THE VERDICT™

OADC Oregon Association of Defense Counsel

Trial Lawyers Defending You in the Courts of Oregon

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Roadmap to COVID-19 Vaccination Policies

Stipulated Protective Orders for Medical Records

Do's and Don'ts of Social Media Discovery

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Features

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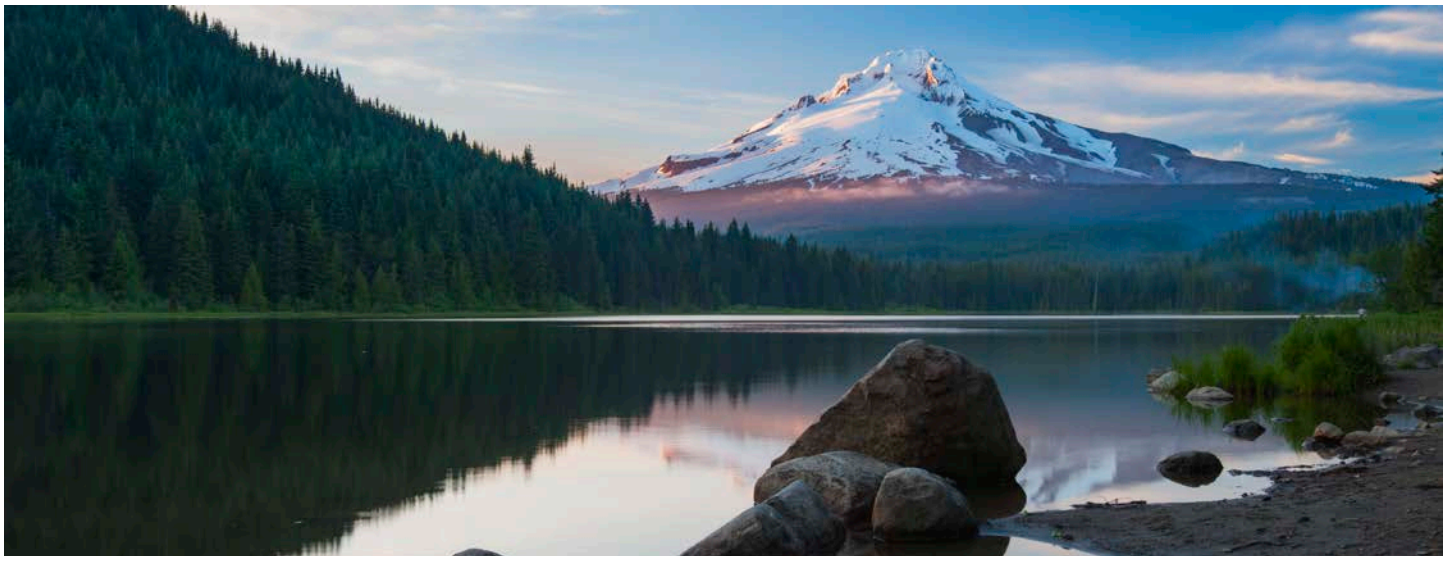
PRESIDENT'S MESSAGE

In a World Gone Mad, Turn to the "Oregon Way"

Grant Stockton, Brisbee & Stockton



GRANT STOCKTON

Professor Ed Harri was a gem. He taught research and writing to first-year law students at Willamette University. Like most of the faculty, he was beloved across the campus. He was demanding, but compassionate, and was fond of starting class with a few good lawyer jokes: *"Why did the lawyer cross the road?... To negotiate with the other side."*

I've often thought that the bar exam should include a requirement to know a lawyer joke, or two. It is important as an attorney, Professor Harri would remind us, to be humble and not to take things personally.

In addition to the art of the lawyer joke, Professor Harri was instrumental in teaching his students the art of advocacy. He taught us to set aside our personal proclivities in pursuit of our client's position. He encouraged us to employ persuasiveness that was always tempered towards professionalism and away from zealotry. He always, as well, encouraged us to recognize the merits of the other side.

While growing into this profession, I was lucky to have a variety of mentors, including my father, who reinforced the professional traits cultivated by Professor Harri. Those mentors added to the mix a sense of doing things the "Oregon way." This was shorthand for a sense of professionalism rooted in simple humanity, with a hint of self-preservation—recalling that we work in a small legal community, and that while any specific case or dispute is transitory, we hope to have a long career where we will no doubt cross paths with everyone many times.

Much has been written about how Abraham Lincoln was challenged by the intersection between advocacy and the "golden rule": To do unto others as you would have them do to you.[1] The "Oregon way" stands as a reminder that we, as a community of local professionals, have usually found a way to accommodate both our client's demands and the golden rule. It often involves freely granting a variety of extensions, working cooperatively on calendaring issues, avoiding the derogatory, and conferring on disputed matters over lengthy phone calls, if not coffee or lunch.

Two years of COVID seems to have frayed our collective social fabric. Many of our neighbors have been isolated for far too long, and the golden rule seems to be dimming in our collective societal consciousness. It's allowed too many to become a bit too quick to judge without seeing the merits of their opposition, too quick to take offense, too quick to brand the opposition a zealot, and a little less inclined to enjoy a social cup of coffee with their opponents (after all, they're meritless zealots!).

While our social fabric feels strained, it has been nice to observe the enduring strength of our professional fabric. The "Oregon way" seems to be persevering, possibly because by our very nature we are still forced to engage one another: It's hard to be a civil lawyer and remain locked away from the world, opposing attorneys, courts, clients, our staff, and the like. We are compelled to continue our professional dialogue in an effort to address our client's problems. At a fundamental level, it's what we are: problem solvers.

In a world that appears to be going mad, wouldn't it be nice if we had a few more "Oregon" lawyers around. A few more problem

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PRESIDENT'S MESSAGE
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solvers as opposed to problem creators. People who are humble, who are not easy to offend, who are guided by rules of professional engagement, and who are willing to see the merits of the opposition. People willing to walk all the way to the other side of the road (not just halfway) to engage their opponents in dialogue.

The professionalism underpinning the "Oregon way" also underpins our OADC community. Beyond serving as a point of simple pride in how we engage with one another, it should also be an encouragement for expanded engagement with our professional companions at the Oregon Trial Lawyers Association. It should serve as motivation to act as aspirational role models for the younger generation. And the "Oregon way" should be seen in our commitment to engage our communities and judiciary to help solve the many post-COVID challenges that face our communities and courthouses.

All of these efforts are, in fact, underway with OADC. The year ahead should be a busy time of engagement for our new Board, our Practice Group Leaders, and our membership. We are partnering with OTLA and number of presiding courts to address COVID trial issues and a variety of other common concerns. We are preparing to unveil a mentorship and education program designed specifically for younger attorneys. And the year should again include a wonderful slate of educational programming.

While the world may be going mad, OADC is still engaged. In the year ahead, I hope you will each find a way to engage as well, to help strengthen our organization, and to help us cultivate our uniquely Oregon brand of professionalism that has made OADC one of the nation's premiere civil defense organizations for over 50 years.

Warm regards for the year ahead,
Grant Stockton

Endnote

1. *See* James McCobb, *Lawyer Lincoln and the Golden Rule,* by Oregon State Bar Bulletin (April 2005).

Are We Out of the Woods Yet? Private Employers' Roadmap to COVID-19 Vaccination Policies

Helaina Chinn
Bodyfelt Mount

Vaccines may provide light at the end of the tunnel created by the COVID-19 pandemic, but not without presenting new challenges along the dark and winding path toward post-COVID "normalcy." While the Centers for Disease Control and Prevention (CDC) has found that the currently available vaccines are highly effective at protecting against severe illness due to COVID-19, the CDC also cautions that even fully vaccinated people can spread certain variants of the virus to others.[1] In light of Oregon's ongoing coronavirus vaccination efforts, including now offering booster shots for certain populations, this article discusses recent administrative agency guidance, legal and practical considerations, and best practices to help defense practitioners and their private employer clients navigate potential liability as they create, implement, and update existing vaccination policies and procedures.


HELAINA CHINN

Employee Vaccination Policies: Three Approaches

With certain industry-specific exceptions,[2] there are generally three vaccination policy approaches available to private employers:[3]

- Option 1: Require that all employees get vaccinated before returning to work on-site.
- Option 2: Strongly recommend that employees get vaccinated before returning to work on-site.
- Option 3: Remain neutral on the issue of vaccination, and let the employees decide for themselves.

While the particulars of any policy can be expected to vary by each unique workplace, these three approaches present both benefits and pitfalls. As an initial step, employers should conduct an individualized assessment of their workforce to weigh their options. Employers would be wise to consider a myriad of factors in developing an employee vaccination policy, including cost-effectiveness, ease of implementation, the anticipated efficacy of the policy in preventing COVID-19 exposure and transmission, workplace culture, employee morale and retention, requirements of third-party clients and customers, corporate social responsibility, and impact on productivity.

Recent Safety Guidance Impacting Vaccination Policies

Whatever approach is taken, no employee vaccination policy will relieve the employer of its obligation to maintain a safe workplace with respect to COVID-19.[4] ORS 654.010 requires employers to implement systems and procedures reasonably necessary to maintain a "safe and healthful" place of employment for their employees, and to "do every other thing reasonably necessary to protect the life, safety[,] and health of such employees."

