauses at key lines and places.

## Acting Teaches You to CONNECT, COMMUNICATE, and INSPIRE

**Tom:** Theater is a magic doorway.[7] It's much more than entertainment or technique; it's an intensely personal and creative process. Theater opens paths to the revelation of yourself as to who you are at your deepest levels. As an actor you strive to dig deeper, to exceed your comfort level, and thus reveal what's been waiting to be discovered within yourself. This means you must become vulnerable, real, and, yes, painfully honest. Lawyers call it being real, being authentic.

**Bill:** If aspiring trial lawyers want to just narrate, what I call legal "stack-a-fact," then neither Tom nor I have much to offer. But, if they want to take the next step, then they should consider attending our Boot Camp.[8]

**Tom:** I agree. My sessions at the Boot Camp will help you find parts of the person/client you represent deep within yourself in order to communicate that character to the jury. Method acting techniques will help you to discover, interpret, and effectively share your client's deepest truth(s). You also learn to confront and quiet your fears of rejection as you allow thoughts and feelings you might normally quash to surface and be expressed.

## Acting (Communication) Tips for the Courtroom

**Tom:** Courtrooms are a special performance place for jury trial lawyers. I offer the following suggestions, some of which will certainly sound familiar to our readers:

### Presentation Skill Development

- **Voice:** As we all know, there are calming voices and irritable voices. And, many times they are out of the same mouth. Voice can cause many reactions from your listeners. Practice different ways of delivering your message. I work with lawyers and witnesses on different ways to speak their words. The impact becomes far more persuasive when emotion is properly added.

- **Posture:** Posture is the first sign of how people feel about themselves and the material they are about to present. Nerves, again, have a big impact on your posture. An audience will sense a speaker's nervousness or lack of confidence. Often the person I am working with has no idea that their posture has changed. I videotape them and they are astonished. Once again, practice and preparation are essential to assure your delivery generates maximum credibility.

- **Space:** Time is spent "blocking" the scene in movies and plays. That means the performers always know where they are as they are delivering their lines. I do the same with my attorneys. I might have them ask a question while walking up to the clerk. This is calculated to give a stagnant audience a real sense of movement. The jury must stay in their seats, and your movement gives them a sense of moving. It wakes them up to what you are about to say and prove. It also helps anytime you can get closer to your audience.

- **Pauses or Silence:** I already mentioned this. A pause can be the most important part of your delivery. It gives the audience a chance to breathe, a chance to soak in what you just said. A pause can be your most powerful weapon. Great actors have the innate ability to slow down, take their time, and linger in the pauses. It might be what isn't said that wins the case . . .

- **Maintaining Eye Contact:** It's always a problem. Looking people dead in the eye is scary. We all had that moment growing up where Mom or Dad tested us by saying "look me in the eye and tell me what happened." Boom! Either you are exonerated or condemned. Lawyers and witnesses should make as much eye contact as possible with each juror. The more you do this the less they will feel you're hiding something.

• **Flow:** This is a term I use during relaxation workouts. Getting a sense of a "flow" through your body is a great way to gain total relaxation. It works for almost everyone, even the stubborn ones. It's an exercise that has the participants visualize a warm liquid flow from their head down through their bodies to their toes. It is sequenced with deep breathing exercises that help with your concentration. It can take several attempts for your mind to allow you to feel the sensations we are trying to accomplish.

### "Inner" Work/Character Development

• **Your Client:** Clients are playing the hardest characters to portray: themselves. You rarely see real people playing themselves in life. Yet it is our job to get our clients to actually relive their total experience now in the present tense, emotionally. I guarantee you what they did in your office will be almost impossible to later recreate in court unless you guide them with the same techniques actors use. What you'll be doing is giving them the tools and confidence and, in turn, the courage to retell their story with the power necessary to convince the jury of their truth.

• **Use of Psychodrama:** It is the basis of method acting. It helps participants feel true emotions. When acting is done right, it forces you to add deeper, more complex emotions to the character. When you truly feel an emotion, it always comes across "emotionally."

**Bill:** Well Tom, we've covered a lot. I'm a beginner at psychodrama, the craft of acting, and how to incorporate them into the courtroom; however, with your guidance, I'm learning and hope I'm improving.

**Tom:** Change is scary, and yet it can be one of the most exhilarating experiences in life. Incorporating method acting techniques into your courtroom armament will help you become more effective. The skills we have discussed are not that radical. Learning more about human nature, which is what method acting really is all about, is simply common sense. You will be able to represent your clients to their fullest. That might mean taking a chance and trying something a little different.

**(Endnotes)**

1 This article builds on Stephen English's June 2010 article on Tom Capps and his lessons on how acting techniques apply in the courtroom. English, Stephen "Acting Like Lawyers," *Litigation Journal* 29:2 (2010) : 1, 28.

2 Ball, David *Theatre Tips and Strategies for Jury Trials,* First Ed. 1994.

3 Mathis, Laura *Acting Skills for Lawyers,* 2011.
Spence, Gerry *Win your Case,* First Ed., 2005.
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Mellon, Nancy *The Art of Storytelling,* 1992.

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6 McElhaney, James W. *Trial Notebook,* 4th Ed. pp. 441, 442, 445.

7 Jesse Wilson, "Lessons From The Stage," www.linkedin.com/pulse/role-actor-trial-lawyer-jess-wilson.

8 Barton's Advocacy Boot Camp is a 23 hour training session spread over two weekends. To apply see www.bartontrialattorneys.com.

# DIRECT EXAMINATION: OLD DOGS AND NEW TRICKS[1]

*By Dennis P. Rawlinson*
*Miller Nash Graham & Dunn LLP*


Dennis P. Rawlinson

An eerie silence fell over the courtroom. The air seemed suddenly heavy. Time stopped. For the first time all twelve jurors were on the edge of their seats. They were fully alert. They seemed to be straining their senses (like bird dogs after prey) to absorb the testimony that was about to come.

It had been quiet in the courtroom before. But nothing like this. It was as if those present in the courtroom were afraid to breathe, lest they distract attention from the questions about to be asked and the answers about to be given.

Some were reminded of old western movies when two cowboys riding through hostile Indian territory would rein their horses to a stop and one would whisper to the other:

"Slim, it's quiet . . . too quiet."

The memorandum in the hands of the witness was important. First, it was addressed not to just anyone but to the president of the tobacco company. But more importantly, the original had never been produced. In the hundreds of thousands of documents produced by the tobacco company, it was nowhere to be found. And yet, like a miracle, here was the file copy—carried to court by its author, revealing to all why the original had no doubt been destroyed.

Plaintiff's counsel, sensing the drama of the moment, waited for the lengthy and unnatural silence to draw the attention of all present in the courtroom to the witness stand. And that it did . . . just like moths in the darkness drawn to a lantern light.

In his opening, plaintiff's counsel described the witness in more glowing terms, but in simple cold English, he was "a turncoat former employee." All knew, without translation, that this meant a witness who was not "beholden to the company"—a witness whose job, reputation, and future income were not on the line. A witness whose testimony would not be tainted by his employment relationship with the defendant tobacco company.

Plaintiff's counsel cleared his throat as a precaution to ensure that the questions he was about to ask would be clear, crisp, and well enunciated.

Q: Did you read the third paragraph of the memorandum?

A: Yes.

Q: What was the subject of the third paragraph?

A: Nicotine.

Q: What about nicotine was discussed?

1 Reprinted from the Spring 2005 edition of *Litigation* magazine, a publication of the American Bar Association Section of Litigation.

A: The nicotine levels in cigarettes.

Q: Did the paragraph suggest that the nicotine levels be increased or decreased?

A: Increased.

Q: If the nicotine levels were increased, would that have any effect on anything?

A: Yes.

Q: What?

A: The number of smokers.

Q: Would increasing nicotine mean more smokers or fewer smokers?

A: More smokers.

Q: More smokers than if the nicotine levels were not increased?

A: Yes.

Q: Would this mean more or fewer sales?

A: More.

Q: Would this mean more or less profit for the company?

A: More.

Q: Would the increased profits be substantial or insubstantial?

A: Very substantial.

The stake had been driven into the vampire's heart. No one in the courtroom missed the importance of these few questions and these few answers. In the minds of most of the jurors, the case was over.

But it was not just the information that was delivered by the direct examination above that had impact. It was the manner in which the direct examination was conducted. Plaintiff's counsel understood the difference between routine direct examination and powerful direct examination. Plaintiff's counsel understood the difference between traditional direct-examination techniques and traditional cross-examination techniques and consciously elected to apply the latter in this direct examination.

By adopting a traditional cross-examination style (in which the lawyer does the work and offers the witness only alternatives and no more than a word or two in the witness's answer), plaintiff's counsel had argued the important points of this testimony to the jury "through the window of the direct-examination witness," just as a cross-examiner argues a case to the jury "through the window of a cross-examination witness."

One of the advantages of arguing the case through a witness on direct examination, just as most lawyers argue their cases through witnesses on cross-examination, is that the lawyer's questions are answered by the fact-finder before the witness answers. As a result, if the answer is compelled by common sense, regardless of the witness's answer, each member of the jury arrives at his or her own answer . . . first. Such an answer is not subject to impeachment by any adversary.

# Litigation Journal Editorial




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The technique discussed above is not novel. Two of the proponents of this alternative approach to direct examination are trial-technique instructors, Judge Herbert Stern and Judge Ralph Adam Fine. Judge Fine uses an example substantially identical to the one set forth above to show the effectiveness of this technique by borrowing from the novel *Runaway Jury* by John Grisham.

