THE VERDICT™

OADC Oregon Association of Defense Counsel

Trial Lawyers Defending You in the Courts of Oregon

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Preparing for Cyberattacks

Challenging Personal Jurisdiction

Mediating Employment Cases

Legal Paraprofessional Licensing

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PRESIDENT'S MESSAGE

My Reason Why: The OADC Community

Katie L. Smith, Walhood Law Group

"Alone we can do so little; together we can do so much."

—Helen Keller

Recently, as I prepared to embark on my year as President of OADC, I found myself reflecting on why I choose to be a member of OADC year after year. The answer was simple for me: the community. When that renewal form hits my inbox each year, there is never a question in my mind. Then I began to wonder—why do others choose OADC? I decided to do a little research. I asked several OADC members why they signed up for OADC in the first place. Across the board the answers were the same: because someone, a partner in the firm or a mentor, walked down the hall and told them they should sign up. Okay … so perhaps an overwhelming number of us joined OADC because we were told to. I went on to ask those members why they continue to renew their membership year after year. The top five answers were essentially the same, including access to quality education, the OADC listserv, speaking and publication opportunities, and the Annual Convention. However, the one reason that surfaced to the top of the list over and over was the *community and relationships* developed through OADC.

KATIE L. SMITH

As with my colleagues, although there are many reasons why I remain a member of OADC, the front runner has been the OADC community. I look forward each year to events where I can engage with other OADC members, and I can honestly say I have had a positive experience with every member I have connected with. It is truly a group of professional, respectful, downright wholesome, and often humorous individuals of the highest integrity. Through the OADC community I have had the opportunity to further my own professional development, I have made some lifelong friends whom I enjoy spending time with, I have gained contacts I feel comfortable calling when I have a random legal issue that I need help on, and yes, OADC has even been a source of referrals.

My takeaway from this exercise was twofold. First, the value of the OADC community cannot be undersold: it is perhaps the most important value of being an OADC member. The second takeaway was the importance of taking others who could benefit from the community that OADC has to offer under our wing and giving them that little nudge. The past two years have been challenging for most of us, and the isolation of COVID has taken its toll on our ability to interact with others in our community. In 2022, as we step back into our offices and work to identify and adapt to the new normal for our professional and personal lives, community is more important than ever.

As a fellow OADC member, I ask two favors of you this year. First, reflect on why you became an OADC member and why you remain an OADC member. I would bet the OADC community and relationships you have built within that community are reasons on your list. Then find one individual (or more) who could benefit from your encouragement and invite them to join our community. There is strength in numbers and value in growing our community with like-minded colleagues and helping to foster the development of those who will lead our profession in the future. The community, mentorship, and support OADC can offer to lawyers of all ages looking to expand their legal prowess, network, and professional development is priceless.

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PRESIDENT'S MESSAGE
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My second ask is that you take advantage of the *full OADC experience.* To me, OADC is so much more than a membership. To fully experience the OADC community I speak so fondly of, I encourage you to engage more deeply in the organization and participate in the events and opportunities available to OADC members. How, you ask?

1. ***Engage with your peers.*** One of the most valuable assets of OADC is our listserv. It is a resource to engage with others in our profession who may be dealing with or have dealt with that same unique issue that just came across your desk. Do you need an expert and would like one who has been previously vetted? Are you dealing with a challenging legal issue new to you? Do you want to engage with others on a new ruling that has impacted how you practice? The listserv is a great resource to discuss those questions and issues. Don't be afraid to send an email. Disclaimer: Please follow listserv guidelines to maintain the integrity of this valuable resource.
2. ***Attend an OADC event.*** The best opportunity to experience the OADC community is to attend one of our OADC events and meet other OADC members. My not-to-be-missed OADC event is the **Annual Convention** in Sunriver. This family-friendly event is a great way to kick off the summer and hands-down my favorite event of the year. I truly look forward to the opportunity to connect and network with my fellow OADC members (and to bank some quality CLE credits). And it's not just me: This event has become a family tradition that my husband and kids look forward to as well. Plans are

full-steam ahead for an in-person event this year (June 16-18, 2022), and our planners are working to put together a great program and weekend, paying homage to the tradition while blending in the new to make this year a fun, family-friendly event and opportunity to reconnect. Not to be undersold is our **Fall Seminar,** which will be in Portland on November 18, 2022, and our **Defense Practice Academy** in September. We also have a couple of new events in development, and our excitement is high as we are in the planning stages. Last but not least are the practice and affinity group events offered throughout the year. These inexpensive sessions are a great way to earn a CLE credit or two, expand your expertise on a focused area of law, and network with other OADC members.

