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Politics And Persuasion: Speaking To A Jury In An Increasingly Politicized World

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On August 21, 2018, Paul Manafort was convicted of five counts of tax fraud, two counts of bank fraud, and a single count of failing to disclose a foreign bank account. Manafort's trial is the first arising from the Special Counsel's Investigation into Russian interference in the 2016 Presidential Election. Despite its bipartisan origins, the Special Counsel's investigation has become increasingly politicized – and has even been branded as a "witch hunt" by President Trump. This stark politicization is seeping into every aspect of our culture, including the jury room. In fact, this heightened politicization even found its way into the Manafort jury deliberations. Paula Duncan, Juror No. 0302, in the Manafort trial, voted for Donald Trump in 2016, believed that the Special Counsel's investigation is nothing more than a political witch hunt, and intends on voting for Donald Trump again in 2020. Ms. Duncan desperately wanted Paul Manafort to be innocent. But, when presented with the evidence, Ms. Duncan followed the law and delivered a verdict that was contrary to what her politics demanded.

The Manafort jury verdict reminds us that most properly instructed jurors can, and will, follow the law despite that individual's political views and learning. However, that a jury can and will follow the law does not mean that politics have no impact on the extent to which they are persuaded. In fact, a juror's politics can be one of the more informative demographic characteristics of a juror where other demographic attributes like occupation and age are unreliable predictors of bias. Accordingly, in a world where political divisiveness is increasingly becoming a part of our community's daily experience it is our job as trial lawyers to figure out how to effectively communicate the facts, the law, and our client's story to a jury in a way that is persuasive to people on all sides of the political spectrum.

Oregon's Political Demographics

Despite Oregon's reputation as a reliably "blue" state, our political demographics are far more moderate. As of July 2018, in the tri-county area (Multnomah, Washington, and Clackamas counties), Democrats currently have registered 493,713 voters, to Republicans' 227,858. However, there are 356,689 unaffiliated voters in the same tri-county area, for this same time period. To put those numbers into percentages, for the tri-county area, 42.8% of voters are likely to be Democrats, 19.8% are going to be Republicans, 30.1% are going to be unaffiliated with any

political party – and 7.3% are going to belong to a third-party (i.e. Libertarian, Constitution, or the Pacific Green Party).

When examining voter registration statistics for the state as a whole, Oregon's collective political moderateness becomes even more clear. Of Oregon's 2.7 million registered voters, 35.5% are Democrats, 26% are Republicans, and 31.6% are unaffiliated with any political party – and 6.9% belong to a third party. Furthermore, according to a 2017 demographic study conducted by Pew Research, 30% of Oregonians self-identify as conservative, 30% identify as liberal, 34% identify as moderate, and 6% are unsure of their political ideology.

As the foregoing statistics make clear, during jury selection and jury presentation, there is a significant likelihood that you will be presenting to a panel with a diverse set of political opinions – some of which are likely to differ markedly from your own. And while you do not need voter registration numbers to tell you that the political demographics of the tri-county area are markedly different than those of an Eastern Oregon county, you cannot take for granted the political ideology of a prospective juror in either region.

Determining Political Persuasion During *Voir Dire*

At the outset, we want to remind you that every judge runs *voir dire* differently, and not every judge will concede that political ideology is a relevant topic to explore during jury selection. Accordingly, use your common sense, good judgment, and knowledge about a judge's particularities before attempting to determine the political makeup of a prospective jury panel.

However, where it is appropriate, there are a variety of questions you can use to get a sense of a prospective juror's political ideology.[1] The below constitutes a non-exhaustive list of potentially helpful questions:

- **"Politically, are you liberal, middle-of-the-road, or conservative?"** This question is the most direct way of getting at a prospective juror's political ideology. However, it is possible that a juror may not want to discuss their political orientation openly – or will present a "middle of the road" opinion in order to avoid providing too much personal information.
- **"Have you made any financial contributions to a candidate for political office in the last four years?"** This question is an off-shoot of the above question about political ideology – but it provides an additional important data point: namely, the depth of a person's political conviction. Here, a person who acknowledges making a political contribution (regardless of the size of the contribution) may feel their political beliefs more strongly than someone who has not made a similar contribution. In addition, you may be able to learn this information on your own where jurisdictions allow social media research. This information is publicly available once you learn the venire's names.
- **"Are you voluntarily a member of a labor union?"** Voluntary members of labor unions or other collective bargaining agreements tend to be more politically liberal than those who are opposed to such arrangements. Accordingly, determining whether a person is voluntarily a member of such an organization may provide an important context clue as to their political ideology. It is also worth asking if the prospective juror has served in a leadership role in a labor union. An affirmative response tells you a great deal about the juror's conviction about union membership. Conversely, ask jurors about their general attitudes toward today's need for labor unions. Those who are opposed to them tend to be more pro-management and can be pro-defense in civil litigation.
- **"Where do you get your national news?"** This question recognizes that there is an increasing divide between where "conservatives" and "liberals" get their news. Notice that we recommend asking about national news. Absent that adjective, you are more likely to get jurors to tell you they watch or read local news, something that is not helpful. If a prospective juror reports getting all of his or her news from Sean Hannity, and report avoiding the "fake news" from CNN, you can draw the appropriate inference about their political ideology.
- **"What organizations or special interest groups do you admire?"** Asking this question may give you a sense of the types of values that are most important to a prospective juror. This question also widens the net of learning jurors' interests even if the prospective juror has never belonged to the group. These values, in turn, can be used as predictors of potential political affiliation.

It is important to remember that political identity can be a sensitive issue for many potential jurors. Some judges will also preclude you from asking about political affiliation. Accordingly, when asking the above questions (or any similar question) – and when evaluating answers provided by prospective jurors – you must refrain from engaging in any outward display of a value based judgment, no matter how much you may disagree with a provided answer. The goal in asking these questions is simply to gain information that you can use during trial: not to endorse or condemn any set of political beliefs.

Presenting with Political Intelligence

Presenting to people of differing political orientations is based fundamentally on generalizations. Generalizations are helpful as a starting point, but every person's political beliefs and values are shaped by their unique personal experience and contexts. Again, we know from multiple studies that the reaction to a particular experience is far more significant for jury selection purposes than the fact that an experience occurred. Thus, while the below are some helpful generalizations, they are not dogmatic:

- **Emphasizing custom, convention, and continuity:** People who identify as politically conservative tend to value and place importance in tradition. Accordingly, if you believe that your jury is one that leans conservative, developing a case theme that focuses on the way in which your client adhered to tradition, convention, or custom may resonate

1 We have discussed these questions with trial consultants, and have confirmed that they are an appropriate way of inquiring about political orientation. However, the trial consultants confirmed that not all judges will permit these questions – and that there are varying degrees of sensitivity about *voir dire* questions focusing on political ideology.

more strongly than a narrative that focuses on the individuality of your client.

- **Emphasizing individuality:** Self-identified liberals tend to value individuality of expression and the needs of each individual to a greater degree than their conservative counterparts. Therefore, when presenting to a liberal-leaning jury, it may help to focus your discussion of the facts on what about your client and their situation is unique.
- **Emphasizing personal responsibility:** Self-identified conservatives tend to identify "personal responsibility" as one of their central values. Thus, presentation to a jury that leans conservative would benefit from a narrative that describes how your client owned the circumstances of the dispute, or emphasizes the way in which your adversary has failed to take personal accountability for their role in the dispute.
- **Emphasizing social welfare:** People who identify as politically liberal tend to place greater value on social welfare programs and on economic equality. Accordingly, to the extent you are presenting to a jury that leans to the political left – it may be valuable to develop a theme that emphasizes these social issues. For example, a jury that leans to the political left may be more receptive to "David vs. Goliath" arguments.
- **The universality of empathy:** Regardless of whether your jury leans to the political right or left, jurors will be persuaded when they can see themselves standing in the shoes of your client. Accordingly, rather than try to pander to political stereotypes to develop jury rapport, there is no substitute for appealing to those universal experiences that cross party lines. Americans, regardless of party, want to believe they are safe, are being treated fairly, and have a certain degree of control over their life and happiness. Appealing to these universal values, and creating real empathy for your client's position, is one of the most powerful tools in the trial lawyer's toolbox.

* * *

It is important to remember that political orientation is but one part of a person's identity. The increasing political divisiveness and 24/7 political coverage can make it seem like the only thing that matters is whether one votes red or blue – but we simply don't believe that political ideology is that all-consuming. But, politics are an important part of our collective cultural experience – and as trial lawyers, we must be aware of all manners of context so that we can present our client's story as persuasively as possible.

Political awareness does not mean that you should work a "lock her up" reference into your closing argument to a panel that you think is conservative, nor does it mean that you should signal a desire for a "blue wave" if your panel is more liberal. Political awareness simply means that you should not take for granted the political makeup of your panel because of your geographic location, and it requires you to be conscious of the way that political ideology can signal what values are going to be important to your audience. Once you have a sense of the values of your audience, you can do what trial lawyers do at their best: weave the law and the facts together to make the most persuasive argument you can for your client. And, as the jury verdict in the Manafort trial shows us, if we do our job as trial lawyers correctly, political affiliation will not control our jury outcomes.

COMMENTS FROM THE EDITOR

Direct Examination: Old Dogs and New Tricks

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Although many established trial techniques or tactics have thus far been largely unchallenged, commentators and practitioners are beginning to reevaluate the wisdom of some of these techniques, including those for direct examination. This article will examine some of the traditional rules of direct examination by comparing these rules or techniques to those used on cross-examination. It will then discuss alternatives to traditionally accepted direct-examination techniques.

Comparison of Traditional Rules of Direct and Cross-Examination

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

This contrast is not surprising. After all, direct examination generally consists of eliciting helpful information from a cooperative witness 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 review of six general rules of cross-examination and comparing these rules with those for direct examination will demonstrate the contrast.

A. End Strongly; Start Slowly.

A good direct examination, redirect examination, or recross-examination should start and end strongly (taking 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.

In contrast, however, a cross-examination should not usually 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).

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.

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.

B. Indirection.

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 your 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:

1. You have more than 30 years of experience negotiating contracts, don't you?
2. You've been highly successful in negotiating successful contracts over your career?
3. You regularly hire lawyers to assist you in reviewing important documents?
4. To the extent that you don't review important documents, you have someone on whom you can rely review them?
5. You insist that important and crucial points that are discovered in documents be brought to your attention?
6. It is this kind of detailed, cautious, and deliberate procedure that has led to your success?

Establishing the witness's general practice of careful reading of documents, while at the same time flattering his or her 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.