In stark contrast to the foregoing, the traditional method of direct examination would have the witness do the work. Plaintiff's counsel would simply ask the witness what the memorandum disclosed, and the witness would be likely to "dump" all the incendiary, high-impact information into a single answer, which could be easily missed by a nonattentive or daydreaming juror.

Q: What was in the third paragraph of the memorandum?

A: I suggested to the president that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine would mean more smokers, which would mean more sales and more profits.

The difference in the effectiveness of the two techniques is obvious.

Although arguably the information provided under both of the direct-examination techniques outlined above is substantially similar, this second example is not as powerful as it could be if the lawyer, not the witness, were doing the work. With a single question and answer, there is always the risk that the jury will be distracted for a moment and miss or misunderstand the answer.

Under the first example, with a lawyer doing the work, it would be hard for a member of the jury to miss the answer or miss the point. The questions and answers are "drawn out," repetitive, and much more dramatic. Moreover, under the first example as discussed above, the jury knows the answer to the question before it is even answered. Why? Because the answer is compelled by common sense.

Today, many established trial techniques and tactics that have been largely unchallenged are being reevaluated by commentators and practitioners to determine whether the assumptions on which they are based are truly sound. One of the areas that is being challenged is the traditional approach to direct examination. As disclosed by the contrast of the two techniques disclosed above, sometimes applying a traditional cross-examination technique to a direct examination can be more effective than employing traditional direct-examination techniques.

Discussed below is a comparison of the traditional rules of direct examination and cross-examination. By understanding how direct examinations are traditionally conducted and understanding how cross-examinations are traditionally conducted, we can then consciously decide whether in a given circumstance (such as the disclosure of the contents of the third paragraph of the memorandum that the tobacco company had destroyed in the example above) abandoning direct-examination techniques and embracing cross-examination techniques for a brief interlude or even for an entire direct examination might make your direct examination more powerful and persuasive.

A comparison of the traditional general rules for conducting direct examination and cross-examination exposes a common theme. Whatever rule applies to direct examination, usually the directly opposite rule applies to cross-examination.

This contrast is not surprising. After all, direct examinations generally consist of eliciting helpful information from cooperative witnesses whose credibility we are attempting to bolster. On the other hand, on cross-examination we are generally attempting to elicit helpful information from an uncooperative witness whose credibility we are attempting to impeach.

## A. Traditional Rules of Cross-Examination

A review of six general rules of cross-examination and comparing those rules with comparable rules for direct examination will demonstrate the contrast.

### 1. Build to a Strong Ending

A traditional cross-examination ends strongly but starts slowly. In contrast, a good direct examination, redirect examination, or recross examination should start and end strongly (take advantage of the persuasive techniques of primacy and recency). Similarly, cross-examination should finish strongly, ending with the traditional "zinger," a point that is a guaranteed winner in that it is absolutely admissible, is central to your theory, evokes your theme, is undeniable, and can be stated with conviction. In direct examination the same kind of impact can be made with a zinger in the opening line of questions.

Cross-examination, however, should usually not begin with a zinger. Why? Because employing an initial zinger will alienate the cross-examination witness and make it impossible to draw from that witness helpful points to generally bolster your case (before turning to hostile questions and ending with a zinger).

#### a. Elicit Helpful Admissions

Starting slowly on cross-examination will allow you to take full advantage of information available from the cross-examination witness before you allow your relationship with him or her to deteriorate into alienation.

First, you can elicit friendly background information that is not threatening, but that may support your theory and theme, such as the achievements and extraordinary training of a defendant who you are attempting to show knew full well what he or she was doing at the time of the complained-of conduct.

#### b. Elicit "Gap Fillers"

Second, after exhausting the friendly information, you can ask questions to build the value of your case by providing affirmative information that will fill in gaps and will be more persuasive coming from an adverse rather than a friendly witness.

Finally, uncontroverted information that is well documented or well settled can be solicited before resorting to your first challenging information questions and finally your hostile questions to the cross-examination witness.

### 2. Use Indirection to Ambush

Traditional cross-examination employs indirection. In contrast, during the direct examination, in the interest of assisting your witness and drawing a clear, easy-to-follow picture for the fact-finder, the examiner works hard to make it clear where he

or she is going. In contrast, on cross-examination, making it clear to the witness where you are going will only encourage the witness to become evasive, hostile, and argumentative.

For instance, if you are trying to make the point that the witness should have understood the contract or letter that the witness read, and you ask the question directly, you will probably not get the answer you want. On the other hand, you can achieve the same goal by indirection. Before concentrating on the simple language of the agreement or letter that the witness has admitted receiving and reading, you can establish the witness's extensive experience, achievements, and laudable business practices through a series of questions with which the witness will have to agree and that will lead to only one conclusion concerning the witness's understanding of the agreement or letter.

Questions that could be asked to set up the indirection:

a. You have more than 30 years of experience negotiating contracts, don't you?

b. You've been highly successful in negotiating successful contracts over your career?

c. You regularly hire lawyers to assist you in reviewing important documents?

d. To the extent that you don't review important documents, you have someone on whom you can rely review them?

e. You insist that important and crucial points that are discovered in documents be brought to your attention?

f. It is this kind of detailed, cautious, and deliberate procedure that has led to your success?

Having established a general practice of careful reading of documents, while at the same time flattering the witness's achievements and work habits, will allow you by indirection either to obtain the admission or to frame a question concerning understanding of the agreement or letter that will make apparent the answer you should have gotten. If you had flagged in advance where you were going and why you were asking the background questions, the result might have been quite different.

### 3. A Foundation of Details Enhances Witness Control

In traditional cross-examination, details are given first. In contrast, often in direct examination the most effective procedure is to cover details only after the witness has described the "action" of his or her recollections. Put differently, it is generally prudent not to interrupt the action of the witness's story on direct examination with detailed questions about distances, thought processes, and emotional reactions until the action has been told and completed in a series of frames where each point adds an additional action step and captures the fact-finder's attention.

In cross-examination, the details must be elicited initially so that you can use them to "herd" and "corral" the witness to provide you with the admissions you need. Until the factual background has been laid by the adverse witness that limits the routes of escape and explanation, cross-examination is often ineffective.

### 4. Scatter Circumstantial Evidence

Traditional cross-examination scatters circumstantial evidence. In contrast, in argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive.

In argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive. If the contention of the proponent is that someone was late for an appointment and therefore negligent in his or her driving, assembling circumstantial evidence about the importance of the appointment, the time of the appointment, the time of the accident, the speed of the car at the time of the accident, and the conduct after the accident, including an immediate phone call to the location of the appointment, supports the persuasiveness of the contention.

In cross-examination, assembling circumstantial evidence to support a contention will make the contention obvious to the adverse witness and result in encouraging that witness to be evasive, hostile, and argumentative. Thus, the circumstantial-evidence points should be separated and scattered, obtained either from different witnesses or at different points in the examination, so that your ultimate objective and contention are not obvious.

### 5. Employ Short Questions Seeking Short Answers

Traditional cross-examination employs short questions and short answers. In contrast, during direct examination the examiner strives for short questions and long narrative answers by the witness. This allows the attention of the fact-finder to focus on the witness, not the examiner. Open questions are used. The witness is left unfettered to improve his or her credibility.

Allowing an adverse witness to launch into long answers and explanations will doom any cross-examination. The questions should be not only short, but also closed-ended to control and limit the adverse witness's response. By inching along and adding only one fact at a time, the examiner can control the adverse witness and give him or her little room for argument and evasion.

### 6. Attention Should Be on the Cross-Examiner, *Not* the Witness

Traditional cross-examination draws attention to the cross-examiner. In contrast, during classic direct examination the examiner attempts to place the attention of the fact-finder on the witness. The examiner simply shepherds the witness in telling his or her story in a natural, credible, and easy-to-follow manner. In contrast, on cross-examination, the attention should be on the cross-examiner. Cross-examination is often the opportunity for the cross-examiner to argue his or her themes or theories by asking questions the answers to which are often irrelevant. By raising impeaching, contrasting, and contradictory points, the examiner brings attention to himself or herself and thereby exposes the weakness of the recently conducted direct examination.

## B. Consider Abandoning the Traditional Cross-Examination Rules

Having refreshed ourselves about the contrast between the traditional rules of cross-examination and direct examination, let's now consider (as one of the "new tricks" being urged by commentators and forward-thinking practitioners) abandoning the traditional direct-examination approach on direct examination for a cross-examination approach.

### 1. Short Questions and Short Answers

Under such an approach, the direct examination should be tightly controlled by the examiner, the direct-examination witness should be given little or no leeway, and the attention of the fact-finder during examination should be on the examiner, not the witness. Thus, like cross-examination, direct examination becomes an opportunity for the examiner to argue his or her case through the window of a witness.

Under this approach, the witness on direct examination is never allowed to answer any more than a sentence. This allows the examiner to do the work and control the examination. It limits the amount of "each bite" of information that is given to the fact-finder, improving the possibility of understanding. Moreover, it allows the examiner to take advantage of the additional benefits discussed below.

A number of advantages can be realized by using cross-examination techniques to conduct a direct examination and thereby argue your case through the window of a witness.

### 2. Lawyer Assumes Control

Under traditional direct-examination techniques, the witness is placed under a tremendous amount of pressure. He is told that he will be asked, "What happened?" The witness is then expected to tell his story in the way that is most persuasive, articulate, and memorable. The witness is told to "be sure to cover this, be sure to cover that, and don't forget to say this . . . and by the way, you cannot use any notes."