3. ***Get published or present.*** *The Verdict™,* our esteemed quarterly that you are reading this very moment, is one of the most respected and comprehensive newsletters read not just by attorneys but the judges throughout our state. I still think fondly of the day a judge recognized my name in court based on an article I had written in *The Verdict™* back in 2014. Authoring an article is a fantastic way to boost your resume and, for those who are keen to delegate, a great boost to the professional development of your associates. There is also excellent value to presenting at one of our CLE events throughout the year. And you don't need to wait to be asked—engage with a practice group and propose a topic of relevance or interest.
4. Become a Leader. My involvement with the OADC leadership has fostered my strongest relationships and has been the biggest contributor to my professional development over the years. It started back in 2013 in my role as publications liaison for the construction practice group, and now I find myself leading this great organization, boosted by a solid team of practice group and affinity group leaders, an outstanding Board of Directors, a fantastic newsletter staff at *The Verdict™*, and a band of mentors and leaders who came before me. With respect to the value of OADC leadership—if you know, you know, and you want to know!

As we step out of the shadows and begin to reconnect in 2022, I invite you to take advantage of the growth opportunity OADC can offer through your engagement with the group, and I ask you to help me in sharing our invaluable organization with others in our field. Together we are strong. I hope to see you soon.

Just Because You Can Doesn't Mean You Should: Considerations for Challenging Personal Jurisdiction

David W. Cramer
MB Law Group

Motions challenging personal jurisdiction can be effective tools in litigation. A successful motion may force the plaintiff to litigate in a more defense-friendly forum, potentially reducing costs and improving outcomes for your client—or, ideally, dissuading the plaintiff from refiling at all.


DAVID W. CRAMER

However, simply because you *can* file a jurisdictional motion does not mean that you *should.* A thorough evaluation of the issue should include the following steps:

1. Evaluate the strength of your motion;
2. Determine in which jurisdiction the case might be filed, should you prevail;
3. Analyze how that state's law might impact your defenses or claims; and
4. Communicate clearly with your client at all stages.

We discuss each of these considerations in further detail below.

1. Evaluate the Strength of Your Jurisdictional Challenge

One of the first questions to ask when analyzing a new complaint is whether you have a jurisdictional challenge. Both the United States[1] and Oregon[2] Supreme Courts issued significant opinions on personal jurisdiction in the past year, which are worth a thorough read to ensure you can effectively spot and assess potential personal jurisdiction issues.

> Although it is not always possible to understand all the nuances of each potential new jurisdiction's laws, it is important to do some research ahead of time to avoid taking your client out of the proverbial frying pan and into the fire.

Jurisdictional challenges can be quite fact-intensive, but which facts matter? Jurisdiction most often becomes an issue in the context of an out-of-state defendant, because general jurisdiction exists over entities that are "at home" in the state.[3] For individuals, that means they are domiciled in Oregon.[4] For corporations, general jurisdiction typically exists in the state(s) in which they are incorporated and have their principal place of business.[5]

If your client is not subject to general jurisdiction in Oregon, you must then understand its connection with Oregon and the suit at issue to assess whether you may have a basis to challenge specific jurisdiction. The legal issues are too complex to address in detail here, but recent case law reiterates that the issue turns on the relationship between the defendant's forum-related contacts or activities and the plaintiff's claims.[6] In short, if the plaintiff's claims do not arise out of or relate to your client's contacts with the forum state, you may have a basis to challenge personal jurisdiction. But should you?

2. Determine Where the Case Could Be Filed

The next step is to evaluate where the case could be refiled if your motion succeeds. Multiple states could have jurisdiction over your client. For example, if your client is a company, it may be sued under general jurisdiction both where it is incorporated and where its principal place of business is located. Additionally, your client might be subject to specific jurisdiction in the state where the tort occurred, the contract was signed, or the offending product was manufactured or sold. Identifying those states will guide the next step in the process.

As an illustration, assume that your client is a trucking corporation. It is incorporated in Delaware with its principal place of business in Idaho. While making a delivery, your client's truck is involved in a motor vehicle accident in Washington, injuring an Oregon resident. The injured plaintiff files suit in Oregon. In this example, jurisdiction is likely available over your client in Idaho, Delaware, or Washington, and the plaintiff could refile the case in any of those states if you successfully challenge jurisdiction in Oregon.

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3. A New State May Mean New Law
Once you have determined where the case could go, you must assess the benefits and risks of each potential destination state. In the prior scenario of the motor vehicle accident occurring in Washington, for instance, if the plaintiff refiled in Washington (where specific, or case-linked, jurisdiction may be available), would that help or hurt your client?