C. Details First.

Often in direct examination the most effective procedure is to cover details only after the witness has described his or her recollections of the action. 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 contrast, on 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 adverse witness lays factual background that limits the routes of escape and explanation, cross-examination is often ineffective.

D. Scatter Circumstantial Evidence.

In argument and on direct examination, assembling circumstantial evidence often makes the contention of the proponent persuasive. If that contention 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 contrast, on 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 so that they are obtained either from different witnesses or at different points in the examination so that your ultimate objective and contention are not obvious.

E. Short Questions and Short Answers.

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.

In contrast, allowing the adverse witness to launch into long answers and explanations will doom the 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.

F. Attention on the Cross-Examiner.

As referred to above, 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.

Alternative Approaches to Direct Examination

Traditionally, as discussed above, the techniques employed in direct examination and cross-examination are directly opposite.

For instance, in direct examination, the examiner attempts to place the attention of the fact-finder on the witness. The witness is given free rein and encouraged to tell his or her story in a narrative manner with limited guidance from the examiner.

In contrast, on cross-examination the attention should be on the cross-examiner. The cross-examiner argues his or her themes or theories by asking questions the answers to which are often irrelevant. The cross-examiner is really arguing his or her case through the window of the adverse witness. The emphasis is on controlling the witness and, by raising impeaching, contrasting, and contradictory points, exposing weaknesses in the recently conducted direct examination. A number of respected trial practitioners and trial-technique teachers are challenging this traditional approach and are suggesting alternatives. A discussion of two possible alternatives to the traditional approach to direct examination appears below.

A. Alternative No. 1: Treat Direct Examination Like Cross-Examination.

Some commentators contend that the direct examination should be tightly controlled by the examiner, that the direct-examination witness should be given little or no leeway, and that the attention of the fact-finder during examination should be on the examiner, not the witness. They believe that, like cross-examination, direct examination is an opportunity for the examiner to argue his or her case through the window of a witness.

Under this alternative 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.

1. Advantages of using direct examination to argue your case through the window of a witness.

a. Removes pressure from the witness.

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, artic-

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ulate, 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 work?

In contrast, under the alternative approach, the lawyer takes control. 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.

b. Employs the techniques of persuasion.

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 on 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.

c. Allows the examiner, not the witness, to be the salesperson.

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 salespersons.

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 active effort to sell the point.

2. A sample examination for your consideration.

Two of the proponents of this alternative approach to direct examination are Judge Herbert Stern and Judge Ralph Adam Fine. One of Judge Fine's examples of the effectiveness of this technique is taken from the novel *Runaway Jury* by John Grisham.

In the novel, a turncoat former employee of a tobacco company is testifying about a memorandum that went to the president of the company, which has since been destroyed by the tobacco company (thereby overcoming the best-evidence-rule problem). The examination follows the traditional method of having the witness do the work.

Q: What was in 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 question and answer are powerful. But not as powerful as they could be if the lawyer were doing the work. With a single question and answer, there is always the risk that the fact-finder will be distracted for the moment and miss or misunderstand the answer.

Now, here's a sample of the same direct examination in which the examiner does the work, limits the answer of the witness, and argues the important points to the fact-finder through the window of the direct-examination witness.

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?
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.

Under the second example, with a lawyer doing the work, it would be hard for a fact-finder to miss the answer or miss the point. In fact, after the first couple of questions, the fact-finder knows the answer to the next question before it's even answered. Why? Because the answer is compelled by common sense.

One of the advantages of arguing the case through a witness not only on cross-examination but on direct examination is that the fact-finder knows the answer before it is given. An answer that the fact-finder arrives at on his or her own regardless of the witness's answer is an answer that will not be subject to impeachment by your adversary.

3. Summary.

We all have plenty to do and think about at trial. Perhaps that is why allowing the witness to do the work on direct examination is so attractive.

But next time you conduct a direct examination at trial, you may want to consider this alternative approach. You may find that the rewards from this technique far outweigh the extra work.

B. Alternative No. 2: The Sponsorship Theory of Direct Examination.

In their book *Sponsorship Strategy*, Robert H. Klonoff and Paul L. Colby[1] advocate the "sponsorship theory" of introducing evidence. The theory's premise is that by offering any item into evidence, the offering attorney endorses, or sponsors, the significance of that evidence to the case. Thus, contrary to traditional thinking about trial strategy, an attorney applying the sponsorship theory will not bring out the weaknesses in his or her own case. Rather, the attorney will introduce only evidence favorable to his or her case. And when conducting direct examination, the attorney will select among witnesses and subject-matter areas and will elicit only favorable evidence.

1. Do not call every potentially helpful witness.

Because the sponsorship theory dictates using only strong evidence, an advocate should not call even a potentially helpful witness until he or she has anticipated the questions that the witness may be asked on cross-examination. Only by doing this will the advocate be able to determine whether the witness's favorable testimony outweighs the potential costs of calling the witness. This means that the advocate must assess the degree to which the opponent's cross-examination may ultimately reduce the value of the witness's testimony on direct examination. Only if the witness will still be strong after considering the effects of cross-examination should the advocate call that witness.

The advocate applying the sponsorship theory must also consider the relative strength of multiple witnesses who may all testify favorably on a single point. If there are multiple witnesses to testify on the same point but the testimony of one witness is stronger than that of the others, the advocate must carefully consider whether he or she should call the "less than strong" witnesses. Although some commentators suggest calling multiple witnesses to testify on the same point, regardless of the strength of each witness, the sponsorship theory counsels against this tactic. Rather, only the strong witness should be used.

For example, Klonoff and Colby provide an example of a burglary case with two eyewitnesses. Both had witnessed the burglary from their apartment windows. After apprehending a suspect, the police asked the two witnesses to look at him. Although one witness positively and unequivocally identified the suspect, the other said that the suspect "looked like" the burglar but also identified some differences in clothing and appearance. The prosecutor introduced both witnesses.

During closing argument, defense counsel was then able to focus his attention on the weaker witness. The jury acquitted the defendant. Klonoff and Colby suggest that the error of the prosecutor's decision to introduce both witnesses was that by doing so, the prosecutor conceded that the strong witness was not sufficient to convict. The sponsorship theory would have counseled introducing only the strong witness and letting the defense introduce the weaker witness if it chose to do so. Then the prosecutor could have attacked the strength of what would have been the defense evidence.

2. Skip the warm-up questions.

Many attorneys begin direct examination by eliciting neutral points. They ask lay witnesses about their educational backgrounds, employment histories, etc., which are rarely relevant to the lay witnesses' testimony. The rationale for this tactic is that asking a witness these warm-up questions before asking substantive questions allows the witness to relax and get used to testifying in the courtroom environment.

This technique may actually be hazardous to an otherwise effective direct examination. For example, seemingly innocuous questions may in fact open the door for cross-examination that the direct examiner had not anticipated. Or such questions may provide opposing counsel with information or material to include in closing argument. Thus, rather than asking the witness warm-up questions to help him or her relax, the attorney should consider conducting pretrial practice examinations (preferably in a courtroom setting, if possible) to help the witness get ready for trial. By doing so, the attorney may be assured that the witness will feel relaxed and prepared for direct examination, and the attorney can then focus on eliciting only helpful information on direct examination.

3. Do not elicit testimony on direct examination that is harmful to your case.

Although it is often suggested that an advocate should elicit damaging testimony or disclose weaknesses in his or her own case, rather than letting opposing counsel expose these weaknesses, the sponsorship theory advocates against using this technique. The rationale for exposing weaknesses in the advocate's own case is that by doing so, the advocate gains credibility with the jury. This rationale is questionable, however, because the jury may consider the advocate's acknowledgment of the harmful matter or weakness in his or her case as self-serving and not worthy of credit. Further, the advocate who elicits damaging information on direct examination in order to bolster his or her own credibility does so at the expense of the witness's credibility.

While an advocate should avoid eliciting damaging testimony on direct examination, the responsible and ethical advocate must be sure to direct his or her witnesses to answer all questions truthfully. Thus, if a witness is asked about damaging matters on cross-examination, he or she must answer directly and honestly.

4. Summary.

The sponsorship theory, which proposes offering only helpful evidence, may be used as an alternative to traditional direct examination. While some attorneys may initially feel uneasy employing this technique after being taught to expose the weaknesses in their own cases, the benefits may very well outweigh any initial discomfort. For example, one experienced defense attorney decided to employ the sponsorship theory and did not

1 Robert H. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* (1990).

bring out the defendant's prior conviction on direct. Rather, he allowed the prosecutor to elicit the prior criminal conviction. This attorney later stated that "the first time I followed the [sponsorship philosophy] in court, I was terrified. It was against everything I had been taught. It worked like a charm. The jurors all stated that they thought the impeachment by the prosecutor on the prior was a 'cheap shot.'"

Observation

Most of us like to think that we become more skilled at direct examination over time. One of the keys to improving our skills is to continue to consider alternative forms of direct examination. Whether we adopt them in all cases, only with particular witnesses, only in particular cases, or not at all, the process of "challenging, rethinking, and revalidating or modifying" our direct-examination techniques will make us better trial lawyers.

Opening Statements – Roadmaps, Recipes or Roman à Clef

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No matter the approach, we all agree opening statements are critical. Whether we choose to present a chronological roadmap, strive to perfect a proven formulaic recipe, or tell a roman à clef (a story with a thinly-disguised version of actual characters and events), there are two goals for opening statement:

» *Gain credibility*

» *Tell our client's story in a compelling manner*

Some studies show that:

- Opinions about liability that jurors form after opening are retained 80% of the time.[1]
- Jurors determine fault in opening statement and damages in closing.[2]
- Jurors rarely make up their minds by the end of opening statement.[3]

There is no dispute that during opening, jurors start to lean one way or the other. And, that lean creates a primacy of belief which colors how they receive and process the rest of what they hear and see at trial.[4]

1. Credibility.

It is well known that lawyers are generally not admired by the public. As of 2013, only 18% of Americans thought lawyers contributed "a lot" to society, down from 23% in 2009.[5] According to a Pew Research Center survey, on professional public esteem, lawyers were rated at the bottom of the barrel of all professions in the survey.[6] (In the face of decades of propaganda on tort reform, the esteem of plaintiff's lawyers may be even lower.) Therefore, a key objective in opening must be to establish credibility in the juror's mind. That's a steep, uphill climb to reach that goal.

a. Do not advocate too soon.

No one wants to be told what to think. No one especially wants to be told by a lawyer. Jurors want to hear what someone did, not what *you* think about it.[7] It is very important not to advocate too soon. If your opponent does, even if objectionable, let it go.

b. Tightly control what is presented.