Is it really fair to lay all this burden on the witness? Is this really the most effective approach to direct examination? Shouldn't a lawyer be doing the "rowing" (work)?

In contrast, under the alternative approach, the lawyer takes control and does the work. The witness is asked a series of short questions to each of which he gives an answer of only a word or two and in no event any longer than a sentence. The lawyer then leads the witness to the next point. The witness can now relax.

### 3. Positive By-Products of Lawyer Control

If the lawyer does the work and coaches the witness to give short answers, the lawyer has a full array of persuasive techniques available. First, repetition of the most important and damaging points; the direct examiner can repeat a point several times by rephrasing the question to ensure that it is remembered by the fact-finder.

Second, the lawyer can remove from the direct-examination testimony tangential, irrelevant, and side points that clutter up the information that the fact-finder needs to receive. Third, the lawyer can, by controlling the witness, make the arguments to the jury that are available through the direct-examination witness. Similar to cross-examination, the examiner can argue the case through the window of the direct-examination witness.

In traditional direct examination, it was up to the witness (whether a fact or an expert witness) to be persuasive—to be the salesperson. At least in my experience, most fact-finders are suspicious of fact or expert witnesses who appear to be "selling" something.

In contrast, the fact-finder expects the lawyer examiner to be a salesperson. As a result, if the lawyer argues through the direct-examination witness and the witness simply provides short, accurate, and thoughtful answers, the resulting argument is that of the lawyer. The witness's credibility is not undercut or tainted by the witness's own active effort to sell the point.

### 4. Example of Positive By-Products of a Lawyer-Controlled Direct Examination

Having discussed the contrast between traditional techniques of direct examination and cross-examination and having discussed how applying cross-examination techniques to direct examination can sometimes be effective, let's take a look at a second example of employing cross-examination techniques in direct examination.

This can be demonstrated by a simple intersection collision case, assuming that there is no dispute as to fault. You have the good fortune of learning that the defendant had three beers before the accident.

You call an eyewitness who was present when the defendant had the three beers at a local tavern. Your direct examination, instead of simply setting the scene and asking the witness what he or she saw and again running the risk that in long narrative answers the point and impact of the testimony might be lost, can be transformed by having the lawyer do the work.

Set forth below is another sample of direct examination in which the examiner does the work, limits the answers of the witness, and emphasizes through repetition the point that the defendant had been drinking at the time of the accident through the window of the direct-examination witness.

Q: Did the defendant have a beer?

A: Yes.

Q: Did the defendant have a second beer?

A: Yes.

Q: Did the defendant have a third beer?

A: Yes.

Q: So the defendant had a total of three beers?

A: Yes.

Q: The three beers that the defendant drank—were they imported or domestic beers?

A: Imported.

Q: The three beers that the defendant drank—were they light beers or dark beers?

A: Light.

Q: The three beers that the defendant drank—were they bottled beers or from the tap?

A: Bottled.

Q: The three beers that the defendant drank—did he drink them out of the bottle or with a glass?

A: Out of the bottle.

Q: The three beers that the defendant drank—did he drink them slowly or fast?

A: He drank the first two fast and the last one slowly.

Under that example, with the lawyer doing the work, it would be hard for the fact-finder to miss the fact that the defendant had three beers. In fact, whether the beers were imported or domestic, bottled or from the tap, light or dark, drunk with a glass or from the bottle, or drunk slowly or fast is irrelevant. The point is, the defendant drank three beers, and that point is being driven home so that the fact-finder will not miss it.

The advantage of arguing the case through a witness on direct examination is that it is powerful and undeniable, and it allows you to repeat and emphasize important points.

A good solid understanding of the differences between traditional direct examination and cross-examination should not be the end of your analysis. Consider using cross-examination techniques during all or portions of your direct examinations. Doing so will give you yet another opportunity to argue your case through the window of the witness on the stand.

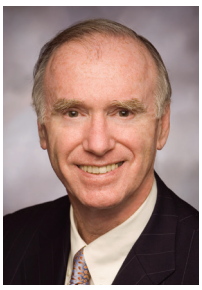
When you stop and think about it, the potential advantage is obvious. It seems undeniable that in a trial, if one of the lawyers spends 80 or 100 percent of his or her cross- *and* direct-examination time arguing his or her case through the window of the witnesses on the stand and the opposing attorney using traditional methods gives up the opportunity to argue the case during direct examination (and as a result is able to argue his or her case through the window of the witnesses on the stand only 50 percent or less of the time), the first lawyer will have the advantage.

We all work hard to master the traditional methods of direct and cross-examination. Having mastered those techniques, we should realize that the battle is not over. One of the keys to continuing to improve our skills is to continue to consider alternative and improved approaches to the persuasive techniques we have mastered. One of the alternatives that may offer the greatest promise is substituting cross-examination techniques in our direct examinations.

# Death with Dignity: A Risk Management Perspective

*By Gabriela Sanchez[1] and Robert Maloney*
*Lane Powell PC*

Gabriela Sanchez



Robert Maloney

## National Right to Die Movement

Oregon was the first state in the nation to adopt a right to die law. The Oregon Death with Dignity Act[2] ("DWDA") was a ballot initiative approved by voters in 1994. In 1997, voters defeated a ballot initiative to repeal the bill. The DWDA finally took effect in 1998, and it has withstood legislative and court challenges.[3]

Nearly twenty years later, four other states (Colorado, Washington, Vermont, and California[4]) and the District of Columbia have enacted right-to-die laws. Further, Montana, pursuant to a Montana Supreme Court case, permits its citizens to use aid-in-dying medication to humanely end their lives.[5] According to the Montana Supreme Court, there is little difference from a public policy perspective between taking a person off life support and prescribing lethal medication.

Other than the initial actions related to the enactment of Oregon's law, there has been little to no litigation arising from the DWDA. With California's enactment of its own death-with-dignity law and its much larger population, we may see a rise in litigation involving death-with-dignity issues. This is particularly true with respect to institutions not initially considered by the original drafters of the DWDA, as described below.

As of January, 2017, at least 20 more states are considering enacting right-to-die statutes.[6]

## Oregon's Death with Dignity Law

In a nutshell, Oregon's DWDA[7] allows a terminally ill patient to request aid-in-dying medication from an attending physician. An attending physician determines that the patient has six months or less to live, is an Oregon resident, is not suffering from psychological or mental disorder, and is capable of making an informed consent. A separate consulting physician then confirms the attending physician's findings. If either physician believes the resident is suffering from mental health issues or is depressed, she must refer the patient to a mental health specialist. Only if the mental health specialist determines that the patient is not suffering from mental health issues causing impaired judgment—and after a subsequent 15-day waiting period—can the attending physician prescribe aid-in-dying medication.

Once the prescription is filled, a patient has the choice to consume the aid-in-dying medication at any time. There need not be any person or physician present at ingestion of the medication. A patient is also not required to notify family or

caregivers of her having obtained aid-in-dying medication. As discussed below, this can pose challenges for caregivers.

Since 1998, and through January 27, 2016, physicians in Oregon have prescribed aid-in-dying medications for 1,545 people. [8] Of those, there have been 991 deaths. The majority of patients had cancer (72%) and cited quality of life as the reason for choosing death-with dignity. The number of Oregon patients using death-with-dignity has increased year-after-year. For instance, in 2015 there were 215 prescriptions filled and 132 deaths. In comparison, in 1998 there were only 24 prescriptions written and 16 deaths, and in 2014, 155 prescriptions were written and there were 105 deaths.

## Challenges and Litigation Risks

As a preliminary matter, it is important to note that the right to die is referred to as death with dignity. From a legal perspective, Oregon's DWDA[9] specifically notes that "actions taken in accordance with ORS 127.800 to 127.897 shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or homicide, under law . . ." In fact, the law further prohibits insurance companies from conditioning policies on a patient not participating under this law. It also provides that, "neither shall a qualified patient's act of ingesting medication to end his or her life . . . have an effect upon a life, health, or accident insurance or annuity policy."[10]

From a risk management perspective, it is important for lawyers to refer to acts performed in accordance with DWDA as death with dignity and not assisted suicide. Aside from suicide having a socially negative connotation, it has certain legal implications that could affect a patient's rights under the law. From an advocacy perspective, informing a jury that a patient chose death with dignity instead of suicide demonstrates an active, informed, and regulated process taken under the guidance of multiple independent medical professionals rather than a unilateral decision to die.

One risk-related action regarding death-with-dignity laws is confirming that a patient is making an "informed decision"[11] about her death. This responsibility lies squarely with the attending and consulting physicians. However, the DWDA offers certain immunities.[12] No person shall be subject to criminal or civil liability for participating in good faith compliance with the law. No health care provider and professional association shall sanction a person for participating under the law. An attending physician participating in good faith under the law cannot be considered to have neglected a patient for prescribing aid-in-dying medication or if a patient does not request medication. No health care provider shall be under any duty to participate in providing aid-in-dying medication to a patient.

A health care provider may also prohibit another health care provider from "participation" under the DWD law on its premises.[13] "Participation" is limited to performing the duties of an attending or consulting physician.[14]

DWDA poses challenges for assisted living and senior living providers who were not contemplated under the law when it was first enacted. The immunities described above extend only to health care providers. Health care providers are those licensed, certified, or authorized to administer health care or dispense medication. It includes a health care facility.[15] While nursing homes are considered health care facilities,[16] assisted living and other non-nursing home senior living communities are not. Consequently, these communities may not enjoy the same DWDA privileges and immunities as other facilities. Further, nursing homes and assisted living facilities have certain regulatory obligations to protect residents that may conflict with DWDA.