If you intend to argue that plaintiff was primarily at fault in causing the accident, your client might not benefit from forcing the case to move. Under Oregon law, if the jury finds that the plaintiff has the greater fault in causing the accident, plaintiff is barred from recovery.[7] Washington, on the other hand, is a pure comparative fault state.[8] A plaintiff 70 percent liable in Oregon recovers nothing. That same plaintiff in Washington is still able to recover 30 percent of his or her damages. However, if plaintiff alleges intentional or reckless conduct, the unavailability of punitive damages could make Washington a desirable jurisdiction for your client. Other issues to consider could be whether the states would apply different statutes of limitations or repose; the availability of expert discovery, interrogatories, or damages caps in other states; and differences in likely jury pool composition. Finally, consider choice of law. Could you get the best of both worlds by, for instance, moving the Oregon court to apply Washington substantive law to bar punitive damages while still enjoying Oregon's cost-effective procedural rules?

Although it is not always possible to understand all the nuances of each potential new jurisdiction's laws, it is important to do some research ahead of time to avoid taking your client out of the proverbial frying pan and into the fire.

4. Weigh All the Factors with Your Client
Finally, communication with your client at every step of the way is critical. Jurisdictional challenges can be expensive "'fact intensive' inquiries."[9] Ultimately, keeping your clients informed and communicating the risks, benefits, and costs of filing a motion will help avoid getting your bills cut, or worse, losing a client. Make sure to discuss the costs—both of completing the initial analysis and litigating the subsequent motion—as well as the benefits. Remind your client that even the threat of such a motion might bring an opposing party to the table for an early mediation or invite a discussion where the parties agree to move the case to a more appropriate forum. On the other hand, a jurisdictional motion could result in costly and inconvenient jurisdictional discovery that does little to move the ball forward and delays the ultimate resolution of the case.

While not every case is appropriate for a jurisdictional challenge, motions challenging jurisdiction can be effective under the right circumstances. Spending time at the front end to carefully evaluate the potential outcomes of a successful motion and be sure that both you and your client understand the risks and rewards can ensure that a successful challenge does not lead to future frustration.

Endnotes
1. *Ford Motor Co. v. Montana Eighth Judicial District Court,* 141 S Ct 1017 (Mar. 25, 2021).
2. *Cox v. HP Inc.,* 368 Or 477, 492 P3d 1245 (Aug. 5, 2021).
3. *Daimler AG v. Bauman,* 571 US 117 (2014).
4. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 565 US 915, 924 (2011).
5. *Id.*
6. *See, e.g., Ford Motor Co.,* 141 S Ct 1017; *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.,* 582 US __, 137 S Ct 1773 (2017).
7. *See* ORS § 31.600(1).
8. *See* RCW § 4.22.070(1).
9. Cox, 368 Or at 509, *citing Robinson v. Harley-Davidson Motor Co.,* 354 Or 572, 581 (2013).

The Inevitable Approaches: Preparing for and Preventing Cyberattacks

Jason Evans
Sussman Shank


JASON EVANS

At this point, the question is no longer *if* you and your firm will be the target of a cyber-attack, but rather, *when.* It is no secret that legal practitioners often deal with sensitive, confidential, and proprietary information. As the legal field has shifted along with the rest of the world from paper to digital files, the means, motive, and opportunity for "cybercriminals" to perpetrate attacks on law firms has increased. These cyberattacks may aim to extract and sell confidential information, extort money in exchange for non-dissemination of sensitive material, or simply lock down a firm's electronic data and files pending payment of hefty ransoms. Any and all of these attacks can have devasting effects on a law firm's finances, reputation, and clients.

Recognizing and Understanding the Risk

Cybercriminals do not discriminate and can and will target companies large and small. According to the ABA, in 2021, 25 percent of survey respondents reported that their firm had experienced a data breach "at some time."[1] While reported attacks did scale up somewhat with firm size, solo practitioners and small firms were far from exempt, with 17 percent of solo practitioners and respondents from firms with 2 to 9 attorneys reporting a data breach, compared to 46 percent of respondents from firms with 50 to 99 attorneys.[2]

In 2020, Vierra Magen Marcus, an intellectual property firm with Fortune 500 clients, suffered a ransomware attack that resulted in the loss of 1.2 terabytes of stolen data, including patents, being auctioned on the dark web. In February 2021, Boston-based Campbell Conroy & O'Neil—known for its service of Fortune 500 clients—fell victim to a massive ransomware attack that the firm's subsequent press release stated included "certain individuals' names, dates of birth, driver's license numbers / state identification numbers, financial account information, Social Security numbers, passport numbers, payment card information, medical information, health insurance information, biometric data, and/or online account credentials (i.e. usernames and passwords)." In late 2020, this author received a malicious link from another attorney—a solo practitioner—requesting that certain documents be downloaded. The attorney's office would later confirm that it had fallen victim to a cyberattack, and that the link was indeed a malicious one. It had been sent to every single contact in the attorney's email system.