Don't wing it. We know our case backwards and forwards, and can put together a quick outline of it on a moment's notice. But if we prepare that way, most of us will take more time than we should in opening statement or, worse, insert argument too soon. A more structured outline, with key phrases scripted, can serve us better. Trials are not intended to present every fact and every possible legal argument. So, avoid "TMI" – too much information. Less is more. This is challenging for many of us, and can require some thought, analysis, and many revisions to craft a concise outline of the crucial facts of the case. The devil is in which details to keep and which to toss. The test is whether the fact is necessary to the theme or will help later with a key aspect of your cross-examination. Let everything else go.

c. Developing a theme.

"A good story cannot be devised, it has to be distilled," according to Raymond Chandler (a novelist known for *The Big Sleep, The Long Goodbye* (praised anthology of American crime stories)). The same is true for the theme of your case.

It was once common practice to simply state something like: "This is a case about a careless driver." A plain statement is not as persuasive today and doesn't gain a juror's trust or develop a lawyer's credibility.[8] Unsupported assertions will only risk suspicions.[9]

A principle to remember, as Seattle trial attorney Paul Luvera states: "My theory is that the jury is generally bored." So whatever you do, make the theme interesting.

d. Telling a compelling story.

At its basic level, a compelling story only needs a beginning, a middle, and an end.

For the beginning, I like the journalist approach to an opening: "A 12-year old boy, who dreamed of becoming a marine biologist, died after he was hit by a school bus that drove onto the sidewalk in front of his grade school."[10] It captures the theme and the key facts.

2. Recipe for a plaintiff's opening statement.

According to David Ball, who writes trial guides for plaintiff's lawyers, you should start with what the rule is, what the act was which violated that rule, and why the rule is important. Some examples[11]:

- "A doctor facing a potential life and death situation needs to be really sure of his diagnosis before deciding

it's safe to send the patient home." (Medical malpractice - failure to diagnose.)

- "Child safety is always the primary consideration in any decision concerning pupil transportation." (Bus stop case.)
- "The Company must treat its policyholders' interests with equal regard as it does its own interests. This is not an adversarial or competitive process." (Bad faith.)

The tried-and-true recipe for plaintiff lawyers, as developed by David Ball, applies the following elements:

a. Rules/consequences.

Tell the juror the rule at issue at the outset. "Whatever a company manufactures has to be safe to use. If it is not safe and it hurts someone, the company is responsible for the harm. Now let me tell you a story...." It is not a time to state the jury instruction, but merely to state the rule and how the act violated it.

b. Story.

Describe what the defendant did – this is about the defendant's choices. The goal here is to not to have the jurors think it's about just money; it is to tell the story of what the defendant did without implying any blame (i.e., it's not time to tell the speed limit yet; if you do jurors shift into adversary mode and circle back to you being a predatory attorney).

c. Blame.

Describe who you are suing and why.

d. Undermine.

Describe what is wrong with liability defense. Explain what you did to investigate and determine the truth. For instance, in a plaintiff's motor vehicle case representing Mr. Monroe you might say:

> "Before we decided to come to trial several things needed to be determined. For example, Ms. Cartwright states that Mr. Monroe came 'zooming out of nowhere.' So we had to determine if that happened. Because if that was the reason why Ms. Cartwright didn't see Mr. Monroe, it may explain why she unsafely entered the intersection. We gathered witnesses' testimony and looked at the scene. One interesting fact, we identified that there are speed bumps along Capitol Hill Road." Then explain why Mr. Monroe had to have slowed down.

e. Causation and damages.

Explain the losses and harms, mechanism of harm, personal consequences, treatment, and what cannot be fixed. Here is where you describe your expert testimony and other basis for causation, and link that to damages. Tell a mini-story not just a before and after. For instance,

> Don't say: "Kaeli used to be an A student but now can't remember anything she studies, no matter how hard she works at it."
>
> Instead tell a mini-story...
>
> "Kaeli worked all day. She studied zoology, geometry, English literature, and mechanical drawing. Her mom and sister helped, shared the heartbreak when Kaeli came home in tears after the test, and said 'it all just went away.'"
>
> Then contrast it with before one spring day when Kaeli received a great report card.

f. Money.

What do you want from the jury? Carefully word this.

3. A classic story spine can be used by plaintiff and defense counsel.

Whether you are a plaintiff's lawyer or a defense lawyer, the narrative framework is time-tested to pull people into a story-like opening. We are hard-wired for story, jurors can easily track – it creates interest so the jurors want to hear more. Think hero-centric stories: *The Odyssey, The Hobbit, Wizard of Oz, Star Wars,* or *The Matrix*. You can make your client the hero or jurors can be heroes. Jury consultants say leave plaintiff out of story--there is an open question there.

Carl Bettinger, in *Twelve Heroes, One Voice: Guiding Jurors to Courageous Verdicts*, provides this structure to an opening statement, that is the classic story spine[12]:

- **"Once upon a time..."** (back story of protagonist)
- **"And every day"** (ordinary world of protagonist)
- **"Until one day"** (inciting event that destroys old world – all is not well)
- **"And as a result of that..."** (crossing road into new world – loss of part of hero, there is no question that something horrible has happened)
- **"And as a result of that..."** (new world – in a more complicated story add this next layer; hero undergoes tests or confronts villains)
- **"And as a result of that..."** (new world – loss of part of hero's beliefs/character)
- **"Until finally"** (climax)
- **"And ever since then..."** (moral of the story; the world is a different place)

By the end of your opening statement, the roles of each person in the courtroom should be clear to the jurors. And, the jurors should understand the seriousness of the matter.[13] The line of action in the plot (your theory of your case) can be as wide as the Amazon River and include a lot of divergent activity, but all of this action must ultimately flow in the same general direction.[14]

The important part of learning about stories is really to be creative and have a more powerful approach to your case.

Regardless of the level of creativity you engage, an opening statement should include the following[15]:

» *Be easy to understand.*

» *Include a principle the other side cannot credibly dispute.*

» *Include rules of the case.*

» *Have intellectual integrity.*

» *Provide a blue print for direct examination and cross examination.*

» *Be interesting.*

Before your next opening statement, read something about story-telling and the power of a story arc that is not law related. Then, simply follow what attorney, and 2013 President of the Litigation Counsel of America, Peter Perlman says about opening statements: "Be careful, be consistent, and be clear."

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1 Recovering for Psychological Injuries, 2nd Edition, William Barton (1990).

2 Recovering for Psychological Injuries, 2nd Edition, William Barton (1990).

3 On Damages 3, David Ball (2011).

4 On Damages 3, David Ball (2011).

5 https://abovethelaw.com/2013/07/lawyers-the-most-despised-profession-in-america/.

6 https://abovethelaw.com/2013/07/lawyers-the-most-despised-profession-in-america/.

7 On Damages 3, David Ball (2011) p. 113.

8 On Damages 3, David Ball (2011).

9 On Damages 3, David Ball (2011).

10 *Cincinnati Enquirer*, March 30, 1996.

11 On Damages 3, David Ball (2011).

12 *Twelve Heroes, One Voice: Guiding Jurors to Courageous Verdicts*, Carl Bettinger (2011) pp. 88-95.

13 Id. at 102.

14 *Inside Story: The Power of Transformational Story Arc*, Dara Marks (2007) pp. 40-41.

15 *Rules of the Road*, Rick Friedman & Patrick Malone (2006).

Winning More by Losing Less—Part Two

By William A. Barton
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Editor's Note: This is the second in a three-part series exploring winning and, more importantly, losing cases and how we as advocates and counsel for our clients can integrate losses in ways that motivate and position us for future wins. Part three will be published in the Winter 2019 edition of the Litigation Journal.


William A. Barton

In the Summer 2018 issue of this publication, I concluded the first part of my essay by asking you to reflect on this question, "What are your deepest motivations for your line of work?"

I also promised to share some of my personal motivations in this issue. They are:

1. It's intensely competitive.
2. The work can be creative.
3. There's a performance aspect I enjoy.
4. I'm an adrenaline junkie and get a rush every time I go into court.
5. If you're introspective, as Wyoming attorney Gerry Spence says, it's "a great way to learn about yourself."

I insist on pushing myself beyond my first two noble motivations by acknowledging my additional, equally honest and self-serving vanities. How about you? What don't you like about it? Responsibility, stress, time intensive and/or the financial aspects of running a profitable business?

TEMPERAMENT: WHAT CLUSTER OF ADJECTIVES DESCRIBES YOU?

It's my impression that most successful and happy criminal defense and plaintiffs' personal injury lawyers are generally: (1) ideologically motivated, (2) extroverted, (3) competitive, (4) like and enjoy people, (5) are comfortable with responsibility and pressure, (6) have good people skills, meaning they have good intuition and "EQ," (7) they can tolerate a high level of uncertainty and ambiguity, (8) are driven (yes, there are degrees of this quality), and finally, (9) they're comfortable with risk, or stated in the negative, they're not "risk averse." If you're a control freak then the nature of trial work will be an enduring challenge. Who's the assigned judge? What will the jury be like? How will the court rule on key evidentiary questions or instructions? Will my subpoenaed witnesses show up on time? The unexpected always lurks just around the corner. Of course, preparation reduces uncertainties, however, it can never be eliminated; its edge is forever evolving. It's in the nature of the work.

THE LOWS OF LOSING ARE MUCH LOWER THAN THE HIGHS OF WINNING ARE HIGH

The emotional sequelae of losing and winning are asymmetrical. When we lose it feels like a part of us dies, when we win it's

more of a relief or respite than anything more. Yes, there's honor in the battle and dignity in the good fight, but losing wears on you; it gets all of us down. Without the perspective of a longer career view fortified by best practices, it's easy to slip into cynicism.

You have invested three years of law school, may have huge student loans, and are now a community asset. Once you get a taste of the courtroom, hopefully you'll want more. Assuming jury trial work "calls" to you, then you must be hardy and emotionally durable. Excellence takes time. Your clients all need and deserve the best of you; we all need the very best of you, and, by the way, so do you!

THE MARKET IS INTENSELY COMPETITIVE

The legal market is glutted, resulting in intense competition and increased specialization. Marketing demands we self-promote and further invites us to stretch our declarations of competence in order to inspire prospective clients to hire us. The economics are unremitting and reduce all margins of error.