Effective May 4, 2021, the Oregon Occupational Safety and Health Division (OR-OSHA) adopted OAR 437-001-0744 to address COVID-19 workplace risks.[5] The rule outlines safety requirements applicable to all employers, details additional obligations for "exceptional risk" workplaces, and includes industry-specific appendices. The rule also addresses physical distancing; masks, face coverings, or face shields; cleaning and sanitization; exposure risk assessments; infection-control plans; mandatory employee training; COVID-19 testing; infection notification; and quarantining, among other requirements.

Subsequent to OR-OSHA's adoption of OAR 437-001-0744, the Oregon Health Authority (OHA) issued interim guidance[6] affording certain employers flexibility to relax the masking and social distancing procedures outlined in the rule *for fully vaccinated employees,* provided that the employer had a policy for verifying vaccination status and reviewed each employee's proof of vaccination before allowing the employee to enter the workplace maskless and without observing social distancing. This relaxation of COVID-related precautions was short-lived, however, upon the arrival of the Delta variant.

In response to the recent surge in COVID-19 cases, OHA temporarily adopted OAR 333-019-1025, effective August 27, 2021, and OR-OSHA updated OAR 437-001-0744(3)(b) to mirror OHA's rule. With some exceptions, the rule requires individuals to wear a mask, face covering, or face shield—regardless of vaccination status—in indoor spaces (irrespective of social distancing) and in outdoor spaces if the individuals do not or cannot consistently maintain at least six feet of distance from individuals outside of their household. Private employers responsible for indoor spaces, outdoor spaces, and organizers of outdoor events or gatherings are subject to additional requirements outlined in OHA's rule.

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Each employer must bolster its safety procedures and document measures taken to comply with applicable agency rules and guidance to protect itself from enforcement actions and negligent exposure claims.

The New Hybrid Workforce

In limited circumstances, an employee cannot be required to become vaccinated, including where an industry-specific statutory exemption applies under ORS 433.416(3),[7] a collective-bargaining agreement or other employment contract forbids it, or the employer has granted the employee a reasonable accommodation excusing the employee from its mandatory vaccination policy. Bases for accommodation include reasons related to disability; sincerely held religious beliefs, practices, or observances; or pregnancy-related concerns.[8]

Employers presented with a request for exemption from a vaccine requirement must conduct a case-by-case analysis to evaluate whether the requested accommodation would create an "undue hardship" or pose a "direct threat" to the safety of the employee or others, and must engage in an open dialogue with the employee to determine if other reasonable accommodations are possible before denying an accommodation request.[9] Employers should ensure that their human resources employees and management are trained to properly handle accommodation requests.

With the availability of exemptions, staggered vaccination timelines, and employees who decline vaccination in workplaces with permissive vaccination policies, employers should expect to have a hybrid workforce consisting of both fully vaccinated and unvaccinated employees at any given time. Vaccination policies should account for the mixed workforce by including a clear procedure for employees opting out or requesting exemption from vaccination, and employees should be kept informed of the same.

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Proof of Vaccination

Employers must comply with the Americans with Disabilities Act (ADA)'s requirements when collecting proof of vaccination. Requesting confirmation of vaccination is not an impermissible "disability-related inquiry" under the ADA; however, the employer must not obtain any other medical information about the employee as part of the proof of vaccination, and it must store any vaccination documentation privately and separately from the employee's regular personnel file.[10]

Resources, Incentives, and Other Encouragement

To prevent disparate impact discrimination claims and/or promote employee vaccination, employers may take proactive steps to remove barriers that would otherwise prevent certain employees from becoming vaccinated. For example, an employer may provide educational resources to its employees regarding available vaccines and the process for becoming vaccinated, assist employees in finding vaccination clinics and appointments, inform employees that the federal government is providing vaccines free of charge, and/or practice transparency regarding executive/managerial inoculations.[11]

Moreover, the Oregon legislature recently passed HB 2818, allowing employers to offer employees paid time off and other incentives for providing proof of vaccination without violating pay equity laws. To prevent discrimination or retaliation claims, however, employers should ensure that any incentives offered to vaccinated employees are available to employees with religious or medical exceptions as well. If the employer offers an incentive for employees who voluntarily receive the vaccination through the employer or its agent, as opposed to the employee's private health care provider or community pharmacy, the incentive must not be so substantial as to be "coercive."[12] Employers should also note that employees are entitled to use paid sick time if they receive mandatory vaccinations during working hours.[13]

Gathering Feedback

Employers can more accurately evaluate and mitigate the risks associated with each policy option by understanding office culture, gauging employee sentiment about proposed vaccination procedures before implementing them, and adjusting their policies, if necessary. An anonymous poll can be a useful tool.

Conclusion

Developing vaccination policies that satisfy an organization's needs while protecting employee safety will continue to be a moving target for the foreseeable future. Regardless of the selected approach, to minimize legal risks employers should consider the above recommendations, be adaptable, and remain vigilant through continued monitoring of COVID-19 and vaccine-related statutes, agency guidance, and case law.

Endnotes

1. *Interim Public Health Recommendations for Fully Vaccinated People,* Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html (last updated September 1, 2021).
2. OAR 333-019-1010 (mandating vaccination of healthcare workers); OAR 333-019-1030 (mandating vaccination of teachers, school staff, and volunteers in K-12 schools).
3. *COVID Vaccinations and the Workplace,* Oregon Bureau of Labor & Industries, https://www.oregon.gov/boli/workers/Pages/covid-vaccine.aspx (last visited September 27, 2021); *What You Should Know About CO VID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,* "K. Vaccinations," Equal Employment Opportunity Commission, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last updated May 28, 2021).
4. ORS 654.010; 29 USC § 654(a)(1).
5. *Interim Guidance in re the Status of Temporary Rule Addressing COVID-19 Workplace Risks* (OAR 437-001-0744), Oregon OSHA (revised August 13, 2021), https://osha.oregon.gov/OSHARules/advisorymemos/COVID-19-memo-re-June-30-rule-changes.pdf.
6. *Interim Guidance for Fully Vaccinated Individuals: Applicability and Enforcement of Mask, Face Covering and Face Shield Guidance and Physical Distancing Requirements in Public Settings,* Oregon Health Authority (May 18, 2021), available at https://digital.osl.state.or.us/islandora/object/osl:969113.
7. *See* ORS 433.407(3) (defining exempt "worker" to include certain health care and clinical laboratory workers; firefighters; law enforcement; and corrections, parole, or probation officers).
8. *See* ORS 659A.118 (disability-related); ORS 659A.146 (pregnancy-related); ORS 659A.033 (sincerely held religious beliefs); 42 USC § 12112 (disability-related); 42 USC § 2000e-2 (discrimination based on religion).
9. ORS 659A.112; 42 USC § 12112; 29 CFR § 1630.15.
10. 42 USC § 12112(d)(4).
11. *See, e.g., Benefits of Getting a COVID-19 Vaccine,* Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html?CDC_AA_refVal=https://www.cdc.gov/coronavirus/2019-ncov/vaccines/about-vaccines/vaccine-benefits.html (last updated August 16, 2021); *Find a COVID-19 Vaccine in Oregon,* Oregon Health Authority, https://govstatus.egov.com/find-covid-19-vaccine (last visited September 27, 2021); COVID-19 *Vaccines Are Free to the Public,* Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/no-cost.html (last updated May 24, 2021).
12. 42 USC § 12112(d)(4); *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,* "K. Vaccinations," Equal Employment Opportunity Commission, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last updated May 28, 2021).
13. ORS 653.641; OAR 839-020-0046(2).

OADC

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Before Entering into Stipulated Protective Orders for Medical Records, Consider Your Professional Responsibility

Christina Anh Ho
Thenell Law Group

When defending a third-party-injury lawsuit, such as an automobile accident, defense attorneys are often faced with a request from plaintiff's counsel to agree to a stipulated protective order (SPO) regarding the plaintiff's medical records.


CHRISTINA ANH HO

Plaintiff's counsel typically demands that these SPOs be signed prior to the production of pre- and post-accident medical records, and the agreements often contain clauses requiring that medical records be destroyed within a specified time period after the conclusion of litigation. While there are many factors to consider before entering into an SPO with such a clause, one issue to consider is whether the form of the SPO violates defense counsel's professional responsibility to maintain their client's file following the termination of litigation.

Ethical Rules Demand that Client Files Be Maintained for a Specified Period

The Oregon Rules of Professional Conduct (the RPCs) contain an implied obligation for attorneys to maintain information related to their representation of each client.[1] RPC 1.15-1(a), which addresses the safekeeping of client property, specifically requires that attorneys maintain "complete records of . . . account funds and other [client] property" for five years following the termination of representation. Although the rule does not refer to those records as the "client file," it is reasonable to infer that the client file is client property for purposes of the RPCs.

Oregon State Bar (OSB) Formal Ethics Opinion Number 2017-192 provides that the "client file," which is not defined by rule, should be considered the "sum total of all documents, records, or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing the client." Although, historically, client files were paper files maintained at a single location, the opinion explains that advances in information technology have changed what constitutes a client file. For example, the shift toward electronic communication means that e-mail correspondence, as well as any documents that are sent as attachments or provided by electronic link, are now part of the client file.

In the context of a personal-injury case, defense counsel will almost certainly obtain the plaintiff's medical records in the course of discovery. Those records can come in either paper or electronic format. In light of RPC 1.15-1(a) and OSB Formal Ethics Opinion Number 2017-192, any medical records used to defend the client in litigation must be treated as part of the client file.