For instance, assisted living providers are required to perform certain assessments, develop care plans for each resident, and manage and administer medication. A resident who obtains aid-in-dying drugs is not required to notify the assisted living community about her having obtained medication. This places the community in danger of being out of compliance with regulations if the resident consumes the medication without any input from the community. Another issue is that patients do not need to notify family members about their having obtained aid-in-dying medication. For communities this can become a potentially difficult situation if a family member who is involved in a resident parent's care is not notified that their parent consumed aid-in-dying medication because the resident wanted to keep this confidential, and the family member later discovers this fact. Issues of capacity and neglect may arise in such a situation.

Even though death-with-dignity issues have not been at the forefront of litigation, with the increase of patients requesting medication to end their lives, other states enacting death-with-dignity laws, and more patients entering nursing homes and senior communities, the risk for potential litigation is on the rise. Therefore, it is important to understand this law and ways to mitigate the risk of litigation.

**(Endnotes)**

1 Gabriela Sanchez is a Shareholder at Lane Powell who represents long term care, senior housing, home health and hospice providers in business, regulatory and litigation matters.

2 Oregon Death with Dignity Act, ORS 127.

3 See, U.S. Supreme Court case *Gonzales v. Oregon*, 543 U.S. (2006) in which U.S. Attorney General John Ashcroft attempted to block Oregon's right-to-die law by authorizing federal drug agent to prosecute doctors who prescribed life-ending medication to terminally ill patients.

4 Colorado, Proposition 106, the End of Life Options Act (passed November 8, 2016); Washington, Death with Dignity Act, RCW 70.245; Vermont, Patient Choice and Control at the End of Life Act, Act 39, 18 V.S.A. Chapter 113; California, End of Life Option Act, AB X2-15; and District of Columbia, B21-0038, the Death with Dignity Act of 2015.

5 *Baxter v. Montana*, 2009 MT 449, 224 P. 3d 1211 (2009).

6 www.deathwithdignity.org/take-action/

7 ORS 127.800 through 127.897.

8 https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ar-index.aspx

9 ORS 127.880.

10 ORS 127.875.

11 ORS 127.800(7).

12 ORS 127.885.

13 ORS 127.885(5)(a).

14 ORS 127.885(5)(d)(B).

15 ORS 127.800(6).

16 OAR 333-009-0000.

# Ninth Circuit Weighs in on Rule 23's "Ascertainability" Requirement

*By Nadia Dahab*
*Stoll Berne*


Nadia Dahab

"Ascertainability?" When courts and commentators use a word that our computer underlines with a squiggly red line, it is a good bet that it will take years of appellate decisions before we understand the new concept. Such is the case with the debate over whether a class must be "ascertainable" or "administratively feasible" to be certified under Federal Rule of Civil Procedure 23.

We are familiar with the basic prerequisites for class treatment under Rule 23(a)—namely, a class must be sufficiently numerous and face common questions of law or fact, the representative parties must have claims that are typical of the class, and those representative parties must be able to adequately represent the class. Nonetheless, whether Rule 23(a) requires that the class meet "administrative feasibility" or "ascertainability" requirements has divided the circuits in recent years. The application of these requirements is particularly important in consumer class actions where defendants argue that the class potentially is so unwieldy that it will be difficult or impossible to determine who the class members are, to give notice to the class, or to process claims.

The Ninth Circuit recently has confirmed that administrative feasibility or ascertainability are not part of the Rule 23(a) analysis. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). In doing so, the Ninth Circuit pointed to the problems created when courts inject new, difficult-to-define requirements into rules or statutes. Thus, the opinion also may stand for the proposition that simple English is better and that complicated judicial phrasing may be a sign that courts are adding requirements that the drafters of a statute or rule never intended. More practically, the Ninth Circuit likely has cemented the split in the circuits and made the question ripe for Supreme Court review. *See* Mayer Brown, *Class Defense Blog*, *available at* https://www.classdefenseblog.com/2017/01/ninth-circuit-rejects-meaningful-ascertainability-requirement-class-certification-cementing-deep-circuit-split/ (last visited Feb. 14, 2017).

The Third Circuit first addressed the question of "administrative feasibility" in 2012. In a class action against tire and automobile manufacturers involving run-flat tires, the court held that an additional prerequisite to Rule 23 is its requirement that the class be "readily ascertainable based on objective criteria." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012). Before *Marcus*, the idea that a class should be "ascertainable" had been broadly understood to mean that a class be clearly defined by objective criteria—after all, "there must be a 'class.'" *See, e.g.*, 7A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1760 (3d ed. 2016) (explaining that requirement). Thus, courts regularly held, almost across the board, that a proposed class must be clearly defined with at least some degree of specificity. *See, e.g.*, *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1041 (9th Cir. 2014) (citing *Wilson v. Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976)).

But *Marcus* raised the bar for ascertainability. Rather than limiting ascertainability to the requirement that "a class must exist," *see* Wright & Miller, Federal Practice & Procedure § 1760, the Third Circuit in *Marcus* held that ascertainability requires class representatives to prove that there is a reliable, "administratively feasible" way in which to ascertain existing class members before the class may be certified. *Marcus*, 687 F.3d at 594.

A year later, the Third Circuit further expanded its "administrative feasibility" requirement in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), which is now regarded as one of the seminal decisions on the issue. *Carrera* was a class action arising from allegedly false and deceptive advertising of Bayer's diet supplement, One-A-Day WeightSmart. The class representatives in *Carrera* sought to certify a nationwide class of consumers under the Florida Deceptive and Unfair Trade Practice Act, and the issue on appeal was whether the class members were "ascertainable" under the *Marcus* standard. The Third Circuit reversed the district court's order granting certification, holding that class members were not ascertainable because the class representatives had failed to identify a reliable, "administratively feasible" way in which to identify the members of the class. *Carrera*, 727 F.3d at 307. Retailer records of customer purchases did not suffice because Carrera had not offered evidence of their reliability. *Id.* at 308-09. Similarly, class member affidavits did not suffice because, according to the court, they would not afford defendants any opportunity to challenge the statements they contained. *Id.* at 309.

Since *Marcus* and *Carrera*, the circuits have split on whether to adopt "weak," "strong," or *any* ascertainability requirements. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015) (describing the "'weak' version of ascertainability" to require that "classes be defined clearly and based on objective criteria"). Just one year after *Carrera*, the Fourth Circuit weighed in, adopting a "strong" version of ascertainability similar to that announced in *Carrera*. *See EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014) (reversing class certification on the ground that local land records did not provide a reliable, administratively feasible way in which to prove class membership). In 2015 and 2016, six more circuit courts addressed the question, three of which (the Sixth, Seventh, and Eighth) departed from *Carrera* and instead adopted the "weak" ascertainability standard. *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015); *Mullins*, 795 F.3d 654. The First, Second, and Eleventh Circuits followed *Carrera*. *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015); *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015); *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945 (11th Cir. 2015).

Finally, this year, in *Briseno*, the Ninth Circuit explicitly rejected the concept that ascertainability or "administrative feasibility" are separate prerequisites to class certification out-

side of Rule 23's stated requirements. Judge Michelle Friedland focused on the text of the Rule, holding that "[a] separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23." *Id.* at 1123.[1]

Like many of the prior cases on this question, *Briseno* was a consumer class action arising from the sale of Wesson-brand cooking oils that had been labeled "100% natural." *Id.* at 1123. Plaintiffs alleged that the labels were false and misleading because Wesson oils are made of bioengineered ingredients that plaintiffs contended were not "natural." *Id.* They filed putative class actions in 11 states and moved to certify those classes under Rule 23. *Id.* at 1124. ConAgra opposed certification, arguing that plaintiffs had failed to satisfy the Rule 23 prerequisite requiring that they demonstrate an "administratively feasible" way in which to identify members of the class. *Id.* at 1124-25.

In addressing the question, the panel applied the Circuit's traditional interpretive paradigm, focusing on the wording of the statute and its plain meaning. *Id.* at 1125. The panel concluded that Rule 23(a) contained an exhaustive list of class action prerequisites, further noting that "[i]mposing a separate administrative feasibility requirement would render [Rule 23(b)(3)'s] manageability criterion largely superfluous, a result that contravenes the familiar precept that a rule should be interpreted to 'give[] effect to every clause.'" *Id.* at 1126 (second alteration in original). With respect to the more broadly accepted notion of "ascertainability" as a means to determine whether the class has been clearly defined by objective criteria, the panel likewise rejected ConAgra's argument that the Ninth Circuit had ever adopted any such requirement:

> We refrain from referring to "ascertainability" in this opinion because courts ascribe widely varied meanings to that term. For example, some courts use the word "ascertainability" to deny certification of classes that are not clearly or objectively defined. *See, e.g.*, *Brecher v. Republic of Argentina*, 806 F.3d 22, 24-26 (2d Cir. 2015) (holding that a class defined as all owners of beneficial interests in a particular bond series, without reference to the time owned, was too indefinite); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (affirming denial of class certification because a class composed of state residents "active in the 'peace movement' " was uncertain and overbroad). Others have used the term in referring to classes defined in terms of success on the merits. *See, e.g.*, *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014) (remanding and instructing the district court to consider, "as part of its class-definition analysis," inter alia, whether the proposed classes could be defined without creating a fail-safe class). *Our court does not have its own definition.*

*Id.* at 1124 n.3 (emphasis added).