YOU MUST CARE IN ORDER TO BE PERSUASIVE; HOWEVER, IT COMES WITH A HIGH PRICE

You must bring something of yourself to advocating, otherwise, you're no better than a technician and might as well email your closing to the clerk. I choose to crawl down the emotional rabbit hole and become invested in my clients and their cases/causes. I want to be committed and hope it shows. The jurors want to know you care: after all, if you don't, why should they? It's akin to "Here I stand, I can do no other." While it's technically unethical to state your personal opinions, functionally you're always an unsworn witness. This passion gives my clients their best chance to win, and keeps them in my corner if we don't. However, once again, it's easy to slide into too much of a good thing. The balance is to care, but not so much that you appear to have lost your objectivity.

SECONDARY TRAUMA

There is emerging literature that confirms we suffer a type of secondary wounding as a result of vicariously experiencing the trauma our clients suffered. On direct exam we encourage our clients to speak in first person and testify as if the event is happening now. We therefore have front row seats to the reliving of incest, rape, domestic violence, alcohol, drugs, and memories of child abuse. In addition to "secondary trauma" or wounding, mental health professionals have also identified a "compassion fatigue"[1] we suffer given the emotional nature of our work. Yes, we must learn to walk a mile in our clients' shoes, and the cumulative effect upon us lawyers can be depressing.[2] This can lead to career "burn-out."

Some advocate a distinction between sympathy and empathy. Jeena Cho in the ABA Journal notes:

"Compassion is a concern for the suffering of others and taking some steps to alleviate the suffering. Empathy, on the other hand, is stepping into the shoes of another. It is important for attorneys to be able to do both. But for lawyers who regularly are working with traumatized clients, it's very important to remind yourself that you care about your clients but you are not your clients.

Keeping a separate identity allows you to function at a higher level as an advocate and to avoid your own trauma. Also, as with diminishing stress generally, self-care is very important to minimizing vicarious trauma. Maintaining healthy habits of sleep, nutrition, and exercise go a long way."[3]

MY CLIENTS TRUSTED ME AND I "LET THEM DOWN"

When we lose, of course it's about our clients, but it's also about us and generates feelings of inadequacy, guilt and shame. They trusted me. I feel that somehow I've betrayed my clients. It therefore feels only right and natural for me to care, and care a lot, and thus hurt, and hurt a lot.

I have a strong emotional push-back whenever I find myself trying to protect myself from the full pain of "my" losses. Why? Because a big part of me feels that somehow I'm responsible for the loss. It's as if, by enduring the pain, it somehow lightens my client's load. I also know my clients don't have the luxury of my "mind games." They're living with the full consequences of the loss; they are the ones going to jail or being evicted from their homes. It was my job to "have my client's back," to support and advocate for them, and do so with passion and commitment. So who am I to now run and emotionally hide?

When I lose, I try my level best to run into and through my feelings, not away from them. As I visualize this process, I see and allow the pain to actually pass through me, rather than staying and corroding my innards. Depression, ulcers, alcohol, cynicism, and "burn out" are common in this profession.

ATTRIBUTION, FAULT, AND OUR EGOS

We all know it's inaccurate to characterize losses and wins as "mine" or "ours." After all, it wasn't me; it was the facts. You play the cards you're dealt, the hand you're given. Concerning the lawyer's impact on the jury outcome, famous attorney Edward Bennett Williams said:

"Once in a while the illusion is created, probably by an overenthusiastic press, that some great trial lawyer never loses a case. This is pure fiction, and not harmless fiction at that. It casts the whole administration of justice in an unfavorable light. The greatest football coaches lose games. There is a limit to what a genius can do with the material with which he must work. If you turn over any given football team to the best coach in America, he may win two more games than the most incompetent coach would win with the same material. Likewise if you take a hundred criminal cases and assume that fifty of them should be won on the merits and that fifty should be lost, and then turn them over to the most able and experienced advocate in America, he will probably win sixty and lose forty. Turn the same cases over to the most incompetent trial man and he will win forty and lose sixty. The concept of a great trial lawyer who always wins has no foundation in reality. It is a television or Hollywood fiction."[4]

1 *See,* "Compassion Fatigue," ABA Commission on Lawyer Assistance Programs, (https://www.americanbar.org/groups/lawyer_assistance/resources/compassion_fatigue.html).

2 Love, Hallie Neuman, "Lawyers Are at Risk for Secondary Traumatic Stress," *56 Bar Bulletin 7*, February 15, 2017, p.8.

3 Cho, Jeena, "A Distressing Business," *ABA Journal*, June 2018, p.28-29.

4 Evan Thomas, *The Man to See*, Simon and Schuster (1992) p. 157.

Deep down I also know that, in spite of my ego and emotional investment, it's not about me, or even my client; it's supposed to be about something much bigger, i.e., this abstraction we call justice. Besides, none of us should believe in a system which isn't merit based, meaning disputes are resolved on the facts and law, rather than the motives or competencies of the parties and their lawyers.

Editor's Note: The last of this three-part series will be published in the Winter 2019 edition of the Litigation Journal.

Applying Oregon's Unjust Enrichment Doctrine After *Larisa's Home Care, LLC v. Nichols-Shields*

By Nadia Dahab
Stoll Berne


Nadia Dahab

Courts and commentators long have complained that the law of benefit-based obligations, to which unjust enrichment is central, is incomprehensible and inaccessible—full of linguistic confusion about what is a right, what is a remedy, and the circumstances in which the doctrine applies. "American lawyers today (judges and law professors included) do not know what restitution is." Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1193–95 (1995). Even the Restatement explains that "[i]t is by no means obvious, as a theoretical matter, how 'unjust enrichment' should best be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what role the principle would ideally play in our legal system." Restatement (Third) of Restitution & Unjust Enrichment § 1 cmt. a (hereinafter referred to as Restatement (Third)).

The "modern" law of restitution and unjust enrichment, invented by the American Law Institute (ALI) and initially set forth in the ALI's 1937 Restatement on Restitution, by all accounts is still evolving, "analogous to tort and contract law in the nineteenth century, when treatise writers were first defining those areas of the law." *Larisa's Home Care, LLC v. Nichols-Shields*, 362 Or. 115, 125–26 (2017) (citing Kull, 83 Cal. L. Rev. at 1194–95). Courts continue to struggle with how to define and apply early doctrinal formulations that used the word "restitution" to describe both a remedy and a cause of action,[1] and are continuing to develop meaningful, practical guidance in an area of law

1 As the Oregon Supreme Court in *Larisa's Home Care* explains, "[a]s a legal term, 'restitution,' for example, is broader than the ordinary meaning might suggest." 362 Or. at 126. Restitution for instance may be appropriate even in the absence of proof that the defendant retained something that previously belonged to the plaintiff; it could require a defendant to give a plaintiff something that the plaintiff never had in the first place. *See id.*

that otherwise is premised on vague notions of "natural justice and equity." *See* Restatement (Third) § 1 cmt. b.

Oregon has been no stranger to the unjust enrichment conundrum. Indeed, the confusion may be particularly acute here, where there is a more limited body of reported cases than likely exists in other states. At least until last fall, when the *Larisa's Home Care* decision was issued, cases from the Oregon appellate courts repeatedly recognized the absence of clarity—and even authority—on the law of unjust enrichment. *See, e.g., Tupper v. Roan,* 349 Or. 211, 220 (2010) ("Although our cases refer to a substantive 'doctrine' of unjust enrichment, none provide[s] any really comprehensive exposition of that doctrine."); *Cumming v. Nipping*, 285 Or. App. 233, 238 (2017) ("[A]lthough Oregon has adopted the doctrine of unjust enrichment through common law, there has been little clarity regarding its application."). In that sense, the Supreme Court's decision in *Larisa's Home Care* provides some of the first meaningful guidance for lower courts and practitioners in Oregon, and, although its framework remains untested, lends objectivity and predictability to a doctrine that historically has been difficult to understand.

The Oregon Court of Appeals in 1993 brought about an early—and, until *Larisa's*, prevailing—formulation of what it viewed as a remedy "to accomplish substantial justice by preventing unjust enrichment." *Jaqua v. Nike, Inc.,* 125 Or. App. 294, 298 (1993). In *Jaqua*, the Court of Appeals was faced with the question whether the plaintiff's claims—in that case, for breach of contract and quasi-contract—sounded in tort or contract, and therefore were subject to a 2-year or 6-year limitations period.[2] In deciding that the claims sounded in contract, the court announced a three-part test for recovering on a quasi-contract theory: there must be (1) "a benefit conferred," (2) "awareness by the recipient that a benefit has been received," and, (3) "under the circumstances, it would be unjust to allow retention of the benefit without requiring the recipient to pay for it." *Id.* at 298 (citing 3 Corbin, *Contracts* § 561 (1963 & Supp. 1992)). The Court of Appeals further explained that "[f]or an injustice to be found [under the third element], one of three things must be true: (i) the plaintiff had a reasonable expectation of payment; [(ii)] the defendant should reasonably have expected to pay; or [(iii)] society's reasonable expectations of security of person and property would be defeated by nonpayment." *Id.* (citing 1 Corbin, *Contracts* § 19A (Supp. 1992)).

Although the Supreme Court never adopted it, the Oregon Court of Appeals maintained the *Jaqua* framework for the next twenty-four years, applying it in a handful of cases in which an unjust enrichment claim was based on an alleged benefit conferred on a defendant without compensation to the plaintiff. *See, e.g., Wilson v. Gutierrez*, 261 Or. App. 410, 416 (2014) (counterclaim plaintiff had provided counterclaim defendant with gambling money with a reasonable expectation of repayment); *Safeport, Inc. v. Equipment Roundup & Mfg., Inc.*, 184 Or. App. 690, 693–94 (2002) (plaintiff had conferred financial benefit on the defendant contractor, who failed to complete work); *Summer Oaks Ltd. P'ship v. McGinley*, 183 Or. App. 645, 647 (2002) (plaintiff had conferred on defendant benefits in the form of public utility charge credits associated with real property); *Volt Servs. Grp. v. Adecco Emp't Servs., Inc.*, 178 Or. App. 121, 134 (2001) (plaintiff placed employees in jobs, allowing defendant to avoid that task when defendant took over plaintiff's contract). In every case, the guiding principle was the same: " 'the theory that one party should not be unjustly enriched at the expense of another.' " *Wilson*, 261 Or. App. at 416 (quoting *Farmer v. Groves*, 276 Or. 563, 568 (1976)).