An SPO Requiring Destruction of Medical Records May Violate RPC 1.15-1(a)

Can a defense attorney enter into an SPO requiring that all of the plaintiff's medical records be destroyed within a short timeframe after the litigation has ended while still meeting their professional obligations? The analysis depends on the exact wording of the SPO, but some common examples of language regarding destruction of medical records are as follows:

> "Upon termination of this lawsuit, the original and all copies of all protected health information shall be returned to plaintiff or destroyed with no copies retained. The party who has received the protected health information will confirm to the plaintiff, in writing, its compliance with this requirement within thirty (30) days of the termination of this lawsuit.
>
> . . .
>
> Within 30 days after the termination of this action, including all appeals, each receiving party must return all confidential material to the counsel for [the plaintiff], including all copies, extracts, and summaries thereof."

Both of the cited examples can be problematic, not only ethically but also practically. Modern data storage technologies make it extremely difficult to locate and genuinely destroy all copies of an electronic record, even with meticulous recordkeeping. For example, both law firms and insurance

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companies routinely preserve copies of all electronic records on backup servers.

Such an SPO Can Be Revised to Satisfy Ethical and Practical Considerations

An underutilized solution is simply to resolve the dispute with a conversation. Raise the ethical issue with plaintiff's counsel and determine what their concerns are. Often, the parties will be able to agree on an alternative provision that meets both parties' needs. For example, an SPO can require the destruction of all physical copies of the medical records but allow defense counsel and the insurer to maintain electronic copies to satisfy their professional and/or organizational obligations.

One illustration of the above-discussed approach is found in a recent decision by the Multnomah County Circuit Court. In an Amended Protective Order addressing protected health information, Judge Amy M. Baggio approved the following language: "Upon termination of this lawsuit, the original and all physical copies of protected health information shall be returned to plaintiff or destroyed, with no copies retained. Digital copies are to be destroyed in the regular course of business." Language that provides for digital or electronic copies to be destroyed in the "regular course of business"[2] allows defense counsel to meet the mandates of RCP 1.15-1(a), because it does not require destruction until the attorney no longer has an ethical obligation to maintain the client's file.

As defense counsel, our focus is on obtaining the medical records needed to defend our client. In so doing, however, special attention should be paid to the particular wording of any proposed SPO. Each SPO must be read carefully and modified, if necessary, to ensure compliance with the attorney's professional responsibility to maintain their client file under RCP 1.15-1(a).

Endnotes

1. *See* RPC 1.1 (requiring competent representation); RPC 1.2(a) (a lawyer may take actions impliedly authorized).
2. *Marco Elizarraraz v. Cody A. Herring, et al.,* Multnomah County Circuit Court Case No. 19CV07430 (Order entered November 25, 2019).

The Do's and Don'ts of Social Media Discovery

Breanna Thompson
Garrett Hemann Robertson

Facebook. Instagram. Twitter. TikTok. Snapchat. Reddit. Fitness Tracking Apps. Social media comes in all forms, and more likely than not, plaintiff has one or more accounts. Those accounts may also convey valuable information about the lawsuit, whether it be providing insight into plaintiff's mental state or plaintiff's physical capabilities after an alleged injury. Picture a medical malpractice plaintiff claiming limited mobility in a lawsuit but posting updates about a recent trek along a portion of the Pacific Crest Trail or skiing at Mt. Hood. Questions arise: What can you get, and how can you get it?

BREANNA THOMPSON

Scope of Discovery

Oregon state courts have not directly addressed discoverability of social media at the appellate level, but the issue falls squarely within the scope of discovery under ORCP 36, which permits discovery "regarding any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Federal cases provide additional guidance on the issue, though based on a differently defined scope of discovery under FRCP 26(b). Courts within the Ninth Circuit have permitted discovery of a party's social media information and communications so long as the requests are narrowed by websites or platforms, time-period, and content related to the case.[1] The content may be related to plaintiff's emotional wellbeing, reflect plaintiff's physical condition, or offer a contemporaneous account of events giving rise to the litigation.

Generally, social networking content is neither privileged nor protected by any right of privacy.[2] Courts have rejected arguments against production based on the request being unduly burdensome, noting the ease with which a plaintiff can request a download of Facebook data.[3] Courts have also rejected arguments against production on the basis that a profile was set to "private," holding that merely locking a profile from public access does not prevent discovery.[4] If the content sought is relevant to the case, social media is generally fair game.

Ethical Considerations

Attorneys and staff should be careful to avoid violating ethical rules when reviewing social media accounts. For example, requesting to be "friends" or starting to "follow" a represented plaintiff on a social media site would be a violation of Oregon Rule of Professional Conduct (ORPC) 4.2, governing communications with persons represented by counsel. While some social media accounts are open to the public and can be accessed without issuing a discovery request, others are set to "private." Using deceptive tactics, such as creating a fake profile, to gain access to "private" social media information is also unethical and violates ORPC 8.4(a)(3), which prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Absent a public profile, attorneys should access social media information by issuing a request for production of documents.

Depending on the platform and archival process, information removed from a social media account may be permanently deleted. Thus, plaintiffs' attorneys should appropriately advise clients to maintain all social media accounts. Failure to do so could violate ORPC 3.4, which prohibits a lawyer from knowingly and unlawfully obstructing another party's access to evidence or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value.

Admissibility at Trial

Oregon courts recently addressed the admissibility of digital evidence, including social media, in two cases: *State v. Sassarini* and *State v. Acosta*.[5] The issues addressed included authentication[6] and hearsay.[7] In the civil context, if social media is exchanged during discovery and received from plaintiff, authentication will not generally be at issue. However, if the social media posts or communications are received from a third party or directly obtained through a public profile, authentication could become an issue when identifying the author of the content. Nevertheless, it is not a bar to admission, so long as the proponent of the evidence makes a

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prima facie showing. Then, the matter of authenticity is one for the ultimate factfinder at trial, not a preliminary ruling by the court.[8] Likewise, for hearsay, if the proponent of the evidence presents a *prima facie* case that the party opponent is the declarant and the statement is offered against the party, the trial court must conditionally admit the evidence and instruct the jury to consider the evidence only if it determines that the party opponent was, in fact, the declarant.[9] Resolving the issue of identity can be accomplished through special jury instructions.[10] Overall, social media discovery that is authored by and offered against the plaintiff can generally be admitted at trial without encountering authentication or hearsay problems.

Practical Tips

Practitioners should not forget about social media when formulating their discovery plans. Using the practical tips below will bring practitioners one step closer to finding that needle-in-the-haystack piece of discovery:

- When issuing document preservation letters, include reference to the party's obligation to preserve information on all social media platforms.
- Obtain social media through a discovery request rather than by snooping or creating a fake profile.
- Ensure discovery requests are appropriately tailored to seek relevant information in the event a motion to compel needs to be filed.
- Provide data download instructions and specify format types to facilitate ease of production.

Data Download Instructions

Providing instructions for downloading the data, either within the discovery requests or when conferring on the scope of discovery, can help facilitate production. It is also helpful to specify the format. Generally, data can be downloaded in HTML format. Instagram also offers JSON format, but this format is not readable and will require another round of downloads or a separate program to convert the data. Below are instructions for downloading data from Facebook, Instagram, and Apple Health:

- Facebook: (1) Go to profile and select "Account," (2) select "Settings & Privacy," (3) select "Settings," (4) select "Your Facebook Information," (5) select "Download Your Information," (6) ensure HTML format is chosen, and (7) select "Create File." The download request may take a few days and the user will be notified once the process is complete. Once complete, the user will need to login and download the file from "Available Copies."
- Instagram: (1) Go to profile and select Account icon in the right-hand corner, (2) select "Settings," (3) select "Security," (4) select "Download Data," (5) enter email address where the link to data will be sent, select HTML format, and select "Request Download" or "Next," (6) enter Instagram account password and select "Next," then "Done." Note that it may take up to 48 hours for the link to be sent.
- Apple Health App Data: (1) Open the Health App, (2) select the Account icon in the top-right corner, (3) at the bottom of the page, select "Export health Data," (4) confirm you want to export Health data, (5) wait for the file to be prepared, and (6) choose how to share the exported data. Note, the health data will be exported in XML format which will need to be converted to a readable format.

Conclusion

Social media has expanded the world of discoverable information. While it presents some potential ethical pitfalls, social media also presents boundless opportunities for litigants to make or break their cases. Understanding the basics of social media discovery will not only aid in the ease of production, but it is now also a requirement for effective lawyering.

Endnotes

1. *Hinostroza v. Denny's Inc.,* No. 2:17-cv-02561-RFB-NJK, 2018 WL 3212014, at *6 (D Nev June 29, 2018).
2. *Id.*
3. *See Voe v. Roman Catholic Archbishop of Portland,* No. 3:14-cv-01016-SB, 2015 WL 12669899, at *2 (D Or Mar 10, 2015).
4. *EEOC v. Simply Storage Mgmt., LLC,* 270 FRD 430, 434 (SD Ind 2010).
5. *State v. Sassarini,* 300 Or App 106 (2019); *State v. Acosta,* 311 Or App 136 (2021).
6. *See* OEC 901.
7. *See* OEC 801.
8. *Sassarini,* 300 Or App at 127.
9. *Acosta,* 311 Or App at 159.
10. *Id.* at 138.