The panel's reasoning ultimately makes clear that Rule 23 was designed to make low-dollar consumer class action cases—such as those arising from individual purchases of cooking oil, tires, or dietary supplements, *see Mullins*, 795 F.3d at 657—possible, not to obstruct their success. The opinion is a win for plaintiffs, as it not only rejects any separate ascertainability or "administrative feasibility" requirements at the class certification stage, but also can be read potentially to endorse aggregate liability determinations at the certification stage and post-certification claims determinations in any case, even in consumer fraud cases. *See Briseno*, 844 F.3d at 1132. The Ninth Circuit in *Briseno* rejected ConAgra's arguments that plaintiffs are likely to submit fraudulent claims forms or that defendants' due process rights are likely to be infringed by any inability to challenge the validity of a class member's claim. In so doing, the opinion endorses the procedure of using individual class member affidavits to establish claims after the certification stage.

*Briseno* does not dismiss entirely the concerns underlying the "administrative feasibility" requirement as it has been defined in the sister circuits. The panel acknowledged the validity of those concerns, but held that they are adequately protected by the other requirements of Rule 23. 844 F.3d at 1127-28 (noting that Rule 23(b)(3) contains specific mechanisms for ensuring the manageability of a class action and for mitigating any administrative burdens that action might create). Nonetheless, class action plaintiffs have a strong argument against defendants' attempts to require that plaintiffs prove any particular manner of ascertaining all existing class members at the class certification stage. And perhaps we have a signal from the Ninth Circuit that courts and commentators should pause when they see a squiggly red line.

**(Endnote)**

1 At the time this article was written, the Ninth Circuit had denied ConAgra's petition for en banc rehearing. No petition for certiorari had yet been filed.

# Back to Basics: Impeachment by Prior Inconsistent Statement

*By Douglas J. Stamm*
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Douglas J. Stamm

I have spent thousands of hours in the courtroom, tried civil and criminal cases, and had the opportunity to observe all kinds of lawyers advocating for their clients. Of all of the mistakes a lawyer can make in trial, one is far more gut churning than any other. Imagine the following scene: a lawyer is in trial listening to an adverse witness testify on direct examination. The lawyer hears the witness make several inconsistent statements about critical facts. The lawyer begins vigorously flipping through documents at counsel table, highlighting reports and deposition transcripts, and eagerly waits to destroy the witness on cross. The lawyer gets to the podium, pulls out a deposition transcript, and immediately demands to know whether the witness made one of the highlighted statements in the deposition transcript. The opposing counsel stands up, and in an unassuming voice says, "objection, improper impeachment." Before the lawyer knows it, the judge sustains the objection. The lawyer, not as aggressive this time, asks the same question but refers to a different highlighted statement. The opposing counsel makes the same objection, which the judge quickly sustains. At this point, the lawyer has lost all color from his face. The courtroom is silent, with the exception of the noise the lawyer is making by aimlessly shuffling paper on the podium. The lawyer, now frantic and aware that the jury is watching him, gives up and moves on to the comfort of his prepared cross.

The scene I just described is not limited to new lawyers. I have observed lawyers of all experience levels try and fail to impeach a witness using a prior inconsistent statement. This is heartbreaking, because one of the most powerful and effective forms of trial advocacy is impeachment by prior inconsistent statement. There is no better way to drive a knife into the heart of the credibility of a witness. However, this deceptively simple tool is often used improperly. A sustained "improper impeachment" objection is not only embarrassing, it also greatly reduces the efficacy of your cross examination. Therefore, if you are about to find yourself in trial, it is critical to review this skill and ensure you are comfortable employing it properly and in a way that inflicts maximum damage. Below is a brief review of the mechanics of impeachment by prior inconsistent statement, as well as some tips I have learned during my time in the courtroom.

## Terminology

Impeachment by prior inconsistent statement is used when a witness remembers a fact, but previously made a different statement about that fact. Impeachment by prior inconsistent statement has three basic steps, which have been described in a number of ways. One of the most popular is the "three Cs," confirm, credit, and confront. Alternatively, the three steps have been described as follows: repeat, build up, impeach. Whatever way you choose to remember the three steps of impeachment by prior inconsistent statement, the process is the same.

### 1. Repeat

First, the most basic step, is to have the witness repeat the testimony from today's hearing that you want to impeach. You cannot effectively impeach unless the witness repeats a fact they said during the current hearing that clearly contradicts a prior statement. While this seems simple enough, you can easily run into trouble by tipping off the witness that you are about to impeach them. An experienced witness, such as a police officer, will immediately know what you are trying to do and offer an explanation. To avoid alerting an experienced witness of what is about to happen, try to ask the question in a more casual manner. For any other witness, a more aggressive form of questioning is appropriate. For example, using phrases like "*today* you say. . ." or "*today* you claim . . ." alerts the jury that you are questioning the accuracy of the witness's statement and that you will soon draw a contrast. I have also found that asking something like, "there is no question in your mind that the statement you gave today is true," as well as asking the witness if they ever gave a different answer to the question that will be the subject of the impeachment, creates added effect.

### 2. Build Up

The second step is to credit, or build up, the prior statement. There are two purposes for this step. First, it is to show that the prior statement was more reliable and accurate. Second, it is to establish a foundation that will allow you to use extrinsic evidence of the prior inconsistent statement. OEC 613(2).

The means by which you establish the accuracy and reliability of a prior statement depends on the nature of the prior statement. For example, if the prior statement is an oral statement given to a police officer, it is important to emphasize the following: (1) where the witness was when they made the statement; (2) the fact that the witness made the statement right after the event when it was fresh in their mind; (3) the importance of giving police officers accurate information; (4) the witness's desire to give the police accurate information to make sure the right person is arrested; and (5) that the witness did in fact give the police accurate information. If, however, the witness made the prior statement in a deposition, you should emphasize slightly different facts: (1) where and when the deposition occurred; (2) the presence of a court reporter; (3) the fact that the witness took an oath to tell the truth and was subject to penalties for perjury; and (4) the fact that the witness had an opportunity to read their testimony and ensure it was accurate; and (5) that the witness did in fact confirm their deposition testimony was accurate.

In addition to establishing the details of the prior statement to credit, or build up, that statement, you must also ask the witness whether they in fact made the statement in order to use extrinsic evidence of the statement. There are three possible responses the witness can give to this question. First, the

witness may admit making the prior inconsistent statement. If this happens, you are done. Although OEC 613(2) does not prohibit introduction of extrinsic evidence of a prior inconsistent statement after a witness admits making it, such evidence is cumulative and likely to be excluded under OEC 403. *State v. Klein*, 243 Or App 1, 13-14, 258 P3d 528, 534-35 (2011). Second, the witness may say they do not remember making the prior inconsistent statement. This response is the equivalent of a denial, and extrinsic evidence is allowed. *State v. Bruce*, 31 Or App 1189, 1194, 572 P2d 351, 353 (1977). Third, the witness may deny making the prior inconsistent statement, which of course permits the use of extrinsic evidence.

A common misconception regarding this step is that it renders the prior inconsistent statement substantively admissible. However, just because you can present extrinsic evidence of a prior inconsistent statement, it does not mean that the statement is admissible as substantive evidence. To be substantively admissible, the prior inconsistent statement must also be relevant, authentic, and either non-hearsay or subject to an exception to the hearsay rule. Common examples of substantively admissible prior inconsistent statements are prior sworn statements (OEC 801(4)(a)) and admissions of a party opponent (OEC 801(4)(b)).

### 3. Impeach

The final step is to impeach the witness with the prior statement. It is critical to use the actual words of the prior statement. If you are using a deposition or other transcribed testimony, be sure to let your opposing counsel know the page and line numbers you are reading from.

A common mistake made during this step involves the use of oral statements. If the witness gave an oral statement to another person who included it in a written report, you cannot impeach the witness by referring to that report. For example, if a detective prepared a report that includes the witness's statements to that detective, it would be improper to ask "didn't you say in the detective's report that . . ." Assuming you otherwise laid a proper foundation for the statement, you could, however, ask "didn't you say to the detective that . . ." The reason is that OEC 613 requires that the prior inconsistent statement be that of the testifying witness. In this example, the report is not the witness's statement. The witness's statement is their words to the author of the report.

## Best Practices

There are several important principles to keep in mind that span each of the above three steps. First, impeach with only one fact at a time. Keeping it simple allows the jury to understand the difference between the two statements. Long, meandering statements may not be totally inconsistent and can easily cause you to lose the attention of the jury. In addition, impeaching a witness using one fact at a time gives you more opportunities to impeach, which further erodes the credibility of the witness. Second, when impeaching with prior sworn testimony, you must read the questions and answers verbatim. It is improper to summarize or paraphrase the testimony because the summary is not the witness's actual statement. Third, be mindful of your tone. For example, if you want to show the witness is lying, project a sharp professional attitude and use questions that employ irony, curiosity, or surprise. If you want to show the witness is forgetful, use a more empathetic tone or allow the witness to explain the inconsistent statement. Your tone during impeachment should match your tone during closing arguments when you discuss the witness's testimony. Fourth, do not impeach with facts taken out of context. Remember, OEC 106 gives your opposing counsel the ability to require you to read the entire relevant portion of a statement, not just the portion you wish to use. Finally, be selective when choosing what facts to use as a basis for impeachment. Not only is extrinsic evidence of a prior inconsistent statement on a collateral matter inadmissible, impeachment on a collateral matter needlessly distracts the jury and undermines the power of your impeachment on more material issues.