But the *Jaqua* framework had its flaws, given the "specious precision [it lends] to an analysis that may be simple or complicated but which at any rate is not susceptible" to such a "checklist" form of analysis. Restatement (Third) § 1 cmt. d. As the authors of the *Restatement (Third)* explain, the third *Jaqua* element—requiring proof that retention of the benefit would be unjust—"incorporates the whole of the question presented, making the rest of the formula superfluous." *Id.* The second element—requiring proof of the defendant's awareness of the benefit—is likewise "mysterious and potentially mischievous" and, in all events, wrong, at least to the extent that it suggests no liability where a defendant is unaware of or attempts to refuse the benefit he or she ultimately retained. *Id.* At bottom, the framework is simply unhelpful, and can lead to errors in judgment on significant legal claims.

In 2011, the *Restatement (Third)* was published, replacing the original 1937 version and providing substantial clarity and thoughtful analysis of the manner in which the common law of unjust enrichment had developed in the courts since the doctrine's inception. Ultimately, the *Restatement* authors conclude that the premise on which the doctrine was based—the theory that one party should not be unjustly enriched at the expense of another—was far broader than the circumstance in which it legally may apply. Restatement (Third) § 1 cmt. b ("In reality, the law of restitution is very far from imposing liability for every instance of what might plausibly be called unjust enrichment."). The authors recognize that the circumstances in which the law should intervene should be narrower, more predictable, and "more objectively determined than the unconstrained implications of the words 'unjust enrichment.' " *Id.* (recognizing that an unjust enrichment claim should arise only when the justification in question is not moral but legal).

To achieve those narrower, more predictable outcomes, the *Restatement (Third)* seeks to catalogue, in a more accessible way, the circumstances in which unjust enrichment exists as a matter of law. Chapter 1 begins by setting forth four general principles that courts and litigants should apply in assessing whether a legally cognizable claim exists. Restatement (Third) §§ 1–4. Chapters 2 through 6 go on to define 44 categories of circumstances in which restitution may be imposed, "employing categories that are large enough to be significant, small enough to describe cases that are perceptibly alike." *Id.*; Restatement (Third) §§ 5–48. Chapter 3, for instance, describes cases of "unrequested intervention," cataloguing circumstances of emergency intervention, performances rendered to a third person (*e.g.*, indemnity, contribution, and equitable subrogation), and self-interested intervention that may, depending on the facts, give rise to a legally cognizable claim. *See* Restatement (Third) §§ 20–24, 26–30. Chapter 5 addresses "restitution for wrongs," describing, among other things, circumstances of trespass, misap-

2 Factually, the claims were based on the defendant's alleged misappropriation of the plaintiff's idea for a new type of shoe. *Jaqua*, 125 Or. App. at 296.

propriation of financial assets, and interference with intellectual property rights that may give rise to such claims. *Id.* §§ 40–42. The authors make clear that their list is comprehensive but not exclusive—cases may arise that fall outside of every category but well within the general principles that underpin the doctrine. *Id.* § 1 cmt. a.

In 2017, the Oregon Supreme Court, finally confronting the flaws of the *Jaqua* framework—which it had never before cited or in any way relied upon—put *Jaqua* to rest and adopted, wholesale, the *Restatement (Third)* approach. In *Larisa's Home Care, LLC v. Nichols-Shields*, the court, faced with an unjust enrichment claim arising out of alleged Medicaid fraud, concluded that

> the formula for unjust enrichment in *Jaqua* is inadequate to the task . . . . In lieu of applying the formula in *Jaqua*, Oregon courts should examine the established legal categories of unjust enrichment as reflected in Oregon case law and other authorities to determine whether any particular enrichment is unjust.

Id. at 132. The court observed that, under its precedent, including *Tupper v. Roan*, Oregon's decisional law on unjust enrichment "can be described as incremental rule development on a case-by-case basis, based on recognized grounds for imposing liability." *Id.* at 127 – 28 (citing *Suitter v. Thompson et ux.*, 225 Or. 614, 625 (1961)). It noted that the *Restatement (Third)* is organized for that approach, "contain[ing] a statement of four general principles and then 44 sections addressing the types of circumstances in which liability in restitution is recognized." *Id.* at 128.

In *Larisa's Home Care* itself, the unjust enrichment claim arose from allegations of Medicaid fraud, in which the plaintiff adult home care facility sought to recover the benefits the defendant had retained when he received care from the facility at the Medicaid, rather than the private pay, rate. The court applied *Restatement (Third)* section 13, which addresses restitution for "fraud and misrepresentation" and provides that "[a] transfer induced by fraud or material misrepresentation is subject to rescission and restitution . . . to avoid unjust enrichment." The court stated that the comments to section 13 set forth illustrations analogous to the facts of *Larisa's*—a person who obtained services by falsely claiming to be indigent. 362 Or. at 133 (citing *Restatement (Third)* § 13 cmt. c, ill. 4). Given that the circumstances were contemplated by the *Restatement (Third)* as giving rise to a cognizable claim, the Oregon Supreme Court concluded the same.

Since *Larisa's Home Care* was decided, the Oregon Court of Appeals has had only one occasion to apply its Restatement-approach framework. In *The Hoag Living Trust dated February 4, 2013 v. Hoag*, 292 Or. App. 34 (2018), the Court of Appeals considered whether the plaintiff's quasi-contract claims, which arose out of conflicting claims to a parcel of real property, were cognizable under the Restatement. It held that they were, applying *Larisa*'s method in precisely the same manner: looking to the facts of *Hoag*, and based on those facts identifying which sections of the *Restatement (Third)* defined analogous categories of claims. *See id.* at 45–46 (citing Restatement (Third) §§ 27, 31).[3]

Larisa's Home Care seems to have been intended to create clarity in an area of law in which clarity certainly has been needed. The opinion, it seems, aims for predictability—recognizing that Oregon's prior formulations were both too broad and too narrow, and that the law should intervene only when the circumstances objectively may be defined as "unjust." Although at this early stage it is difficult to identify the decision's practical impact—that is, whether and to what extent claims previously deemed legally cognizable are no longer so, or vice versa—a few practical takeaways immediately present themselves:

1. **Advocates should study the Restatement (Third) and its illustrations:** Although the Oregon Supreme Court seems open to resorting to "other authorities" to define categories of legally cognizable unjust enrichment claims, the primary sources on which practitioners should rely include existing Oregon Supreme Court decisions and the illustrations contained in the 44 sections of the *Restatement (Third)* that define liability in restitution. Each section includes a handful of illustrations, describing particular sets of facts and sometimes citing to caselaw from other jurisdictions on which those illustrations are based. If you can identify—as in *Hoag*—a particular illustration analogous to the facts of your case, you are probably in good shape.
2. **Evaluate risk accordingly:** If you *cannot* identify an analogous set of facts or an Oregon Supreme Court decision on point, evaluate litigation risks accordingly. In the absence of some clear category, litigants will be forced to rely on some "other authority," guided by the general principles of sections 1 through 4. The "limiting principles" of section 2, while helpful to the analysis, only circumscribe, and do not define, what it means for a set of circumstances to be "unjust." Cases presenting facts clearly outside of those contemplated by the *Restatement (Third)* seem less likely ultimately to prevail.
3. **Consider the impact that *Larisa's Home Care* may have on other existing common-law claims.** The 44 relevant sections of the *Restatement (Third)* encompass certain causes of action for which other decisional law exists in

3 The U.S. District Court for the District of Oregon has also been faced with a *Larisa's Home Care* analysis on one occasion this year. In *County of Clackamas v. Mortgage Electronic Registration Systems, Inc.*, 2018 WL 2305688 (D. Or. 2018), Clackamas County sued Mortgage Electronic Registration Systems, Inc. (MERS), alleging a claim for unjust enrichment. *Id.* at *1. In its complaint, the County sought to recover, among other things, recording fees that MERS avoided by assigning trust deeds between its members, and benefits that MERS obtained by listing itself as the beneficiary on those trust deeds. The district court dismissed both claims, noting that "[t]he Counties' allegations are missing the linchpin of a successful unjust enrichment claim—that the Defendants obtained benefits *from the Counties* by fraud." *Id.* at *2.

That statement, however, may not be correct under the *Restatement (Third)*, which makes explicit that a benefit need not flow directly from one party to the other to give rise to a viable claim. Section 1 of the *Restatement (Third)* makes clear that although "[r]estitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth," "the benefit that is the basis of [the] claim may take any form, direct or indirect." Restatement (Third) § 1, cmt. d.

Oregon, including indemnification, contribution, and equitable subrogation. It is not yet clear whether and to what extent *Larisa's Home Care* impacts that earlier decisional law, but the potential impact is worth noting and considering going forward.

4. **Consider other potential rights and defenses.** The *Restatement (Third)* not only categorizes legally cognizable claims, but also addresses applicable defenses, §§ 62–70, and appropriate remedies, §§ 49–61. Furthermore, section 4 explains that an unjust enrichment claim may be legal, equitable, or both, in turn impacting important litigation considerations such as the right to jury trial on that particular claim, the impact of related statutes limiting remedies, and whether a claim may be dismissed based on the existence of an adequate remedy at law.

In all events, *Larisa's Home Care* and the *Restatement (Third)* are important sources to study for their insight on potential legal or equitable claims that may or may not have existed previously in Oregon or that may now be eliminated. Practitioners should be aware of cases making their way through the Oregon courts, noting the circumstances in which those cases base their claims. And, if the Oregon Supreme Court truly is serious in its willingness to consider "other authorities" as the basis for such claims, 362 Or. at 132, perhaps there is room for some creative advocacy in the development of this body of law.

Stare Decisis at the Oregon Supreme Court

By Michael Willes
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Litigators throughout the state have taken interest in *Horton v. Oregon Health and Sciences University*. The decision reshaped the legal landscape of damages limitations and the right to have a jury resolve issues of fact in civil cases. In the wake of the court's opinion in *Bagley v. Mt. Bachelor, Inc.*, I wrote a pair of articles criticizing the court's implementation of a totality-of-the circumstances balancing test for determining the unconscionability of contracts.[1] H. L. A. Hart has noted that this type of discretion has "no clear principles or rules determining the relative importance of . . . constituent values or, where they conflict, how compromise should be made between them."[2] To some extent, the *Horton* decision continued the Oregon Supreme Court's embrace of subjective—perhaps unguided—analysis, with respect to its treatment of the remedy clause and its own power to overrule constitutional precedent. "Balancing" one undefined set of factors against another affords the court immense flexibility at the expense of stability and its own legitimacy.