Recent Case Notes

Sara Kobak, Schwabe Williamson & Wyatt
Case Notes Editor

Employer Liability Law

The Oregon Court of Appeals Reverses Defense Verdict, Finding Trial Court Erred in Failing to Instruct the Jury on Nondelegable Duty under the ELL

In the latest chapter of the saga of *Yeatts v. Polygon Northwest Company,* 313 Or App 220, -- P3d -- (July 14, 2021), the Oregon Court of Appeals reversed a defense verdict based on the trial court's decision not to give plaintiff's requested jury instruction related to the nondelegable duty under the Employer Liability Law (ELL). The dispute in *Yeatts* arose out of injuries that plaintiff suffered when he was working as a framer for a subcontractor on a residential townhome project. Defendant was the general contractor for the project. Plaintiff's injuries occurred when a guardrail system failed, and plaintiff fell from a third-story platform of the building that he was framing. Plaintiff asserted claims for common-law negligence and under the ELL against defendant as the general contractor. Even though defendant was not plaintiff's direct employer, plaintiff alleged that defendant nevertheless was liable under the ELL because defendant retained the right to control the manner and methods of the safety systems on the project. The trial court granted summary judgment to defendant, but the Oregon Supreme Court reversed the dismissal of plaintiff's ELL claim in *Yeatts v. Polygon Northwest Co.,* 360 Or 170, 379 P3d 445 (2016) (Yeatts I).

On remand from the Oregon Supreme Court's decision, plaintiff reasserted his ELL claim based on a retained right-to-control theory under ORS 654.305. The trial court bifurcated damages from liability to allow the jury to first answer two questions: (1) whether defendant retained the right to control safety measures at the project under its subcontract with plaintiff's employer and, thus, was subject to the ELL; and (2) if so, whether defendant violated the ELL in a manner that caused plaintiff's injury.

Plaintiff requested for the trial court to give UCJI 55.15, which states: "A defendant that is an employer under the Employer Liability Law cannot avoid the duties imposed by the Employer Liability Law by delegating those duties to any other person or company." The trial court determined that UCJI 55.15 is a proper statement of the law, but it refused to give the instruction for fear of confusing the jury. Rather than give the requested instruction, the trial court allowed plaintiff to argue that an employer's duties under the ELL are nondelegable. The jury ultimately found that defendant retained the right to control the work and that defendant's violations of the ELL were a cause of plaintiff's fall. The jury, however, also found that plaintiff's own negligence also contributed to his fall, with the jury finding plaintiff 51 percent at fault and defendant 49 percent at fault. As a result of that fault allocation, the jury rendered a verdict for defendant.

Plaintiff appealed again. On appeal, the Oregon Court of Appeals determined that UCJI 55.15 is a proper statement of the law—that is, when a duty arises under the ELL, it is nondelegable in the circumstances presented by the case. Because the jury found that defendant retained control over the safety of the guardrail system, defendant's duties under the ELL were nondelegable. The Court of Appeals further held that the trial court erred in refusing to give plaintiff's requested instruction under UCJI 55.15 because that instruction would not have been unnecessarily cumulative of other instructions. Finally, the Court of Appeals determined that the failure to give the requested instruction on nondelegable duty under the ELL was not harmless because the jury might have misunderstood the scope of defendant's wrongdoing when assigning comparative fault.

■ ***Submitted by David W. Cramer***
MB Law Group

Subrogation Rights

The Oregon Court of Appeals Reverses Verdict in Favor of Insureds for Breach of Contract Against Their Insurer, Following Insureds' Settlement With Tortfeasor Extinguishing Insurer's Subrogation Rights

In *Nelson v. Liberty Insurance Corporation,* 314 Or App 350, -- P3d – (Sept. 9, 2021), the Oregon Court of Appeals reversed a jury verdict and award of attorney fees in favor of two insureds (plaintiffs) against their insurer after determining that the trial court erred in granting summary judgment for plaintiffs on the insurer's affirmative defense to plaintiffs' breach-of-contract claims.

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This insurance dispute arose after plaintiffs' property was damaged by a fire that began at a nearby lumber mill. After initially filing a claim for the fire loss with their homeowner's insurer, plaintiffs withdrew their claim and told the insurer that the lumber mill would be accepting responsibility for the damage. The insurer responded by sending a letter to plaintiffs confirming that their claim had been closed without payment at their request. Eighteen months later, plaintiffs filed a breach-of-contract action against their insurer, as well as a separate action against the owner of the lumber mill alleging negligence and other claims. The insurer responded to plaintiff's action by stating that the insurer would reopen the claim and by reminding plaintiffs of the subrogation condition in their insurance policy. Specifically, the homeowner's policy contained a subrogation provision that, in relevant part, allowed the insurer to require its insureds to assign their rights of recovery for a loss to the extent that the insurer makes payments for that loss, and it further required cooperation from the insureds.

By mutual agreement, plaintiff's breach-of-contract action was subsequently stayed while the insurer adjusted the claim. During that adjustment period, plaintiffs settled and released all claims against the lumber mill. After learning of plaintiffs' settlement with the lumber mill, the insurer informed plaintiffs that it would not pay the covered losses for which the insurer asserted subrogation rights. The insurer also amended its answer to assert an affirmative defense to plaintiffs' breach-of-contract claims for interference with the insurer's right of subrogation.

In its affirmative defense, the insurer asserted that plaintiffs were required to assign rights of recovery for a loss to the extent that the insurer made payment; plaintiffs knew that the insurer intended to assert its right to subrogation and was actively adjusting the claim; and despite that knowledge, plaintiffs fully released the lumber mill without obtaining recovery for the damages claimed under the policy, thereby prejudicing the insurer's rights. Plaintiffs moved for partial summary judgment against the insurer's affirmative defense. In seeking summary judgment, plaintiffs argued that the insurer waived its subrogation rights, or should be estopped from asserting those rights, because the insurer decided not to participate in a possible mediation and failed to secure an assignment of subrogation rights prior to plaintiffs' settlement with the mill. The trial court granted the summary judgment motion based on the estoppel argument.

The Oregon Court of Appeals reversed, finding a triable issue of fact with respect to estoppel. As an initial matter, the Court of Appeals noted that the trial court failed to view the record in the light most favorable to the insurer as the non-moving party. The court then analyzed the equitable nature of subrogation, which legally arises when the insurer pays its insured, not by operation of any assignment. The court found a genuine issue of material fact existed regarding whether the insurer had remained silent when it had a duty to inform the plaintiffs of its subrogation rights. In reversing the partial summary judgment in favor of plaintiffs, the Court of Appeals also vacated the general judgment and supplemental judgment for attorney fees and costs in excess of $300,000.

■ ***Submitted by David W. Cramer***
MB Law Group

Personal Jurisdiction

The Oregon Supreme Court Clarifies and Broadens the Test for the "Relatedness" Requirement of Specific Personal Jurisdiction

In *Cox v. HP Inc.*, 368 Or 477, 492 P3d 1245 (Aug. 5, 2021), the Oregon Supreme Court clarified the requirements for Oregon to exercise specific personal jurisdiction in claims against an out-of-state defendant in the wake of the United States Supreme Court's decision in *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 592 US __, 141 S Ct 1017, 209 L Ed 2d 225 (2021).

The action arose when a generator at HP exploded, severely injuring plaintiff. Plaintiff and his wife sued HP, who in turn brought a third-party claim for contribution. The third-party defendant was a nationally recognized testing laboratory that certified products manufactured by others to ensure compliance with safety standards. HP alleged that the third-party defendant laboratory had negligently certified the design of the generator that injured plaintiff.

The third-party defendant laboratory responded to HP's third-party action by moving to dismiss the claim for lack of personal jurisdiction. In arguing that Oregon lacked personal jurisdiction, the laboratory asserted that it was incorporated in Delaware, had a primary place of business in Massachusetts, and its connection to the generator at issue was limited to evaluating one sample unit and then conducting regular inspections of the manufacturing factory to ensure product consistency. The laboratory asserted that all work was performed in Connecticut, and it never inspected or tested the particular unit that reached HP in Oregon.

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In opposing the motion to dismiss, HP did not contest the laboratory's factual assertions. Instead, HP contended that the laboratory had obtained approvals from the State of Oregon to perform testing services. HP also offered evidence that the laboratory regularly conducted certification of HP products within Oregon and that HP would not have purchased or used the generator without the laboratory's certifications about the safety of the generator.

After the trial court denied the laboratory's motion to dismiss, the Oregon Supreme Court issued an alternative writ of mandamus. On review of the merits, the Oregon Supreme Court explained the three-part framework used to analyze whether specific personal jurisdiction over a non-resident defendant is appropriate: (i) whether the defendant has purposefully availed itself of the privilege of conducting activities in the forum state, (ii) whether the case arises out of the defendant's activities in the forum state, and (iii) whether such an exercise of jurisdiction comports with fair play and substantial justice. The second prong—known as the "relatedness" inquiry—requires the defendant's conduct in the state to have an adequate link to the litigation at issue.