## Conclusion

When used properly, impeachment by prior inconsistent statement can change the outcome of a trial. A botched attempt, however, can leave you with egg on your face in front of the jury. Even worse, a failed attempt could look like you took a cheap shot at a witness. A short review of this fundamental skill can get you a long way.

# Buy Local: Rely on Oregon Law, Not Federal Precedent, When Seeking a TRO or PI in State Court

*By Dallas DeLuca*[1]
*Markowitz Herbold PC*


Dallas DeLuca

When moving for a preliminary injunction or temporary restraining order under ORCP 79 A(1), evidence that a party is likely to succeed on the merits should be irrelevant. Federal Rule of Civil Procedure 65's requirement that the movant must make such a showing is not part of Oregon law.

Here is ORCP 79 A(1), which sets forth the standards a court must use to determine whether to issue a PI or a TRO:

> Subject to the requirements of Rule 82 A(1), a temporary restraining order or preliminary injunction may be allowed under this rule:
>
> (a) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief; or
>
> (b) When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual. This paragraph shall not apply when the provisions of Rule 83 E, F(4) and H(2) are applicable, whether or not provisional relief is ordered under those provisions.

In contrast, FRCP 65(a) has no similar text and provides only that "[t]he court may issue a preliminary injunction only on notice to the adverse party."

Although there are other parts of ORCP 79 and FRCP 65 that are parallel and substantively similar,[2] the Oregon Rule setting forth the criteria to decide whether to grant a PI or TRO has no parallel in that federal rule.

Instead, ORCP 79 A is substantively similar to pre-ORCP Oregon statutes stretching back to the Deady Code. Section 407 of Title III of the Organic and Other General Laws of Oregon (1874) is the progenitor of ORCP 79 A(1). Section 407 provides as follows:

> When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in retraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when it appears by affidavit that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of plaintiff's rights, concerning the subject of the suit, and tending to render the decree ineffectual[.]

The overlap between ORCP 79 A(1) and Section 407 is not a coincidence. The Council on Court Procedures commentary to ORCP 79 (1979-1981 biennium) states that "The grounds spelled out in subsection A.(1) are identical to [former] ORS 32.040" with one exception not relevant here.[3] And *former* ORS 30.040 was nearly identical (with a comma or two omitted) to Section 407. To the extent that there are slight differences between ORCP 79 A(1) and *former* ORS 32.040, we should presume that those are not substantive, because the Commentary states that the "grounds * * * are identical[.]"

ORCP 79 A(1) has its own case law stretching back to the 19th century, decades before Federal Rule 65 was promulgated in the 1930s. And "those [Oregon] cases remain good law." *Or. Educ. Ass'n v. Or. Taxpayers United PAC*, 227 Or App 37, 45-46 n4, 204 P3d 855 (2009); *also* Or. Civ. Pleading and Prac. § 34.6 (same, citing *Or. Educ. Ass'n*).

The case law for ORCP 79 A(1) differs substantially from the familiar four-part balancing test from federal case law. Most significantly, ORCP 79 A(1) does not require a mini-trial to determine who is most likely to succeed on the merits at a later trial. *Compare with Winter v. NRDC, Inc.*, 555 US 7, 20 (2008) (under FRCP 65, the movant must establish that she "is likely to succeed on the merits"). A motion under ORCP 79 A(1) is not a mini-trial on the merits; instead, courts determine whether the complaint entitles the plaintiff to the relief sought.

The Oregon Supreme Court in an early case stated that when deciding whether to grant a preliminary injunction, the trial courts should do so without making any determination on the ultimate merits.

> A preliminary injunction is only a provisional remedy, the sole object of which is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. In granting or refusing temporary relief by preliminary injunction, courts of equity should in no manner anticipate the ultimate determination of the question of right involved.

*Helms v. Gilroy*, 20 Or 517, 520, 26 P 85 (1891) (citation omitted). *Helms* states explicitly that a preliminary injunction can issue before "a hearing upon the merits[.]" *Id. Helms*'s interpretation of Section 407 is supported by the text and the margin notes for the statute. Section 407 used the phrase "When it appears *by the complaint* that the plaintiff is entitled to the relief demanded[.]" (Emphasis added.) The margin notes cite *Woodruff v. Fisher*, 17 Barb. 224 (Sup. Ct. NY 1853). *Woodruff* states that to obtain an injunction the plaintiff needs only a verified complaint (one not on information and belief) and, if the plaintiff has that, it does need a separate affidavit before obtaining a preliminary injunction. *Id.* at 225.

A half-century after *Helms*, the rule had not changed: "Hearing had on motion to show why preliminary injunction should not issue was not one on the merits." *Fleming v. Woodward*, 180 Or 486, 488, 177 P2d 428, 429 (1947) (citations omitted). "'[T]he essential conditions for granting such temporary injunctive relief are that the complaint allege facts which appear to be sufficient to constitute a cause of action for injunction[.]'" *State ex rel. Tidewater Shaver Barge Lines v. Dobson*, 195 Or 533, 580, 245 P2d 903, 924 (1952) (quoting 28 Am. Jur. Injunctions, 207, § 14).

The most recent appellate case to look at the question does not differ. In *Oregon Education Ass'n v. Oregon Taxpayers United PAC*, 227 Or App 37, 45, 204 P3d 855, 860 (2009) (Landau, J), the court stated in *dicta*, citing *Fleming*, that "a hearing on whether a preliminary injunction should issue is not a hearing on the merits, but is merely to determine whether the party seeking the injunction has made a sufficient showing to warrant the preservation of the status quo until the later hearing on the merits." (citations omitted). The moving party has to make a "sufficient showing" that without the PI or TRO the status quo is in jeopardy and that the status quo is worth preserving. "The office of a preliminary injunction is to preserve the status quo so that, upon the final hearing, full relief may be granted." *Id.* (internal quotation marks, alterations, and citation omitted).

Lawyers should not rely on federal precedent to contend that TRO and PI motions under ORCP 79 A(1) require a movant to show that it is likely to succeed on the merits. Practitioners may cite *Von Ohlen v. German Shorthaired Pointer Club of America, Inc.*, 179 Or App 703, 710–711 & n13, 41 P3d 449 (2002), for the proposition that federal decisions interpreting FRCP 65 are persuasive authority when interpreting ORCP 79 A.[4] *See State ex rel Eltrym Historic Theater LLC v. The City of Baker City*, 2006 WL 6204550, Baker Cty. Cir. Ct. (Aug. 15, 2006) (citing both federal and state precedent to decide a TRO, and citing to *Von Ohlen v. German Shorthaired Pointer Club* for basis to rely on federal cases); *see also* Or. Civ. Pleading and Prac. (2012 rev.), Chap. 34, Permanent Injunctions, Temporary Restraining Orders, and Preliminary Injunctions, §34.6-2 (stating parties may rely on federal precedent when arguing TRO and PI motions based on citation to *Von Ohlen*).

But *Von Ohlen* is irrelevant to ORCP 79 A(1). That case interpreted the provisions in ORCP 79 D, which addresses whether a non-party is bound by an injunction. In *Von Ohlen*, reliance on federal precedent was appropriate to interpret ORCP 79 D because it is substantively similar to FRCP 65(d)(2). In contrast to ORCP 79 D, ORCP 79 A(1), quoted above, does not have a counterpart in the federal rule.

Although courts should not look at evidence of the merits of the claim, courts must consider other factors in addition to the allegations in the complaint. "'[T]he essential conditions for granting such temporary injunctive relief'" include "'that on the entire showing from both sides it appear[s], in view of all the circumstances, that the injunction is reasonably necessary to protect the legal rights of the plaintiff pending the litigation * * *.'" *Tidewater Shaver Barge Lines*, 195 Or at 580-81 (quoting 28 Am. Jur. Injunctions, 207, § 14). Courts, in deciding whether to grant a preliminary injunction or a temporary restraining order, "exercise * * * discretion in balancing conveniences, in affording protection against needless injury, in preserving the subject matter of the suit, and not infrequently in preserving the status quo." *State ex rel. Pac. Tel. & Tel. Co. v. Duncan*, 191 Or 475, 500, 230 P2d 773, 784 (1951).

The precedent interpreting ORCP 79 A(1) does not include the "likely to succeed on the merits" prong from the four-part balancing test that federal courts must use when considering motions for a TRO or PI. That changes what should be argued in TRO and PI hearings. Evidence supporting which party is likely to succeed on the merits should be irrelevant and inadmissible at the PI and TRO hearings. All the plaintiff needs (in addition to showing irreparable harm or the need to preserve the status quo) is a pleading that can survive a motion to dismiss. That may make ORCP 79 A more plaintiff-friendly than FRCP 65, and the bench and bar should open a conversation about the costs and benefits of the Oregon standard and whether ORCP 79 A should be changed to expressly include the "likely to succeed on the merits" part of the federal balancing test.

**(Endnotes)**

1 Dallas DeLuca is a trial lawyer at Markowitz Herbold. He represents businesses, government entities, and individuals in commercial litigation. Dallas successfully resolves disputes for his clients in state and federal courts. His practice focuses on commercial litigation, including contract, intellectual property, shareholder, employment, and real estate disputes.

2 ORCP 79 B, concerning when to grant a TRO without notice to the adverse party, is substantively similar to FRCP 65(b). ORCP 79 D, concerning the form of the TRO and the PI and the parties bound by them, is similar to FRCP 65(d).