The *Horton* Decision

In *Horton*, the plaintiff's six-year-old son underwent surgery at Oregon Health and Sciences University ("OHSU")—a state corporation—where he suffered damage to the blood vessels sustaining his liver.[3] Remedying that mistake required a liver transplant, various surgeries, and lifetime monitoring for further complications.[4] The defendant physician—a state employee—and the hospital admitted liability but contested the amount in controversy.[5] Following the damages trial, the jury awarded $6 million and $6,071,190.38 in noneconomic and economic damages, respectively.[6] Following trial, the defendants moved to cap total damages at $3 million pursuant to the Oregon Tort Claims Act.[7]

OHSU won, but the doctor lost. The trial court held that "because sovereign immunity applies to OHSU, the legislature constitutionally may limit the damages for which OHSU is liable."[8] The defendant physician argued that he too could seek protection under the umbrella of "discretionary immunity" and "that, because he would not have been liable for any damages in 1857 for his negligence, the Tort Claims Act limit [could] be applied constitutionally to him."[9] The trial court, relying on *Smothers v. Gresham Transfer, Inc.*, a 2001 Oregon Supreme Court opinion, rejected that argument, holding instead that the $3 million Oregon Tort Claims Act cap, as applied to the physician defendant, would have violated not only the remedy clause of the Oregon Constitution, but also both jury trial clauses—Article I, section 17, and Article VII (Amended), section 3.[10] Accordingly, OHSU's exposure was capped at $3 million; a limited judgment for the full amount of the jury's award was entered against the physician defendant.[11]

On direct appeal, the Oregon Supreme Court held that "the remedy clause does not protect only those causes of action that pre-existed 1857, nor does it preclude the legislature from altering either common-law duties or the remedies available for a breach of those duties."[12] The court expressly disavowed *Smothers*, because the case lacked "support in the text and history of Article I, section 10"; was "at odds" with another clause of the Oregon Constitution; conflicted with prior cases interpreting Article I, section 10; and was "of a relatively recent vintage" and therefore had not been relied on by too many subsequent decisions—all while admitting that plain language and history of the remedy clause did not have a "clear answer regarding the clause's meaning."[13] This attack on prior precedent seems to violate the court's "assum[ption] that fully considered prior

1 *See* Caveat Venditor*: The Consequences of* Bagley v. Mt. Bachelor, Inc. *for Negligence Releases and Other Contractual Provisions*, 34 Or. St. Bar Litig. J. 12 (2015); *A Foil for* Fazzolari*: Recent Negligence Case Law Weakens Duty Limitations*, 94 Or. L. Rev. Online 1 (2016).
2 *Discretion*, 127 Harv. L. Rev. 652, 659 (2013).
3 *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168, 171 (2016).
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 171–72 (citing *Clarke v. Or. Health Scis. Univ.*, 343 Or. 581, 600 (2007)).
9 *Horton*, 359 Or. at 172.
10 *Id.*
11 *Id.*
12 *Id.* at 219.
13 *Id.* at 198.

cases were correctly decided."[14] Robert S. Peck and Dean Erwin Chemerinsky wrote that overruling *Smothers* was a "breathtaking pirouette, essentially expressing disagreement unanchored to new understandings or deeper inquiry [that] provides extraordinarily weak grounds for overruling a recent and maturely decided case."[15]

To make sense of prior case law, *Horton* outlines three general categories of legislation subject to remedy-clause constraints. The first category is where the legislature recognizes a duty but either provides no remedy or an "insubstantial" one.[16] Second, if as a part of a "larger statutory scheme" the legislature grants benefits to some while limiting remedies to others, a "'substantial'" but limited remedy may be acceptable under the remedy clause.[17] This is the "quid pro quo" exception allowing for the limitation of remedies such as the workers' compensation system.[18] Third, upon considering "whether the common-law cause of action that was modified continues to protect core interests against injury to persons, property, or reputation or whether, in light of changed conditions, the legislature permissibly could conclude that those interests no longer require the protection formerly afforded them," the legislature may impose remedy limitations.[19] When discussing this third category, Judge David Schuman quipped, "I believe that's a fancy way of talking about ad hoc balancing—what was the state's interest, what is the degree of harm inflicted upon the individual. *Horton* discarded the 1857 bright-line rule."[20] In other words, the court has acknowledged—or, maybe more appropriately, assumed—the power to determine the shelf-life of common-law remedies, despite incorporation into Article I, section 10. The opinion offers no guidance on when it is appropriate for the court to assume that policy-making role, a remarkable feat for a majority opinion that runs more than 83 pages.

Prior and subsequent opinions from the Oregon Supreme Court show a fondness for balancing tests. The court has favored them for deciding whether a contract is unconscionable,[21] whether police had obtained voluntary consent to conduct a search,[22] and what bounds are applicable to a voluntary search of the contents of a person's belongings.[23] In the latter context, the court has twice rejected attempts to establish rules that "would undermine . . . a full-throated consideration of the totality of the circumstances bearing on the scope of the defendant's consent."[24] *Horton* has followed suit with respect to the remedy clause and, perhaps more importantly, by abandoning any formal approach to *stare decisis*. Not only does this present a conundrum for parties who want to conform their activities to dependable statements of law, it also undermines the court's legitimacy.

Stare Decisis No Longer

Methodological and factual errors were once the focus when the Oregon Supreme Court considered overruling prior constitutional pronouncements. In *Stranahan v. Fred Meyer, Inc.*, a decision from 2000, the court overturned a 1993 decision, *Lloyd Corp. v. Wiffen*, that addressed the geographic scope of the right to gather petition signatures. Respect for stability, the court asserted, "applies with particular force in the arena of constitutional rights and responsibilities, because the Oregon Constitution is the fundamental document of this state and, as such, should be stable and reliable. On the other hand, the law has a similarly important need to be able to correct past errors."[25] In overruling its prior precedent, the court paid "particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question."[26]

State v. Ciancanelli, a 2005 case, contains perhaps the most rigid recitation of the procedure for overturning constitutional precedent. The challenging party first had to persuade the court that the established rule was founded on an erroneous "paradigm."[27] Second, the challenging party "still ha[d] before it the more difficult task of persuading this court that application of the appropriate paradigm establishes that the challenged constitutional rule is incorrect."[28] The final step required proving that unwinding the accumulated precedents built on the erroneous constitutional pronouncement would not "unduly cloud or complicate the law."[29]

In its 2011 opinion in *Farmers Insurance Co. of Oregon v. Mowry*, the court acknowledged its

> obligation when interpreting constitutional and statutory provisions and when formulating the common law is to reach what we determine to be the correct result in each case. If a party can demonstrate that we failed in that obligation and erred in deciding a case, because we were not presented with an important argument or failed to apply our usual framework for decision or adequately analyze the controlling issue, we are willing to reconsider the earlier case.[30]

As of the *Mowry* decision, the court's focus—at least nominally—had not strayed from a search for errors. Nevertheless, in *Couey v. Atkins*, a decision from 2015, the court invoked a variation on an old balancing-test refrain to chip away at its *stare decisis* constraints: "Precisely what constitutes an 'error' sufficient to warrant reconsideration of a constitutional precedent *cannot*

14 *Farmers Ins. Co. v. Mowry,* 350 Or. 686, 700 (2011) (citing *State v. Ciancanelli*, 339 Or. 282, 290 (2005)).
15 *The Right to Trial by Jury as a Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 Or. L. Rev. 489, 540 (2018).
16 *Horton*, 359 Or. at 219.
17 *Id.*
18 *Id.* at 221.
19 *Id.* at 219–20.
20 David Schuman, *Setting the Stage*, 96 Or. L. Rev. 673, 676 (2018).
21 *See Bagley v. Mt. Bachelor, Inc.*, 356 Or. 543, 560 (2014).
22 *See State v. Unger*, 356 Or. 59, 72 (2014).
23 *State v. Blair,* 361 Or. 527, 539 (2017).
24 *See State v. Winn*, 361 Or. 636, 641 (2017); *Blair*, 361 Or. at 539 (rejecting State's proposed corollary that all contents within a container for which consent to conduct a search has been received would allow search of closed but unlocked containers within).
25 *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 53, 11 P.3d 228, 237 (2000).
26 *Id.*
27 339 Or. 282, 291.
28 *Id.*
29 *Id.* In *Stranahan* the court took the first opportunity available to correct its faulty constitutional analysis in *Lloyd Corp. v. Whiffen*, 315 Or. 500 (1993). *See Ciancanelli*, 339 Or. at 290.
30 *Mowry*, 350 Or. at 698 (citing *Stranahan*, 331 Or. at 54, 11 P.3d 228).

be reduced to a neat formula."[31] When the *Couey* court made that statement, however, it was expressly in the context of possible errors that could require reconsideration, not other considerations such as changing public policy.

The Oregon Supreme Court took the next step with *Horton*. It defined three categories of constitutional pronouncements that are most susceptible to reconsideration: (1) those amounting to dictum, (2) those having no underlying analysis or explanation, and (3) those where the analysis is erroneous or does not find support in the text or the history of the relevant constitutional provision. Additional factors include "whether others have 'rel[ied] on the rules of law announced by this court to structure their transactions'" and the age of the decision under scrutiny.[32] These categories have the ring of *Ciancanelli's* procedure but none of its rigor. The final word on *stare decisis* renounces any formal process when reconsidering past precedent. Building on *Couey*, *Horton* states: "The answer to the question whether a case should be overruled cannot be reduced to the mechanical application of a formula but requires instead an exercise of judgment that takes all *appropriate factors* into consideration."[33]

This seems to be just another balancing test.

Balancing Act

One could argue that each part of the *Horton* majority's decision—on *stare decisis*, the remedy clause, and jury-trial rights—represents additional power that the Oregon Supreme Court has assumed for itself. Whether one has that jaded a view or not, balancing tests pose a significant threat to the court's legitimacy. They lack academic rigor. And they threaten to destabilize precedent due "'simply to a change in personnel rather than reasoned reconsideration.'"[34]

The court's treatment of *Smothers* exemplifies this concern. *Horton* details at great length remedy clause history, prior precedents, other states' remedy clauses, and the turmoil that the remedy clause has caused among the Oregon state judiciary. Yet after pages and pages of putative analysis, the court acknowledges that it had learned "little about the meaning of Oregon's remedy clause"[35] and that "it is difficult to tell what meaning the remedy clause would have had to an early American audience."[36] Based more or less on a difference of opinion with their predecessors, the majority overturned *Smothers*.