In examining the "relatedness" prong, the Oregon Supreme Court explained that its prior case law held that the prong was satisfied if a defendant's Oregon activities was a "but-for" cause of the litigation and provided a basis for concluding that the litigation was reasonably foreseeable. In the wake of the United States Supreme Court's recent decisions about specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.,* 582 US _, 137 S Ct 1773, 198 L Ed 2d 395 (2017), and *Ford Motor Co.,* 141 S Ct 1017, however, the Oregon Supreme Court explained its requirement of a "but-for" causal link was too strict. Specifically, the Oregon Supreme Court clarified that there will be "at least some cases in which the relationship among the defendant, the forums, and the litigation is close enough to support specific jurisdiction in the absence of a but-for causal link." *Cox,* 368 Or at 494 (internal citation and quotation marks omitted). The court, however, continued to adhere to the "conclusion that a case will 'arise out of or relate to' the defendant's connection to Oregon only if the defendant's Oregon activities "provide a basis for an objective determination that the litigation was reasonably foreseeable." *Id.* (internal citation and quotation marks omitted).

Applying the refined test for specific jurisdiction to the facts, the Oregon Supreme Court ultimately held that the record did not establish a basis for Oregon to exercise specific jurisdiction over the defendant in this case. Examining the laboratory's Oregon activities in detail, the court found that there was no evidence that the laboratory sold or marketed generators to Oregon consumers or performed any certification work on generators after they arrived in Oregon. While the laboratory generally availed itself of the privilege of securing clients in Oregon for testing work, the court found that those activities were not related to the present litigation about a product that the laboratory never certified in Oregon. Failing to find a sufficient relationship between the laboratory, Oregon, and the case at hand, the Oregon Supreme Court dismissed HP's third-party claim against the laboratory for lack of personal jurisdiction.

■ ***Submitted by Rosa O. Ostrom***
Schwabe Williamson & Wyatt

Construction Law

The Oregon Court of Appeals Holds That a Criminal Conviction Alone Is Insufficient for the CCB To Assess a Civil Penalty

In a rare *en banc* decision, the Oregon Court of Appeals held in *Allied Structural v. Construction Contractors Board,* 311 Or App 40, -- P3d -- (May 5, 2021), that the Construction Contractors Board ("CCB") exceeded its authority when it assessed a $5,000 civil penalty because of the licensee's unfitness for licensure on criminal conviction grounds. In the decision, the majority concluded a criminal conviction status alone is insufficient to assess a civil penalty because the statute and relevant CCB rules relate to whether the person is presently fit to be a construction contractor, and not whether the prior conduct of the applicant was in violation of a relevant statute or rule.

The matter pertained to the construction contractor license for a business named Allied and its owner. In 2006, while holding a previous license, the owner was convicted of first-degree sexual abuse, attempted sexual abuse, and public indecency, with victims under the age of 14. The owner served time in prison for his crimes and was released to post-prison supervision. In 2014, the owner then applied for a new construction contractor license.

CCB rules require that a licensure applicant must disclose criminal convictions only if the convictions are less than five years old. In applying for the license for Allied in 2014, the owner did not disclose his criminal history, and Allied received a license. The owner subsequently sought to evade the conditions of his parole, and his parole officer informed the CCB. The CCB investigated and commenced proceedings against Allied that resulted in revocation of Allied's license and a $5,000 civil penalty.

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ORS 701.098(1) authorizes the CCB to "revoke, suspend or refuse to issue or reissue a license and the board may assess a civil penalty" under various circumstances. Among those circumstances supporting revocation is if the licensee was convicted of sexual abuse. ORS 701.098(1)(i)(E). The Oregon Court of Appeals concluded that the CCB properly revoked the license because the owner failed to report the conviction in connection with his prior license and also engaged in subsequent probation violations. A majority held, however, that CCB could not assess a civil penalty when the licensee had not also violated a statute or rule.

In dueling opinions, the majority and dissent disagreed as to what constituted a violation. The dissent, joined by Chief Justice Egan wrote, "The text of ORS 701.098 could not be more plain that each of the myriad of circumstances and misconduct described in ORS 701.098(1)(a) through (n) can constitute the basis for the assessment of a penalty." The majority, however, disagreed.

In holding that the CCB lacked authority to impose a civil penalty based on a determination that a licensee is unfit due to criminal convictions, the majority examined the text and context of the statute. The majority reasoned that ORS 701.992(1) authorized the imposition of a civil penalty only if a licensee "violated" a provision of ORS chapter 701 or a CCB rule. The majority noted that a person does not "violate" any provision of ORS chapter 701 or CCB rules merely by the status of having been convicted of a crime. Because a fitness inquiry is distinct from a penalty inquiry, each with separate rules, the majority held that the CCB exceeded its authority by assessed the civil penalty without statutory authorization for a penalty.

■ ***Submitted by Gregory W. Woods***

Employment Law

The Oregon Supreme Court Clarifies the Standards for Wrongful Discharge Claims Based on Whistleblowing Activities

In *Walker v. State by & through Oregon Travel Info. Council,* 367 Or 761, 484 P3d 1035 (April 8, 2021), the Oregon Supreme Court clarified when a plaintiff may assert a wrongful discharge claim based on whistleblowing activities. The court held that the threshold issue of whether a plaintiff has identified an important public policy permitting the plaintiff to assert a wrongful discharge claim turns on an evaluation of sources of law to determine whether the claimed public policy lies at the core of the employee's alleged protected activity, and that such a determination is a question of law for the court. Once identified, a plaintiff must establish that he or she had a reasonable belief that the law was being violated, and that is a question of fact for the jury.

After plaintiff was hired as the chief executive officer for a semi-independent state agency, friction developed between her and the agency's governing body, the Oregon Travel Information Council (Council), over plaintiff's approach towards adjusting staff salary ranges and the respective roles between her and the Council. In light of the ongoing conflict, plaintiff sent a memorandum to the chief operations officer for the State of Oregon detailing her concerns about the Council's actions, including that the Council had violated public meeting laws when the Council's executive committee requested to meet with plaintiff without publicly noticing the meeting as required by statute. The Council became aware of plaintiff's memorandum. Conflict continued for several months before the Council ultimately terminated plaintiff.

Plaintiff filed an action for wrongful discharge and statutory whistleblowing under ORS 659A.203(1)(b), alleging that her memorandum was protected whistleblowing and that she had fulfilled an important public duty by reporting the Council's illegal conduct. The wrongful discharge claim was tried to the jury, and the whistleblowing claim to the court. The jury returned a verdict in plaintiff's favor on the wrongful discharge claim; however, the trial court dismissed plaintiff's statutory whistleblowing claim.

The Court of Appeals reversed the wrongful discharge verdict and affirmed dismissal of plaintiff's whistleblowing claim. The Oregon Supreme Court granted plaintiff's petition for review and reversed the Court of Appeals. On review, the Supreme Court found that the Court of Appeals incorrectly conducted a conjoined analysis of the reasonableness of plaintiff's belief that she was reporting a violation of law on both the wrongful discharge and whistleblowing claims. The Supreme Court also held that the "objectively reasonable belief" element of whistleblowing is a question of fact, not a question of law.

At the outset of its analysis, the Supreme Court noted that whether a plaintiff has identified an important public policy that lies at the core of the claimed protected activity giving rise to a wrongful discharge claim is a question of law for the court. That determination rests on sources of law evidencing the asserted public policy, and the sources of law must relate to the acts by plaintiff that led to her discharge. The court concluded that ORS 659A.203(1)(b) is such a source of law and that the statute related to the protected nature of the acts by plaintiff. The court

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also held that the "objectively reasonable belief" element of whistleblowing underlying the wrongful discharge claim is one of fact for the jury, requiring the jury's verdict for the plaintiff to be upheld if there is any evidence supporting the jury's finding that plaintiff had a reasonable belief as to the Council's violation of law.

■ ***Submitted by Christine Sargent***
Littler Mendelson

Timber Trespass

The Oregon Court of Appeals Holds That Plaintiffs Can Recover Double Damages When There Is an Injury to Timber or Produce, Even If the Injury Was Not Willful

In *Simington Gardens, LLC, et al. v. Rock Ridge Farms, LLC,* 308 Or App 661, 481 P3d 396 (Jan. 27, 2021), the Oregon Court of Appeals affirmed the trial court's decision that enhanced damages and attorney fees are available under Oregon's timber trespass statute where there is an injury to produce, even if the injury was not willful.

In *Simington Gardens, LLC,* plaintiffs were owners of an organic produce farm. Plaintiffs sued a neighboring farm after some of the neighbor's cows escaped their enclosure and trampled and defecated on plaintiffs' newly planted crop of organic salad greens. Defendant's employees retrieved the cows and, in doing so, caused additional damage to the crop. Plaintiffs sued, seeking damages on theories of common-law trespass, conversion, and trespass to produce under ORS 105.810. Under ORS 105.810 and 105.815, a plaintiff can recover double or treble damages for a trespass to timber, produce, or shrubs, depending upon whether the trespass was "casual or involuntary" or "willful," respectively.

The case was tried to a jury, which was instructed that they could award damages to plaintiffs for the crop destruction caused by both the cows and employees. On the trespass to produce claim, the jury could only consider damages caused by defendant's employees when they entered the plaintiffs' property to retrieve the cows, as ORS 105.810 specifically provides for damages "whenever any *person,* without lawful authority, willfully injures or severs from the land of another any produce" (emphasis added). The jury determined plaintiffs were entitled to prevail on all of their claims and awarded just over $26,000 in damages, attributing $11,000 of those damages to the damage caused by defendant's employees, which the jury

decided was done "casually/involuntarily." As a result of this finding, the trial court concluded that under ORS 105.815, it was required to double plaintiffs' damages award on the trespass to produce claim. In a supplemental judgment, the trial court also awarded the plaintiffs their attorney fees pursuant to ORS 105.810.