3 The commentary to ORCP 79 from the 1979-1981 biennium is available at http://www.counciloncourtprocedures.org/Content/1979-1981%20Biennium/ORCP%20Rules%201981/Rule%2079.pdf.

4 This article is not implying that all lawyers and judges are using federal precedent when considering ORCP 79 A(1) motions. Given the limited number of trial court decisions and briefs readily accessible, it is hard to determine the proportion of such motions where the parties contend that federal precedent applies.

# RECENT SIGNIFICANT OREGON CASES

*By Stephen K. Bushong*

Honorable
Stephen K. Bushong

## Claims and Defenses

***Philibert v. Kluser,*** 360 Or 698 (2016)

Plaintiffs, two brothers, ages eight and 12, were crossing the street in a crosswalk with the signal. Defendant negligently drove his pickup truck through the crosswalk, narrowly missing the plaintiffs, but hitting their seven-year-old brother, who died at the scene. Plaintiffs sought recovery for their emotional distress. The trial court dismissed the action, and the Court of Appeals affirmed, relying on the "impact rule." Under that rule, a plaintiff can recover damages for negligently caused emotional distress only if the plaintiff can show some physical impact to the plaintiff. The Supreme Court reversed. The court rejected both the "impact rule" applied by the Court of Appeals, and the "zone of danger" rule proposed by plaintiffs. Instead, the court concluded that the rule articulated in the *Restatement (Third) of Torts* section 48 (2012) "best promotes principled outcomes while avoiding the prospect of imposing potentially unlimited liability on defendants for the emotional distress that their negligence may cause." 360 Or at 702. Under that test, a defendant "who negligently causes sudden serious bodily injury to a third person is subject to liability for serious emotional harm caused thereby to a person who (a) perceives the event contemporaneously, and (b) is a close family member of the person suffering the bodily injury." *Id.* at 711, quoting *Restatement* § 48. The court concluded in this case that plaintiffs' complaint "states a claim for relief for bystander recovery under the *Restatement* test." *Id.* at 716.

***West Hills Development Co. v. Chartis Claims,*** 360 Or 650 (2016)

Plaintiff (West Hills) was the general contractor for a development project. West Hills' contract with a subcontractor, L&T Enterprises (L&T), required L&T to indemnify West Hills and to name it as an additional insured on L&T's insurance policy. When the homeowners' association sued West Hills for construction defects leading to damage caused by water intrusion, West Hills tendered the defense to L&T's insurer. The insurer declined to defend, contending that West Hills failed to show that it qualified as an "insured" for purposes of the duty to defend because it was named as an insured only to the extent of liability based on L&T's ongoing operations, and the damages sought by the homeowners were not incurred while L&T was actually working on the project. The underlying claims were eventually settled, and West Hills sued the insurer for breaching its duty to defend. The trial court and the Court of Appeals held that the insurer had a duty to defend, relying in part on extrinsic evidence to show the timing of the damages. The Supreme Court agreed that the insurer had a duty to defend, but the court saw no reason to resort to extrinsic evidence or to modify its existing case law regarding an insurer's duty to defend. The court thus reaffirmed the "four-corners" rule—duty to defend is determined by comparing the complaint to the insurance policy without resorting to extrinsic evidence—and expressly rejected the insurer's assertion that there is no duty to defend unless the complaint "rules in" coverage. 360 Or at 665. The court resolved any uncertainty about the allegations in the complaint in favor of the duty to defend and concluded that the allegations, reasonably interpreted, "could have resulted in West Hills being liable for damages covered by the policy." *Id.* at 667.

***Wels v. Hippe,*** 360 Or 569 (2016)

Plaintiff sought a prescriptive easement over an existing road that crosses defendant's property. The trial court granted relief. The Court of Appeals affirmed, but the Supreme Court reversed. The court explained that, "to establish that the use of an existing road is adverse, a plaintiff must show that the use of the road interfered with the owners' use of the road or that the use of the road was undertaken under a claim of right of which the owners were aware." 360 Or at 571. The record here does not contain evidence supporting those findings. Evidence that plaintiff's use of the road "may have caused dust and noise" is legally insufficient because it does not demonstrate any interference with defendants' own use of the road. *Id.* at 583. Evidence that plaintiff believed he had a right to use the road without defendants' permission is legally insufficient "in the absence of evidence that he communicated that belief to defendants." *Id.* The trial court "therefore erred in finding for plaintiff on his prescriptive easement claim." *Id.*

***McBride v. State Farm Mutual Automobile Ins. Co.,*** 282 Or App 675 (2016)

Plaintiff was injured in an automobile accident and sought to recover personal injury protection (PIP) benefits from her insurer (State Farm). State Farm paid medical expenses incurred for six months following the accident, and then requested plaintiff to submit to a medical examination as allowed under the policy to determine if the medical expenses she continued to incur were reasonable and related to the accident. Plaintiff failed to appear for the scheduled medical examination, and her attorney failed to respond to State Farm's requests to reschedule. The trial court granted summary judgment in State Farm's favor on plaintiff's claim to recover PIP benefits. The Court of Appeals affirmed. The court held that (1) State Farm's failure to send a denial notice within 60 days after receiving the claimed medical expenses meant that, under ORS 742.524, the expenses were presumed to be reasonable and necessary; and (2) "that presumption is not conclusive and may be rebutted by State Farm." 282 Or App at 683. The court further held that complying with a requested medical examination "is a condition precedent to the insured's ability to obtain PIP benefits and not a condition of forfeiture of those benefits if the insured refuses to proceed with the examination." *Id.* at 689. Summary judgment in State Farm's favor was appropriate in this case because plaintiff failed to submit evidence creating a genuine issue of material fact regarding (1) whether plaintiff acted unreasonably in failing to attend the exam; and (2) whether her failure prejudiced State Farm's ability to assess whether the charges at issue were reasonable and necessary. *Id.* at 691.

***Deep Photonics Corp. v. LaChapelle,*** 282 Or App 533 (2016)

The plaintiff corporation (DPC) sued two of its shareholders and former officers, alleging that they had misappropriated corporate assets and trade secrets. The shareholders responded by, among other things, filing a third-party complaint, asserting derivative and direct claims against DPC's corporate counsel, alleging that the attorneys breached their fiduciary duties and negligently advised the corporation. The attorneys filed a special motion to strike the third-party complaint under ORS 31.150, Oregon's anti-SLAPP statute, and a separate motion to dismiss under ORCP 21 A(8). The trial court (1) denied the special motion to strike, concluding that the third-party claims did not arise out of protected activity as required by ORS 31.150; and (2) granted the motion to dismiss, concluding that the attorney-client privilege prevented the attorneys from using communications that were necessary to the attorneys' defense. The Court of Appeals affirmed the first ruling but reversed the second. The court assumed, without deciding, that "Oregon law would recognize a defense to liability based on the attorney-client privilege." 282 Or App at 549. The trial court erred in granting the motion to dismiss, because "there are two sets of allegations against [third-party] defendants that fall outside that attorney-client relationship and thus do not, on their face, implicate the attorney-client privilege as a barrier to [third-party] defendants mounting a defense." *Id.* at 552.

***Clinton Condo. Owners Assn. v. Truck Ins. Exchange,*** 282 Or App 484 (2016)

Plaintiff sued its window washing company (We Do Windows) for breach of contract and negligence. We Do Windows tendered defense to its insurer, which denied the tender. Plaintiff eventually settled with We Do Windows and took an assignment of its claims against the insurer as part of the settlement. The insurance policy precluded the insured from assigning its rights under the policy without the insurer's consent. Plaintiff contended that the anti-assignment clause was invalid under ORS 31.825. The trial court disagreed; the Court of Appeals affirmed, concluding that (1) under *Brownstone Homes Condo. Assn. v. Brownstone Forest Hts.*, 358 Or 223, 236 (2015), the statute only applies to the assignment of claims that arise from a judgment against the insured; and (2) the claims here arose from the insurer's breach of a contractual duty to defend and indemnify the insured and "did not result in any direct sense from a judgment" against the insured. 282 Or App at 487.

***Miller v. Columbia County,*** 282 Or App 348 (2016)

Plaintiff pointed a gun at and threatened to shoot a neighbor after the neighbor complained about noise from plaintiff's dogs. A deputy sheriff arrested plaintiff, but the district attorney decided not to pursue criminal charges against her. Plaintiff then sued Columbia County for false arrest and malicious prosecution. A jury found in plaintiff's favor on both claims. The Court of Appeals reversed, concluding that the trial court erred in denying the County's directed verdict motions on both claims. The court explained that plaintiff's arrest was supported by probable cause, "because the facts known to the arresting officer established an objectively reasonable belief that plaintiff had committed the offenses of menacing and pointing a firearm at another." 282 Or App at 363. Probable cause "defeated both plaintiff's false arrest and malicious prosecution claims as a matter of law." *Id.*

***Landis v. Limbaugh,*** 282 Or App 284 (2016)

Plaintiff fell and was injured while jogging on a sidewalk owned by Washington County. The trial court granted the county's motion for summary judgment, concluding that the county was immune from liability under Oregon's recreational use statutes, ORS 105.668 to 105.700. The Court of Appeals reversed. The court explained that "one critical determinant in recreational immunity is the landowner's decision to open land, not generally available, for the statutorily specified uses such as recreation." 282 Or App at 291. The immunity does not apply to sidewalks and other property that is generally open for public use even though the injured person was using the property for recreation when she was injured. The plaintiff's own recreational purpose "cannot be the sole determinant of recreational immunity." *Id.* at 296.