"Upon close examination, judicial legitimacy does not turn on consent to be governed by the written Constitution (and it alone), as is often thought, but on contemporary acceptance and the reasonable justice of the prevailing regime of law."[37] When the court abandons established processes for "weighing" one undefined set of factors against another, how can lawyers and the public do anything but suppose that the justices "presume[d] the conclusion instead of reasoning to it"?[38]

31 *Couey v. Atkins*, 357 Or. 460, 485 (2015).
32 *Mowry*, 350 Or. at 700–01.
33 *Horton*, 359 Or. at 187 (emphasis added) (citing Mowry, 350 Or. at 697–98).
34 Randy J. Kozel, *Stare Decisis As Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 466 n.99 (2010) (quoting Philip P. Frickey, Stare Decisis *in Constitutional Cases: Reconsidering* National League of Cities, 2 Const. Comment 123, 140 (1985)).
35 *Horton*, 359 Or. at 216–17.
36 *Id.* at 206.
37 Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 596 (2001).
38 *The Remedy Clause, Reexamination of Verdicts, and Separation of Powers Principles*, 96 Or. L. Rev. 707, 723–24 (2018) (comments of Hon. David Schuman).

Recent Significant Oregon Cases

By The Honorable Stephen K. Bushong
Multnomah County Circuit Court


The Honorable Stephen K. Bushong

Claims and Defenses

Ortega v. Martin,
293 Or App 180 (2018)

Plaintiff was surfing at Pacific City near Cape Kiwanda when he was struck by a dory boat operated by defendant Martin. The boat's propeller severed plaintiff's left arm. Although the arm was recovered and surgically reattached, plaintiff suffered permanent physical impairment and post-traumatic stress syndrome as a result of the incident. Plaintiff sued Martin and the State of Oregon, alleging that the state was negligent in failing to warn surfers of the danger of collisions. The state moved for summary judgment, contending that the "recreational immunity" statute, ORS 105.682, barred recovery. The trial court denied the state's motion, and the case proceeded to trial. The jury found the state's comparative fault to be 70 percent and awarded $717,250.24 in economic damages and $3.1 million in noneconomic damages. The court then reduced the damages award by 30 percent to account for plaintiff's comparative fault, and applied the $1.5 million noneconomic damages cap contained in ORS 30.271(2)(a). The Court of Appeals affirmed. The court, applying *Landis v. Limbaugh*, 282 Or App 284 (2016), *rev dismissed*, 361 Or 351 (2017), held that the state was not entitled to recreational immunity because it lacked the authority "to make a volitional decision whether or not to allow recreational use" of the ocean and beaches. 293 Or App at 193. The court further concluded that "application of the cap to plaintiff's recovery in this case, which resulted in him recovering approximately two-thirds of the amount that he would have received absent the application of the cap, does not violate Article I, section 10 [of the Oregon Constitution]." *Id.* at 196.

McCormick v. State Parks and Recreation Dept.,
293 Or App 197 (2018)

Plaintiff was severely injured when, while visiting Cove Palisades State Park, he dove into Lake Billy Chinook and hit his head on a submerged boulder. He sued the state for negligence. The trial court granted the state's motion for summary judgment, concluding that recovery was barred by ORS 105.682, the recreational immunity statute. The Court of Appeals, apply-

ing its decision in *Ortega v. Martin*, 293 Or App 180 (2018) (above), reversed. The court explained that the state was not entitled to summary judgment on the grounds of recreational immunity because, under *Ortega*, the state "has not established as a matter of law that it permitted the recreational use of Lake Billy Chinook within the meaning of ORS 105.682." 293 Or App at 201.

Oregon Psychiatric Partners v. Henry, 293 Or App 471 (2018)

Defendant quit her job as a psychiatric nurse practitioner with plaintiff Oregon Psychiatric Partners (OPP) and opened her own practice. OPP sued, alleging that defendant violated the noncompetition provision in her employment contract. The trial court entered judgment for defendant, concluding that the noncompetition agreement was unenforceable under ORS 653.295. The Court of Appeals reversed, concluding that the agreement was enforceable in part as a covenant not to solicit or transact business with OPP's customers. Construing the statute, the court concluded that "the legislature appears to have intended for ORS 653.295(4)(b) to allow an employer to enforce an agreement not to solicit or transact business with persons or entities who would reasonably be expected to return to the employer for purposes of doing business when the employer-employee relationship ended." 293 Or App at 480. The court further concluded that, although "the agreement as written would restrict competition to a degree not permitted" by the statute, nothing in the statute "suggests that the legislature intended to preclude partial enforcement of overbroad nonsolicitation agreements." *Id.* at 481-82.

Meyer v. Oregon Lottery, 292 Or App 647 (2018)

Plaintiffs worked as managers for the Lottery. They were involved in an extramarital romantic relationship. When other employees complained that the relationship affected their work, the Lottery opened an investigation. Plaintiffs were placed on paid administrative leave while the investigation was pending. After being placed on leave, plaintiff Meyer filed a complaint with the Lottery's human resources department, alleging that the Lottery's then-director (defendant Niswender) had sexually harassed Meyer and other women, and that the investigation was in retaliation for her resistance to Niswender's sexual advances. Plaintiffs were ultimately disciplined, and the investigation report was released to the media. Plaintiffs sued, asserting constitutional claims under 42 USC 1983, statutory retaliation claims, and other claims. The trial court ultimately granted summary judgment to defendants on all claims. The Court of Appeals reversed in part, concluding that the trial court erred in dismissing plaintiffs' freedom of association claim under section 1983, and part of plaintiffs' statutory retaliation claims. With respect to the section 1983 claim, the court concluded that "a government employer violates its employees' right to intimate association by impermissibly investigating their private sexual conduct or taking adverse employment action based on that conduct." 292 Or App at 659. With respect to the retaliation claim, the court concluded that plaintiffs created a genuine issue of material fact as to causation regarding "(1) the issuances of the disciplinary letters imposing increased supervision based on the timing those letters were issued and (2) the release of the [investigation] report to the media based on the timing of that release and the possibility that its release was pretextual." *Id.* at 685.

Mason v. BCK Corp., 292 Or App 580 (2018)

Plaintiff was drinking with an acquaintance (defendant Mullenix) and Mullenix's fiancé at Duffy's Irish Pub (operated by defendant BCK Corporation). At the end of the evening, plaintiff asked Mullenix for a ride home. Plaintiff was seriously injured when Mullenix lost control of her car, striking a tree. Mullinex's blood alcohol content was .205 percent—well above the legal limit of .08 percent—two hours after the accident. Plaintiff alleged that BCK was liable because it had served Mullenix while she was visibly intoxicated. BCK moved for summary judgment, contending that ORS 471.565(2) shielded it from liability because plaintiff had "substantially contributed" to Mullenix's intoxication by encouraging or facilitating her drinking that evening. The trial court granted BCK's motion; the Court of Appeals affirmed. The court construed the "encouraging" clause of the statute to "bar recovery by a plaintiff who has engaged in conduct that encouraged the patron or guest to purchase alcoholic beverages, drink alcoholic beverages, or otherwise engage in drinking activities, such as drinking with the person or 'bar hopping.'" 292 Or App at 599. The court construed the "facilitating" clause of the statute to "bar recovery by a plaintiff who knowingly acted in any manner to make it easier for the intoxicated person to consume alcoholic beverages, if that facilitation substantially contributed to the intoxication." *Id.* at 602. The court concluded that, "because plaintiff failed to come forward with evidence from which a reasonable trier of fact could find that he did not substantially contribute to Mullenix's intoxication during the hours they spent drinking and socializing together, the trial court correctly granted defendant's motion for summary judgment." *Id.* at 606.

Balzer v. Moore, 293 Or App 157 (2018)

The Court of Appeals, applying its recent decision in *Mason v. BCK Corp.*, 292 Or App 580 (2018) (above), concluded: "Given the legislature's choice to place the burden on plaintiff in this type of case, plaintiff's failure to come forward with evidence from which a reasonable factfinder could find that he did not substantially contribute to Moore's intoxication during the hours they spent drinking and socializing together, the trial court correctly granted defendant's motion for summary judgment." 293 Or App at 168.

Kailash Ecovillage, LLC v. Santiago, 292 Or App 640 (2018)

In this residential eviction case, tenant moved to dismiss, contending that landlord's pre-eviction notice did not give tenant the statutorily-required amount of time to remedy the defect. The trial court denied the motion and entered judgment awarding possession of the premises to landlord. The Court of Appeals reversed. The case turned on whether the landlord was entitled to serve tenant by first class mail and attach the notice to the main entrance—commonly known as "nail and mail" service—as authorized by ORS 90.155(1). Under the statute, landlord could use "nail and mail" service if the landlord designated an address in the rental agreement at which the landlord

could receive notices by posting and first class mail. Here, the rental agreement provided a specific mailing address, but landlord subsequently notified tenants by email that it was moving to "Amrita House"—without designating a mailing address. The court concluded that (1) "once landlord moved, the agreement no longer supplied tenant with a mailing address that allowed tenant to communicate with landlord reliably by mail" (292 Or App at 645); and (2) landlord's "email about the move to Amrita House did not solve the problem because, although it might have been sufficient to inform tenant where to post a notice, it did not tell tenant the address for mailing a notice." *Id.*

Bayview Loan Servicing v. Chandler & Newville,
292 Or App 562 (2018)

Plaintiff Bayview brought an action to judicially foreclose its trust deed after borrowers defaulted. While that action was pending, a second lender commenced a non-judicial proceeding to foreclose a second trust deed that was junior in priority to Bayview's lien. The purchaser at the trustee's sale conveyed its interest to defendant Chandler & Newville (C&N). Bayview then filed an action for strict foreclosure against C&N. In response, C&N contended that Bayview's first foreclosure action was ineffective because the foreclosure judgment referred to the wrong lot number. The trial court agreed, and entered judgment declaring that C&N owned the property free and clear of Bayview's lien. The Court of Appeals reversed. The court explained that, in the original foreclosure action, the trial court ultimately corrected the erroneous property description under ORCP 71 A. 292 Or App at 572. As a result, the court concluded that (1) Bayview's "corrected judgment of foreclosure was effective as to all named parties"; (2) Bayview's senior lien interest "survived judicial foreclosure and the subsequent sale with regard to the interest acquired in the interim by C&N"; and (3) C&N's interest "remained subject to Bayview's lien, and Bayview was entitled to pursue foreclosure in order to resolve C&N's interest, providing a right of redemption." *Id.* at 576.