On appeal, defendant challenged the trial court's decision to enhance plaintiffs' damages pursuant to ORS 105.815. In making that challenge, defendant argued that plaintiffs did not prevail on their trespass to produce claim because, under ORS 105.810, the damage to produce must be caused "willfully," and that enhanced damages cannot be awarded where the injury is "casual or involuntary." After engaging in a statutory analysis, the Court of Appeals held that although the statutes use the word "trespass," a trespass to land is not required to prove an injury to produce. Rather, a defendant can be liable for timber or produce trespass while on a plaintiff's property with or without permission, so long as the injury to the timber or produce was done without consent. The Court of Appeals also held that willful conduct is not required for an enhanced damages award for a "casual or involuntary" injury to timber or produce and that the trial court's award of double damages to the plaintiffs was proper.

■ ***Submitted by Lauren Russell***
Dunn Carney

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Tort Claims Notice

Plaintiff Fails To Established "Actual Notice" As Required by the Oregon Tort Claims Act, ORS 30.275

In a significant ruling, Lane County Circuit Court Judge Karsten Rasmussen granted summary judgment in defendants' favor in *Isis Barone v. Lane County et. al.,* Lane County Circuit Court Case No. 19CV43329 (April 29, 2021). The decision is a helpful example of the application of the "actual notice" standard of the Oregon Tort Claims Act (OTCA), ORS 30.275.

Plaintiff was a former employee who resigned her position citing a discriminatory and retaliatory work environment. Plaintiff also faced a pending disciplinary investigation. County Counsel hired a private investigator to interview plaintiff before her departure about her claims of harassment, discrimination, and retaliation. After leaving, plaintiff filed for unemployment benefits, which the county successfully defeated. Plaintiff then filed a complaint with the Bureau of Labor and Industries (BOLI) making the same allegations. Prior to receiving a decision from BOLI, plaintiff withdrew her complaint and informed BOLI of her intent to file a civil suit.

Eventually, almost 16 months after plaintiff resigned from her employment, she filed a civil complaint against the county and her former supervisor. The county successfully challenged her initial complaint on the grounds that it did not contain any allegations showing she had provided the notice required by the OTCA. In her amended complaint, plaintiff alleged that she had provided "actual notice" of her claim as provided in ORS 30.275(6).

Plaintiff claimed the following acts amounted to "actual notice" under the OTCA: submitting her resignation, participating in an independent investigation into her allegations of workplace misconduct, requesting confidential documents from the independent investigator, appealing the denial of her unemployment insurance benefits, and filing a complaint with BOLI. Plaintiff argued that even if the court found that none of her communications standing alone complied with the notice requirements of the OTCA, then the court should consider them as a whole and find she had substantially complied with the notice requirements under the OTCA.

Defendants argued that plaintiff had not complied with the notice requirements under the OTCA. The theory of substantial compliance is to provide a remedy to a plaintiff for a communication that would otherwise comply with the OTCA requirements but for a technical deficiency. Defendants argued none of plaintiff's communications contained either a claim for damages, or an intent to file an action against defendants. In addition, none of plaintiff's communications would have led a reasonable person to believe plaintiff intended to file an action, as required by the OTCA.

Defendants also argued that, even if plaintiff's communications were found to contain a claim for damages, or informed of the time, place and circumstances giving rise to such a claim, none of her communications were given to an individual responsible for administering tort claims on behalf of defendants as required by the OTCA. Defendants argued none of plaintiff's examples of "actual notice" complied with the notice requirements of the OTCA, either standing alone or taken as a whole. After considering all argument, the court granted summary judgment in defendants' favor.

■ ***Submitted by Sara L. Chinske***
Lane County Office of Legal Counsel

Government Liability

The United States Supreme Court Abrogates Community Caretaking Doctrine

The United States Supreme Court handed down a case, *Caniglia v. Strom,* 141 S Ct 1596 (May 17, 2021), regarding a police officer's authority to enter a home under "community caretaking" authority.

The facts in the case were simple—husband and wife were arguing in their home; husband got a pistol, put in on the dining room table, and asked his wife "to shoot him now and get it over with"; wife left and went to a hotel for the night. The following morning, wife could not reach husband and requested a welfare check. Officers went to the home with wife and found husband on the porch. Husband agreed with wife's description of the events with the pistol, but he denied being suicidal. The responding officers decided that husband was a danger to self or others, and they called an ambulance for a mental-health hold. The officers then entered the home and seized two handguns. Husband filed a lawsuit claiming that the officers entered his home and seized his guns without a warrant in violation of the Fourth Amendment. The First Circuit Court of Appeals found that the officers had authority to enter the home under the "community caretaking exception" to the warrant requirement.

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On review, the Supreme Court thought otherwise. The court noted that the police did not have a warrant or consent, and they were not dealing with a crime. There was no argument that any exigent circumstances existed. While the Supreme Court had decided in an earlier case that a similar search for a firearm in a vehicle fell under community caretaking, they made it clear that the ruling did not extend to an officer's ability to enter a home. They did point out that officers can enter a home when certain exigent circumstances exist, such as the need to render emergency assistance to an injured occupant or to protect someone in the home from imminent injury or to provide emergency aid. The court also stressed that they have repeatedly declined to expand the scope of exceptions to the warrant requirement to permit entry into a home without a warrant.

Prior to the *Caniglia* decision, Oregon courts have made it clear that, under Article I, section 9, of the Oregon Constitution, police officers may not rely upon the community caretaking statute, ORS 133.033, to enter a home unless they have a warrant or a valid warrant exception. *State v. Martin,* 222 Or App 138, 193 P3d 993 (2008). An officer may enter into a home without a warrant if the officer has consent, or if there is a valid warrant exception, such as hot pursuit, probable cause with exigent circumstances, or the need to render emergency aid.

The bottom line is that the United States Supreme Court has now said what the Oregon courts decided years ago: Officers have no authority to go into a home without consent or a valid warrant exception, and "community caretaking" is not a valid warrant exception.

■ ***Submitted by Elmer Dickens***
Washington County Office of County Counsel

Government Liability

Response to COVID-19 in Multnomah County Inverness Jail Meets Fourteenth Amendment

In *Homer Jackson v. Michael Reese,* Multnomah County Circuit Court Case No. 20CV19874 (Jan. 27, 2021) the trial court held that plaintiff, an adult in prison at the Multnomah County Inverness Jail (MCIJ), failed to demonstrate deliberate indifference to his conditions of confinement under the Fourteenth Amendment with regard to his exposure to COVID-19.

Plaintiff's medical condition placed him at high risk of serious harm or death if exposed to COVID-19. Plaintiff's confinement in jail regularly exposed him to other adults in prison (AIPs) who did not follow social distancing or mask wearing protocol. Plaintiff also personally observed that some staff did not follow policy and also failed to wear masks and gloves. Plaintiff's physician concluded that plaintiff should be placed in medical isolation because he was at high risk of exposure and the protocols in MCIJ were inadequate to protect him. Based on this, plaintiff sought immediate relief through a *habeas corpus* proceeding pursuant to ORS 34.310 *et. seq.*

In response to the petition, defendants offered the testimony of Dr. Seale and Deputy Chief Chad Gaidos. Their testimony described the following protocols: (1) quarantine period of 14 days; (2) daily testing of high-risk inmates; and (3) isolation of positive test cases in negative pressure cells. The policies also required staff to wear masks and gloves, with regular cleaning. The overall system for quarantine, medical screening, monitoring, and education was developed using CDC and OHA guidelines to provide a comprehensive system for dealing with COVID-19.

To prove a claim under the Fourteenth Amendment challenging the conditions of confinement, a plaintiff must establish that: (1) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) those conditions put the plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (4) by not taking such measures, the defendant caused the plaintiff's injuries. *Gordon v. County of Orange,* 888 F.3d 1118, 1124-25 (9th Cir. 2018).

Looking at those factors, the Multnomah County court concluded that the record showed that the county was not deliberately indifferent. In doing so, the court explained: "By making a finding that plaintiff failed to prove deliberate indifference under the Fourteenth Amendment, the court is not concluding that plaintiff is in a safe environment. Far from that, given plaintiff's extremely fragile condition, he is at great risk of harm because he is living in a very crowded congregate environment where only so much can be done to assure his safety. But the court finds that the defendant is doing what reasonably can be done by adopting most of what the CDC has published as guidance and by working so closely with the Tri-County Health Officer."

■ ***Submitted by Chris Gilmore***
Office of Multnomah County Attorney

Petitions For Review

Sara Kobak, Schwabe Williamson & Wyatt
Case Notes Editor

The following is a brief summary of cases for which petitions for review have been granted by the Oregon Supreme Court. These cases have been selected for their possible significance to OADC members; however, this summary is not intended to be an exhaustive listing of the matters that are currently pending before the court. For a complete itemization of the petitions and other cases, the reader is directed to the court's Advance Sheet publication.