***Ault v. Del Var Properties, LLC,*** 281 Or App 840 (2016)

Plaintiff was injured when she tripped over the edge of a sidewalk in front of defendants' office building. The trial court granted defendants' motion for summary judgment because plaintiff failed to establish that the sidewalk was in an "unreasonably dangerous condition." The Court of Appeals reversed. The court explained that, under *Moorehead v. TriMet,* 273 Or App 54, 68, *rev den,* 358 Or 550 (2016), a landowner is obligated to take reasonable action to protect an invitee against unreasonable risks of harm. An "unreasonable risk of harm" "is not defined as an unreasonably dangerous condition, and . . . the establishment of premises liability does not necessarily depend on the existence of an unreasonably dangerous condition." 281 Or App at 847. In this case, the court concluded that the record on summary judgment "presents genuine issues of material fact from which a jury could find that the uneven pavement edge and other circumstances together created an unreasonable risk of harm to plaintiff." *Id.* at 853-54.

***Zybach v. Perryman,*** 281 Or App 670 (2016)

Plaintiff's mother died, leaving a will that left all her assets to her adult daughter (defendant), except for $1 left to plaintiff and two stepchildren. The personal representative for the estate—selected by plaintiff—contested the will, alleging that defendant exercised undue influence over their mother. The probate court did not find undue influence and upheld the will. Plaintiff then sued defendant for intentional interference with prospective economic relations, unjust enrichment and constructive trust. The trial court granted summary judgment to defendant, concluding that plaintiff's claims were barred by claim and issue preclusion based on the earlier probate court determination. The Court of Appeals reversed. The court held that issue preclusion does not apply because the issue of the mother's intent—whether she intended to leave her assets to her children in equal shares or intended to leave all her assets to defendant—"was not actually litigated in the first proceeding and was not essential to a final decision on the merits[.]" 281 Or App at 677. The court further determined that the trial court erred in granting summary judgment on the basis of claim preclusion because there were genuine issues of fact

regarding whether plaintiff was in privity with the personal representative who had contested the will. *Id.* at 678.

## Procedure

***Handy v. Lane County,*** 360 Or 605 (2016)

Plaintiff alleged that Lane County's governing body met in private for the purpose of deliberating toward a decision in violation of Oregon's public meetings law, ORS 192.630(2). The county filed a special motion to strike the claim under Oregon's anti-SLAPP statute, ORS 31.150. Among the issues addressed on appeal, the Supreme Court addressed "the burden that the anti-SLAPP statute places on a plaintiff once a defendant makes a prima facie showing that the plaintiff's claim arose out of protected statements, documents, or conduct under ORS 31.150(2)." 360 Or at 617. The court concluded that, after the defendant makes its prima facie showing, to avoid dismissal, plaintiff "must submit evidence from which a reasonable trier of fact could find that the plaintiff met its burden of production." *Id.* at 622-23.

***Bredberg v. Verble,*** 283 Or App 65 (2016)

The trial court abused its discretion in dismissing the *pro se* plaintiff's third amended complaint for want of prosecution. Although the case had been pending for five years, the case "did not stall at an early stage of the proceedings, but instead passed, albeit slowly, through the summary judgment stage and the near completion of extensive discovery by both sides, up to the point where it was set and ready for trial." 283 Or App at 69-70.

***Migis v. Autozone, Inc.,*** 282 Or App 774 (2016)

Plaintiffs brought a class action against his former employer, alleging that defendant violated Oregon's wage and hour laws by failing to pay plaintiffs for work done "off the clock" and failing to timely pay final wages due upon termination of employment. The trial court certified an "off-the clock" class and a "final wages" class, and declined to decertify the classes at the time of trial. A jury awarded damages for unpaid wages, and the trial court awarded statutory penalties under ORS 652.150 and ORS 653.055 on the off-the-clock claims for failing to pay overtime wages due and failing to timely pay final wages upon termination. The Court of Appeals affirmed the class certification order (and the order denying defendant's motion to decertify) under ORCP 32, and reversed the statutory penalties. The court construed the statutes to require plaintiffs "to establish that an employer's failure to pay wages is willful in order to impose civil penalties." 282 Or App at 803. The court concluded that the trial court "erred by not allowing the jury to make that determination" for both types of penalties awarded on the off-the-clock claims. *Id.*

***Thornburgh Resort v. Loyal Land, LLC,*** 281 Or App 337 (2016)

The trial court denied a defendant's motion to compel arbitration of a dispute based on the parties' agreement—which required binding arbitration—because defendant waited almost three years after the lawsuit was filed before filing the motion. The Court of Appeals reversed. The court held that (1) the trial court essentially concluded that defendant waived its right to arbitration or that the doctrine of laches impaired that right; (2) waiver, estoppel and latches are conditions precedent to arbitrability because they are procedural in nature, rather than substantive defenses that grow out of the controversy itself; and (3) consequently, "waiver or laches is for an arbitrator to decide and not the court." 281 Or App at 341.

***Cintas Corp. No. 3 v. Art Erickson Tire & Auto,*** 281 Or App 201 (2016)

Plaintiff brought a civil action for recovery of damages under $50,000; the trial court transferred the case to arbitration under ORS 36.405. After the arbitrator ruled in plaintiff's favor and defendant filed a notice of appeal and request for a trial *de novo* under ORS 36.425, plaintiff sought to enforce a provision in the parties' agreement that required disputes to be resolved through binding arbitration. The trial court denied defendant's request for a trial *de novo,* concluding that the parties had agreed that the arbitration would be binding. The Court of Appeals reversed, concluding that it was too late to enforce the binding arbitration provision. The court explained that plaintiff "is not entitled to forgo its contractual right to binding arbitration, succeed in statutory arbitration, and then seek to retroactively enforce that contractual right." 281 Or App at 206-07.

## Jury Instructions

***Sloan v. Providence Health System-Oregon,*** 282 Or App 301 (2016)

Eighty-five year old Jack Sloan (Sloan) fell in his bathroom. He took a cab to Providence Hospital, where he was treated by doctors employed by defendant Apogee Medical Group (Apogee). The doctors saw no evidence of fractured ribs on a chest x-ray, and ultimately discharged Sloan to Three Fountains nursing facility. Twelve days later, Sloan returned to the hospital, where he died. The autopsy concluded that Sloan died of respiratory failure due to blood in his chest cavity and a collapsed lung caused by multiple rib fractures suffered in a domestic fall. At trial, plaintiff's expert testified that the hospital chest x-rays showed, albeit subtly, one to five displaced rib fractures and fluid in the chest cavity. Apogee argued at trial that it was not negligent and that "something happened" to Sloan while he was at the Three Fountains facility that caused his death. The jury found that Apogee was negligent, but that its negligence did not cause Sloan's death. On appeal, plaintiff argued that the trial court erred in failing to give plaintiff's requested instruction on liability for subsequent conduct of a third party. The Court of Appeals agreed and remanded for a new trial. The court concluded that the requested instruction correctly stated the law and was supported by the pleadings and the evidence, and that the trial court's failure to give the instruction substantially affected the outcome. The court concluded that the instruction "would have explained to the jury that Apogee could be liable for injury caused by Three Fountains' conduct, if Apogee's negligence was a 'cause-in-fact' of Sloan's death and if Sloan's death, because of the conduct of Three Fountains, was a reasonably foreseeable consequence of Apogee's negligence." 282 Or App at 318.

***Purdy v. Deere and Company,*** 281 Or App 407 (2016)

A two-year old child suffered serious injuries resulting in the amputation of her leg when her father accidentally backed over her while mowing the lawn using a riding lawn mower

manufactured by defendant Deere and Company (Deere) and sold by defendant Ramsey-Waite Co. Plaintiff alleged that defendants were liable on theories of negligence and strict products liability. The jury returned a general verdict in favor of defendants. The Court of Appeals originally affirmed, concluding that the general verdict form made it impossible for the court to tell whether any of the claimed instructional errors substantially affected plaintiff's rights, as required for reversal under ORS 19.415. The Supreme Court reversed and remanded, instructing the Court of Appeals to determine, based on the record as a whole, whether there was "some or a significant likelihood that the error influenced the result." If so, then reversal is required. Applying that test on remand, the Court of Appeals concluded that (1) the trial court made three instructional errors on plaintiff's products liability claim; and (2) there is "some likelihood" that those errors influenced the result as to that claim. As a result, the court reversed and remanded for a new trial against Deere on the products liability claim, and affirmed the judgment in favor of both defendants on the negligence claims.

### Miscellaneous

***MT & M Gaming, Inc. v. City of Portland,*** 360 Or 544 (2016)

Plaintiff, a Washington corporation that operates a casino in Washington, sought a declaration that the City of Portland violated Oregon's social gaming statutes when it approved permits to engage in certain social gaming practices in Portland. The Oregon Supreme Court held that plaintiff did not have standing to seek relief under Oregon's Declaratory Judgment Act. The court rejected the City's argument that, to have standing under the statute, "a plaintiff must show that it is subject to the statute or that its alleged interests are within the zone of interests that the statute seeks to protect." 360 Or at 566. Rather, to have standing to seek a declaration about the interpretation of a statute, a plaintiff "must show that it has a legally recognized interest that is adversely affected by the statute." *Id.* In this case, plaintiff lacked standing "because it failed to assert or sufficiently develop an argument that its interest in the interpretation of [Oregon's social gaming statutes] is an interest that is legally recognized by any source." *Id.* at 566-67.

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