Merchants Paper Co. v. Newton,
292 Or App 497 (2018)

Plaintiff Merchants Paper Co. (Merchants) entered into an exclusive distribution agreement with Pact Trading Group (Pact), a former competitor in the wholesale paper cup business. Under the agreement, Pact withdrew from direct customer sales and instead served as an intermediary with paper cup suppliers in Asia. The agreement gave Pact the right to terminate on 30 days' notice but did not give Merchants a corresponding right. Defendant—Merchants' former attorney—reviewed the agreement but did not point out the termination provision. Merchants ultimately became unsatisfied with the distribution arrangement and intentionally breached the contract after receiving assurances from defendant that the agreement was legally unenforceable. Pact sued. The court ruled on summary judgment that the agreement was enforceable. Merchants then settled with Pact and sued defendant for legal malpractice. The trial court granted defendant's motion for summary judgment, concluding that the claim was barred by the statute of limitations. The Court of Appeals reversed. The court explained that the operative point of time for statute of limitations purposes "is when plaintiff knew, or should have known, that defendant's actions resulted in damages." 292 Or App at 509. On this record, the court concluded that "a reasonable trier of fact could determine that time to be when plaintiff learned from new counsel that defendant's assurances of escaping the contract unscathed were incorrect." *Id.*

Portfolio Recovery Association v. Sanders,
292 Or App 463 (2018)

After defendant defaulted on his credit card debt, the bank assigned the account to plaintiff Portfolio Recovery Associates, LLC (Portfolio). The trial court granted Portfolio's motion for summary judgment on its account stated claim. The Court of Appeals reversed. The court concluded that the trial court did not err in applying Oregon law to Portfolio's claim even though the credit card agreement provided that it would be interpreted under Virginia law. The court explained that the agreement on which Portfolio's claim is based "is an implied one from an account stated, and *that* agreement does not contain a choice-of-law provision." 292 Or App at 469 (emphasis in original). The trial court erred in granting summary judgment because "there remains an issue of fact whether there was a meeting of the minds as to the specific amount owed." *Id.* at 475.

Wilcox v. Les Schwab Tire Centers of Oregon,
293 Or App 452 (2018)

The Court of Appeals held that, because the federal Sevicemembers Civil Relief Act, 50 USC sections 3901 to 4043, "tolled the Oregon statute of limitation for plaintiff's wrongful-death action for the period that plaintiff was serving in the Air Force, the trial court erred by dismissing plaintiff's action as untimely." 293 Or App at 459.

Procedure

Ransom v. Radiology Specialists of the Northwest,
363 Or 552 (2018)

Plaintiff alleged that two of defendant's radiologists were negligent when they read plaintiff's imaging studies in 2013. During their depositions—taken in 2016—plaintiff's counsel asked the radiologists to look at the imaging studies and describe what they saw. Defense counsel instructed the radiologists not to answer, contending that the questions called for expert testimony that was not discoverable under ORCP 36 and protected by the attorney-client privilege. The trial court denied plaintiff's motion to compel. A divided Supreme Court issued a peremptory writ of mandamus, with the majority concluding that the questions did not call for impermissible expert testimony and did not invade the privilege. The court explained that "an expert who acquires or develops facts or opinions as a participant in the events at issue may be questioned about those events as an ordinary witness." 363 Or at 566-67. The testimony was discoverable because the radiologist's "present-day ability to describe what he can see in [the imaging scan] and his knowledge about the significance of what it shows may provide relevant information about what he perceived and knew in 2013." *Id.* at 571. And the fact that the radiologists' answers could be affected by discussions with their attorneys does not violate the privilege because the questions "do not call for disclosure of attorney-client communications." *Id.* at 572. The concurring opinion suggested that

ORCP 36 B, properly construed, does not impose a limit on expert discovery at all. *Id.* at 574-75 (Landau, Sr. J., concurring). The dissenting justices thought that the radiologists' current observations and opinions—as opposed to the historical facts regarding their actions at the time—would be "the very epitome of expert testimony" that is not permitted in Oregon. *Id.* at 596 (Nakamoto, J., dissenting).

Trinity v. Apex Directional Drilling LLC, 363 Or 257 (2018)

After defendant Apex defaulted on its loan, and defendant Lachner defaulted on his guaranty, plaintiff Trinity filed a breach of contract action against both defendants in Clackamas County Circuit Court. Defendant Lachner moved to dismiss, pointing out that the guaranty contained a forum-selection clause that required any litigation related to or arising out of the guaranty to be brought in San Francisco. The trial court denied the motion, concluding that it had discretion and that Oregon was the more reasonable forum. The Supreme Court issued a peremptory writ of mandamus, concluding that "the trial court did not have discretion to deny Lachner's ORCP 21 A(1) motion to dismiss based on the forum-selection clause: The law required the court to dismiss the action." 363 Or at 263.

Air Rescue Systems Corp. v. Lewis, 292 Or App 294 (2018)

The Court of Appeals held that the trial court lacked authority to hold defendant in contempt for violating an oral settlement agreement that was read into the record in open court. The court explained that a "private agreement and a court order are fundamentally different." 292 Or App at 299. Here, a reasonable person "would not have understood . . . that the court was *ordering* her to comply with the terms of an oral settlement agreement or else face being held in contempt of court." *Id.* (emphasis in original).

Snook v. Swan, 292 Or App 242 (2018)

The Court of Appeals held that the trial court erred in denying plaintiff's special motion to strike defendant's libel per se counterclaim under ORS 31.150—Oregon's anti-SLAPP statute—when defendant relied only on her pleadings and arguments in response to the motion. The trial court "mistakenly believed that the terms of the statute did not require defendant to submit any affidavit or declaration—that is, any evidence—in support of her counterclaim, and it denied the special motion to strike based on that mistaken understanding of the law." 292 Or App at 247.

Dahlke v. Jubie, 292 Or App 804 (2018)

Kent and Sara Dahlke were married and living in Wyoming when Kent died in 2003. The probate court ordered Sara, as the personal representative of Kent's estate, to distribute property known as the Barge Inn to the Dahlke Marital Trust (the marital trust). Sara complied. Shortly before her death, Sara conveyed the Barge Inn to the Sara L. Dahlke Living Trust (the living trust), purportedly to satisfy a legal obligation the estate owed to Sara. Plaintiffs—Kent's sons—filed suit against the trustee of the living trust, seeking to require her to execute a deed transferring the Barge Inn back to the marital trust and imposing a constructive trust on income generated by the Barge Inn. Plaintiffs moved for summary judgment on the grounds that Sara lacked authority to transfer the Barge Inn from the marital trust to the living trust. The trial court granted the motion, concluding that any debt owed by Kent's estate to Sara had been extinguished, so Sara had no legal right to transfer the Barge Inn out of the marital estate to satisfy the extinguished debt. The Court of Appeals reversed, concluding that "the basis for the trial court's summary judgment ruling differs significantly from the basis on which plaintiffs sought summary judgment." 292 Or App at 810. Under the circumstances, "it was improper for the trial court to grant summary judgment based on an issue that was not raised in plaintiffs' motion because that issue was not properly before the court." *Id.* at 810.

Evidence

Mall v. Horton, 292 Or App 319 (2018)

Plaintiff was injured when defendant's pickup truck collided with plaintiff's car. Defendant admitted negligence but disputed the extent of the claimed injuries. At trial—which was limited to the issue of plaintiff's noneconomic damages—plaintiff sought to call an expert in biomechanical engineering and accident reconstruction. The expert—Dr. Jonathan McClaren—testified at an OEC 104 hearing that he was a licensed chiropractic physician for six years, held a certification in biomechanical engineering, and an advanced certification in whiplash biomechanics and injury traumatology. Defendant argued that McClaren was not qualified under OEC 702 to testify as a biomechanical engineering expert because his testimony would not be helpful to the jury, and that he was not qualified as an expert in accident reconstruction because, although he was accredited, he did not have the requisite professional experience in the field. The trial court excluded the testimony. The Court of Appeals reversed. The court concluded that, under OEC 702, "McClaren need only be qualified as an expert by 'knowledge, skill, experience, training, *or* education,' and his certifications and experience are sufficient to satisfy that liberal standard." 292 Or App at 327 (emphasis in original). The error was not harmless because the court could not say "that there was little likelihood that the exclusion of McClaren's testimony as an expert in biomechanical engineering and accident reconstruction affected the jury's verdict." *Id.* at 328.

Miscellaneous

Miller v. Ford Motor Co., 363 Or 105 (2018)

Answering a certified question from the Ninth Circuit Court of Appeals, the Supreme Court held that, "under ORS 30.905(2), when an Oregon product liability action involves a product that was manufactured in a state that has no statute of repose for an equivalent civil action, then the action in Oregon also is not subject to a statute of repose." 363 Or at 118.

City of Corvallis v. Pi Kappa Phi, 293 Or App 319 (2018)

The City of Corvallis passed a "hosting" ordinance that made it unlawful to "permit, allow or host a juvenile party . . . while alcoholic liquor is consumed or possessed by any minor." 293

Or App at 320 (quoting ordinance). The trial court declared the ordinance unconstitutional because it was preempted by ORS 471.410(3), part of the Oregon Liquor Control Act. The Court of Appeals affirmed. The court explained that ordinance conflicts with state law because the statute "punishes people who engage in the culpable behavior of knowingly permitting their property to be used for an improper purpose. In stark contrast, the city ordinance creates a strict-liability crime[.]" *Id.* at 331.

Busch v. McInnis Waste Systems, Inc.,
292 Or App 820 (2018)

Plaintiff suffered severe injuries, including the amputation of his leg above the knee, when he was struck by defendant's garbage truck while crossing a street in downtown Portland. Defendant admitted liability and the case proceeded to trial on damages. The jury awarded more than $3 million in economic damages and $10 million in noneconomic damages. The trial court then granted defendant's motion to reduce the noneconomic damages award to $500,000 under ORS 31.710(1). The Court of Appeals reversed. Previously, the court held in *Vasquez v. Double Press MFG., Inc.*, 288 Or App 503, *rev allowed*, 362 Or 665 (2018), and *Rains v. Stayton Builders Mart, Inc.*, 289 Or App 672 (2018), that application of the statutory noneconomic damages limitation in those cases violated the remedy clause in Article I, section 10, of the Oregon Constitution. Finding this case to be "indistinguishable from *Vasquez* and *Rains*," the court concluded that application of the statute to plaintiff's damages award also violated the remedy clause. 292 Or App at 824.

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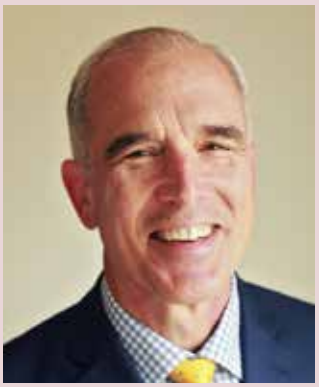

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