***Abraham v. Corizon Health*, S968265, Ninth Circuit No. 19-36077. Oral argument heard on November 3, 2021.**

In this certified question from the Ninth Circuit to the Oregon Supreme Court, the petitioner seeks to pursue a claim for alleged discrimination based on disability under the Oregon Public Accommodation Act. Petitioner was held for several days at a local jail after his arrest for criminal charges. Respondent is a private healthcare company that provided medical services for prisoners at the local jail under a contract with the county. Petitioner is deaf, and he alleges that the healthcare provider violated ORS 659A.142 by failing to provide a sign-language interpreter at his jail medical appointments. The Oregon district court dismissed petitioner's claim on the ground that jail medical services for prisoners do not qualify as a "place of public accommodation" under ORS 659A.400. Because the issue was a state-law question of first impression, the Ninth Circuit certified the issue to the Oregon Supreme Court. On review, the certified question before the Oregon Supreme Court is: "Is a private contractor providing healthcare services at a county jail a 'place of public accommodation' within the meaning of ORS 659A.400 and subject to liability under ORS 659A.142?"

***Scott v. Kesselring*, S068503 (A163709), 308 Or App 12, 479 P3d 1063 (2020). Oral argument scheduled for January 13, 2022.**

In this negligence case, defendant admitted liability for causing a rear-end car accident, but she disputed the amount of plaintiff's compensatory damages. At the trial to determine the amount of plaintiff's compensatory damages, the trial court permitted plaintiff to tell the jury that defendant was distracted by her cellphone moments before the accident, notwithstanding

defendant's objections that such evidence was irrelevant under OEC 401 and presented an undue risk of prejudice under OEC 403. On appeal, the Oregon Court of Appeals issued a divided opinion in favor of defendant, with the majority holding that the distracted-driving evidence was irrelevant to the issue of compensatory damages before the jury. On review to the Oregon Supreme Court, the primary questions presented are: (1) whether the Court of Appeals correctly held that the admission of the distracted-driving evidence was reversible error in the damages trial; (2) whether the Court of Appeals acted within its discretion in declining to consider plaintiff's alternative "right for the wrong reason" arguments on appeal; and (3) whether the Court of Appeals correctly held that plaintiff was required to file a cross-appeal, not merely assert a cross-assignment of error, to challenge a trial court's decision to strike plaintiff's punitive-damages claim.

Legislative Update

Rocky Dallum, Tonkon Torp
OADC Lobbyist

This has been an atypical fall in preparing for the upcoming legislative session. September's Special Session on Redistricting, political turnover, and the growing field of gubernatorial candidates are setting the stage for 2022's legislative session.

ROCKY DALLUM

The Special Session on Redistricting held in September spurred a number of policy and political developments that will evolve between now and next year's election. For instance, issues have arisen over the maps themselves: Both the state and Congressional maps, approved with exclusively Democratic votes, are subject to several challenges over claims of gerrymandering. The legal standards for creating district boundaries, reactions by a variety of legal observers, and a preliminary opinion by retired state Judge Henry Breithaupt (acting as a "special master") indicate it is unlikely that any of the maps will be rejected. Most interestingly, the challenges are not completely partisan, as Democrat Marty Wilde from Eugene has joined Republicans in the challenge over select state legislative district lines. The legal challenges will likely be resolved cleanly, but the political fallout will linger for at least a year.

First, it's likely that this year's redistricting drama will lead to a ballot measure next year creating an independent citizen commission on redistricting. A similar measure fell short of the requisite signatures in 2020 (a difficult year for signature gathering). Secondly, the new Congressional district Oregon gained from the 2020 census is already attracting candidates from the existing crop of current elected officials. Those candidates who leave the Legislature to run for office will be replaced by County Commission appointees, creating uncertainty and speculation over their replacements. A handful of legislators were either drawn out of their existing districts, now live in a district with another incumbent legislator, or will reside in a new district with significantly different political make-up, meaning that some may leave the field, and some will be posturing for re-election.

The biggest repercussion of September's Special Session may be the broken relationship between House leadership and House Republicans. Speaker Tina Kotek backed out of a deal to allow both parties equal representation on the Redistricting Committee, ultimately creating a new partisan committee to pass the Congressional map. House Republicans voted to censure the Speaker (a vote that failed on party lines), but the political posturing and breakdown of trust will cast a pall over proceedings in February, particularly as it comes to procedural rules or quorum, where leadership will need the support of at least several R's.

Further complicating the relationship between parties is the upcoming gubernatorial race. Kate Brown is precluded from running due to term limits. House Speaker Tina Kotek has announced her intention to run for governor in the Democratic primary (but remains adamant that she will not step down before the session ends). She joins State Treasurer Tobias Read, *New York Times* columnist Nicolas Kristoff, and a few others vying for the Democratic nomination. The Republican pool features 2016 nominee Bud Pierce and some lower profile politicians including the mayor of Sandy, Stan Pulliam. Adding intrigue to the governor's race, State Senator Betsy Johnson (D-Scappoose) is leaving her party to run as an unaffiliated candidate. She is currently the Senate Co-Chair of the legislature's budget-writing committee, meaning two high-ranking sitting legislators will both be preparing to mount campaigns as the 2022 legislative session is underway, unless they (or others) step down to focus on fundraising and other political activities.

All of these developments make it incredibly unclear how the 2022 session will function and what policies legislators—particularly those running in new districts or for higher office—will prioritize. Specific to OADC, we know very little about potential issues of interest compared to the information we have had at this point during the political cycle in prior years. September's quarterly legislative hearings were canceled due to … redistricting! There is always the potential for bills related to liability, particularly as it relates to COVID and medical providers, but that's not certain yet. With labor and workforce being such hot topics in Oregon politics, expect to see at least some bills impacting employment practice, particularly wage and hour issues in agriculture. The state is experiencing an influx of revenue, both from income tax collection and federal stimulus, meaning OADC may join our fellow legal organizations in seeking funding for our courts and our bench. Legislators are limited to two bills each and three per committee in the 2022 session, so we expect fewer issues of concern, but OADC's Government Affairs Committee will react as bills are introduced.

Honorable Stephen W. Morgan

Lane County Circuit Court

A BIOGRAPHY

Judge Stephen Morgan is the newest judge on the Lane County bench, beginning his judicial role in January of 2021. While he is new to the bench, he has been present in the Lane County Courthouse for almost 20 years as a prosecutor at the Lane County District Attorney's Office.

HONORABLE STEPHEN W. MORGAN

Judge Morgan grew up in Madras, Oregon with no exposure to the legal environment. He joined the United States Marine Corps Reserves immediately after high school, turning 18 while in boot camp, and otherwise spent time working in a mill in Madras. When Operation Desert Shield was underway, he took time away from his studies at Portland State University in preparation for the potential call to action. Judge Morgan noted that while reservist activations are commonplace today, it was unheard of at the time. Although Judge Morgan was not ultimately called to serve in Desert Shield, this pivoted his educational journey from Portland State to the University of Oregon, where he met his wife. Upon completion of his bachelor's degree in psychology, he and his wife spent time living in Taiwan teaching English. After a couple of years traveling and living abroad, Judge Morgan returned to the University of Oregon to attend law school.

While in law school, Judge Morgan began working with the victim's services unit in Lane County. Through this service, Judge Morgan developed an interest in criminal law, particularly with respect to victim advocacy. This interest and experience eventually led to a position as a Yamhill County prosecutor and, subsequently, a Lane County prosecutor. In his role as a prosecutor, Judge Morgan recognized the need to have a specialized domestic violence unit, given the unique issues that arise in those cases, and thus co-founded the domestic violence unit at the Lane County District Attorney's Office.

Participating as a prosecutor in over 100 trials, Judge Morgan grew to love trial work early on, for reasons ranging from the human and factual aspects of trials to the variety of legal issues involved to the idea of the courtroom as a great equalizer for all members of our communities. Approximately 15 years into his prosecutorial career, he began to consider joining the bench, largely related to his comfort in the courtroom and the motivation and inspiration that comes with being intimately involved in the judicial process.

Gone are the days when an attorney could excuse oneself for not being "tech savvy." However, with new technologies there is risk of losing the collegiality that comes from face-to-face interactions, and therefore greater vigilance, professionalism, and mentorship will be required among members of the bench and bar.

Judge Morgan expressed that being a judge, even during these difficult times, has been more rewarding than he expected or hoped. During this time, he has observed open-minded legal practitioners excel in pursuing advocacy for their clients while adapting to accommodate the safety and needs of the community. Gone are the days when an attorney could excuse oneself for not being "tech savvy." However, with new technologies there is risk of losing the collegiality that comes from face-to-face interactions, and therefore greater vigilance, professionalism, and mentorship will be required among members of the bench and bar.

While Judge Morgan feels at home when he is in the courtroom, he expressed that the chambers work, often involving stacks of motions, is more daunting. However, this is also what excites him most about being a judge—there is something new to learn and do each day.

■ ***Submitted by Joel Petersen***
Hodgkinson Street Mepham

Defense Victory!

Christine Sargent, Littler Mendelson
Defense Victory! Editor

Summary Judgment Granted Across the Board in Medical Negligence Case

On January 27, 2021, Lane County Circuit Court Judge Charles Carlson granted summary judgment in favor of defendants in *Brooks Cooper, as personal representative for the Estate of Matthew Kegler v. PeaceHealth, et al.,* Lane County Circuit Court Case No. 19CV32323. Kirstin L. Abel and Jamie T. Azevedo of Bodyfelt Mount represented defendants South Lane Mental Health Services, Inc. and Jessica Sarabale. Katie Eichner and Matteo Leggett of Lindsay Hart represented defendants PeaceHealth and Georgene Moldovan, M.D. Chad Stavley represented plaintiff.

Plaintiff brought claims for professional medical negligence against defendants, who are mental health providers, alleging negligence in performance of a suicide risk assessment and in discharging plaintiff's decedent from the hospital. Defendants moved for summary judgment against plaintiff's claims and argued that ORS 426.335(5)—which bars liability against licensed independent practitioners and hospitals involved in involuntary health holds—should also extend to bar liability against mental health providers involved in assessments relative to such holds, especially where mental health providers have no authority to remove or place holds or to discharge patients. Defendants also argued that plaintiff otherwise presented no genuine issues of material fact relative to plaintiff's individual claims. Agreeing with defendants, Judge Carlson granted all defendants' motions for summary judgment and dismissed plaintiff's claims in their entirety.

■ ***Submitted by Ian Baldwin***
Wood Smith Henning & Berman

Complete Defense Verdict in Multnomah County Virtual Jury Trial

On April 21, 2021, TriMet deputy general counsel Sarah Ewing and senior deputy general counsel Michael Shin obtained a defense verdict in *Joanne Denzer v. TriMet,* Multnomah County Circuit Court Case No. 19CV19250. The trial was conducted via Webex video conference from April 19-21. The Honorable Angela Lucero

presided. James Buchal of Murphy & Buchal represented plaintiff. The parties agreed to an eight-person jury.

Plaintiff had alleged personal injuries resulting from defendant TriMet's bus fumes. In a three-week period in April and May 2017 during which TriMet made light rail system repairs, TriMet ran a shuttle bus service for disrupted light rail routes. A temporary shuttle bus stop was located across the street from the third-floor apartment of the plaintiff. Plaintiff alleged that fumes from idling buses accumulated and caused her to faint and injure herself. She brought claims for negligence, private nuisance, and trespass, and sought damages totaling $50,000 for medical

CONTINUED ON NEXT PAGE

DEFENSE VICTORY!
continued from previous page

expenses and noneconomic damages. Plaintiff's partner Thom Gambaro was initially a party to the lawsuit, alleging that bus fumes caused him to develop lung cancer and seeking nearly $10 million in damages. In July 2020, TriMet filed a motion for summary judgment, relying in part on an opinion from TriMet's pulmonary medicine expert, Bart Moulton M.D. The Honorable Judith Matarazzo dismissed Gambaro's lung-cancer-related claims on summary judgment but permitted certain other claims to proceed. Gambaro subsequently passed away, and trial proceeded on Denzer's claims only.

A significant amount of trial time was dedicated to jury selection. Testimony lasted approximately one day. After the close of testimony, the court dismissed plaintiff's negligence claim on directed verdict due to lack of medical causation evidence. The trespass and nuisance claims were submitted to the jury, and the jury unanimously found that TriMet was not liable on either claim. Jurors provided positive feedback to Judge Lucero regarding their experience. Notably, the court file includes a comprehensive order regarding protocols and procedures for remote jury trials.

■ ***Submitted by Flavio A. ("Alex") Ortiz***
Rall & Ortiz

Plaintiff's Failure to Comply with Duty to Cooperate Results in Summary Judgment

On May 10, 2021, U.S. District Judge Marco Hernandez adopted Findings and Recommendations from Magistrate Judge Youlee Yim You in *Schalk v. Infinity Insurance Company,* U.S. District Court for the District of Oregon Case No. 3:20-cv-00615-YY (see 2021 WL 1877976 for Findings and Recommendations), granting summary judgment in favor of defendant Infinity Insurance Company. Francis J. Maloney, III and Scott A. MacLaren of Maloney Lauersdorf Reiner represented defendant. Plaintiff, represented by Gregory Fry, asserted claims for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing.

Defendant moved for summary judgment against the complaint, asserting that plaintiff's failure to provide his bank statements during the investigation of plaintiff's insurance claim breached plaintiff's duty to cooperate under the policy. Specifically, defendant argued that plaintiff's failure to produce those bank statements during the adjustment process, when plaintiff relied on them in summary judgment, was prejudicial. Relying on case law from Oregon and beyond, the court found that plaintiff breached the cooperation clause to the prejudice of defendant in hampering defendant's ability to timely investigate and assess the extent of damages prior to plaintiff filing the suit.

■ ***Submitted by David Cramer***
MB Law Group

Declaratory Judgment for Lower Limits Awarded in UIM Case

On April 12, 2021, Heather Beasley and Allie Boyd of Davis Rothwell Earle & Xóchihua obtained declaratory judgment in *Progressive Universal Ins. Co. v. Voyles, et al.,* Multnomah County Circuit Court Case No. 20CV04468. Judge pro tempore Thomas Brown presided. Jesse A. Busse of the Willamette Law Group represented defendants.

This case arose from a motor vehicle accident resulting in a claim by the driver of the insured vehicle (the spouse of the named insured) for underinsured motorist benefits up to the liability limits, even though the named insured wife had elected UIM benefits less than the liability limits.

Under ORS 742.502(2)(a), a motor vehicle bodily injury liability policy must have the same limits for uninsured motorist coverage as bodily injury liability coverage, unless a named insured in writing elects lower limits. ORS 742.502(2)(b) provides that if a named insured elects lower limits, the named insured must sign a statement electing the lower limits within 60 days after making the election.

Although the named insured wife had executed a written election for lower UIM limits on a form containing both the election and the required statement, the insured driver argued this was insufficient to satisfy the requirements of ORS 742.502(2) because the "election" referenced in ORS 742.502(2)(a) and the written "statement" referenced in ORS 742.502(2)(b) were two separate written documents that must be executed in two distinct steps. Relying on the legislative history of ORS 742.502, Progressive argued the intent of the statute was clear: If the insured elected lower limits, the statute required the named insured to sign only one written document within 60 days of the election. Thus, Progressive's form met the requirements of ORS 742.502 and constituted a valid election. Ultimately, Judge Brown agreed with Progressive and held that the election form effectively resulted in lower UIM limits.

■ ***Submitted by Pamela Paluga***
Abbott Law Group

The Scribe's Tips for Better Writing

Dan Lindahl
Bullivant Houser Bailey

Putting Citations in Their Proper Place

For at least 20 years, legal writers have debated whether to put citations to authority in a brief's text or in footnotes.

Bryan Garner is the leading advocate for putting citations in footnotes. According to Garner, placing citations in footnotes improves a brief's readability. Garner's view is that the only reason case citations were ever put in the text is because, until the age of automated word processing, it was difficult to put footnotes in a brief.

DAN LINDAHL

But Garner has made little progress in persuading lawyers and judges to remove case citations from the document's text and relegate them to footnotes. A few courts routinely put case citations in footnotes. The Supreme Court of Delaware is an example. And several judges follow that practice, such as Judge Patrick E. Higginbotham (Fifth Circuit Court of Appeals), Judge Andrew J. Kleinfeld (Ninth Circuit Court of Appeals), Justice William B. Cassel (Nebraska Supreme Court), and Justice Elizabeth D. Walker (West Virginia Supreme Court). But those are the exceptions: I rarely see judicial opinions where the citations are in footnotes. And although I occasionally see lawyers who use the Garner style, that's rare, too.

Over the years, I've experimented with putting citations in footnotes. But I ultimately reverted to the traditional approach of putting citations in the text.

I am now convinced that is the best approach. My primary reason for putting citations in the text is because most of us—and nearly all judges—now read briefs in electronic form rather than on paper.

Not so long ago, briefs were paper documents, and the full page lay before the reader. The reader's eyes could move from the text, down to the footnote, and back to the text with minimal effort (if one wanted to check the citation).

Almost all briefs are now filed and read in electronic form—often on a tablet with a relatively small screen. A judge of average eyesight is unlikely to have an entire page of the brief visible on the tablet's screen. Instead, only a portion of the page will be visible.

And therein lies the problem: Because the entire page is not visible, the reader must take some action, beyond mere eye movement, to see the footnote's text. In some fashion or another, the reader must manipulate the page, whether by scrolling to the bottom of the page or clicking on the footnote symbol if there is a hyperlink that shows the footnote's text.

Garner argues the adept legal writer can avoid these problems by including enough information in the text that the reader feels no need to look at the citation. That works sometimes, but not all the time.

If the brief is embarking on an extended discussion of a critical case, the writer can certainly reference the case name and the issuing jurisdiction while putting the numbers in a footnote, something like this: "In *Hoffman Constr. Co. v. Fred S. James & Co.,* the Oregon Supreme Court established the rules for interpreting an insurance policy." In that example, the reader has been told both the case name and the issuing court. But that only works when a case is receiving some in-depth treatment. It's impractical to include all the information for the many other citations that support a proposition of law but don't require any extended discussion of the case.

One goal of legal writing is to make the process simple for the reader. Inserting dozens of obstacles into the brief, in the form of footnote citations, does not ease the reader's burden.

For that reason, I avoid putting citations in footnotes.

Association News

New and Returning Members

OADC welcomes the following new and returning members to the association:

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Smith Freed Eberhard

Courtney Caimona
Luvaas Cobb

Emilie Edling
Houser

Dmitriy Golosinskiy
Lewis Brisbois Bisgaard & Smith

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Christian Jahn
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Anthony Kuchulis
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