Law firms are especially susceptible to "phishing" or "spoofing" attacks, given the high volume of emails attorneys and staff receive on a daily basis from external sources. Phishing occurs when a malicious actor uses email or text message to trick a recipient into providing personal/sensitive information

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(e.g., login ID, password, date of birth, and/or SSN), generally through mimicking messages and websites of reputable, trusted companies or document services.[3] Phishing can occur in the form of false QR codes that have been placed in malicious emails, or even cut and pasted over physical codes that a user scans with their phone (e.g., at a restaurant with an online menu, accessible by scanning a tabletop code). Like phishing, spoofing typically occurs by way of a malicious actor attempting to impersonate a trusted, authorized source (e.g., a manager, a representative of a vendor, or perhaps even a client) in an attempt to obtain sensitive, personal information in response. Ultimately, every employee is a potential point of failure for a firm's security measures, so it comes as no surprise that as firm size increases, so too does the likelihood of a breach.

Best Practices for Cybersecurity Risk Management and Prevention

Practice leaders and managers should consider how to protect their firms from the inevitable attempts to breach their systems as well as put safety nets in place for the unfortunate scenario in which a malicious actor's attempt is successful. As one author puts it, taking an "It won't happen to me" approach "just won't cut it these days."[4] Rather, active engagement with these newfound electronic threats is not only good business practice but may also be an ethical imperative, stemming from an attorney's ethical duties relating to competence, communication, confidentiality, and supervision.[5]

How can law firms and practitioners get ahead of this issue? For starters, ensure your firm is not among the 17 percent that report having "no [cybersecurity] policies" or the 8 percent that "don't know about security policies."[6] One particularly effective and easily-implemented tool—two-factor authentication, lauded by Microsoft as being 99 percent effective against account compromise attacks[7]—is an excellent place to start. Firms can also ensure that all employees are trained to identify suspicious emails and links. Even if the material appears to be from a trusted source, if it raises suspicion, a phone call to the sender to verify the message's legitimacy can easily dispel any doubts. Robust encryption software, cybersecurity protocols and policies, and reliable antivirus programming are additional tools that firms can use to get ahead of these threats.[8]

While prevention is obviously preferable, cyber liability insurance is also available to mitigate a firm's risk should a breach nevertheless occur. The ABA 2021 Cybersecurity TechReport reported that 42 percent of its survey respondents had such an insurance policy.[9] Some cyber liability insurance policies also include periodic training for employees and staff, with compliance linked to premium incentives. Cyber liability insurance thus may serve dual purposes—not only insuring the company from the potential financial consequences of a breach, but also providing sophisticated resources and incentives to train employees to prevent a breach from occurring in the first place.

Conclusion

As paper-based files become a thing of the past, the sensitive data and financial information that many law firms maintain make them prime targets—one-stop shops—for malicious actors trying to farm sensitive materials or extort money for their own gain. In this fluid situation, with constantly evolving technology and threats, active prevention and response are key. While there is no one-size-fits-all solution to cybersecurity threats, the references provided in this article represent a good set of starting points to consider. Ultimately, case-by-case education and awareness will be key to maximizing the efficacy of each firm's protections of its clients' sensitive data.

Endnotes

1. David G. Ries, *2021 Cybersecurity,* Am. Bar Ass'n, https://www.americanbar.org/groups/law_practice/publications/techreport/2021/cybersecurity/ (last visited Feb. 21, 2022).
2. *Id.* As many large firm respondents reported being unaware of whether their firm had ever experienced a breach, the occurrence of data breaches at larger firms may be underrepresented by these statistics. *Id.*
3. Fed. Trade Comm'n, How to Recognize and Avoid Phishing Scams, https://www.consumer.ftc.gov/articles/how-recognize-and-avoid-phishing-scams (last visited Feb. 21, 2022).
4. Dan Bowman, *Law Firm Cybersecurity Starts with You,* Nat'l L. Rev (Apr. 22, 2021), https://www.natlawreview.com/article/law-firm-cybersecurity-starts-you
5. Ries, *supra* note i. The ABA has issued at least three formal ethics opinions touching on attorneys' cybersecurity obligations, including ABA Formal Opinion 477R, "Securing Communication of Protected Client Information" (May 2017), ABA Formal Opinion 483, "Lawyers' Obligations After an Electronic Data Breach or Cyberattack" (October 2018), and ABA Formal Opinion 498, "Virtual Practice" (February 2021). *Id.*
6. *Id.*
7. Melanie Maynes, *One Simple Action You Can Take to Prevent 99.9 Percent of Attacks on Your Accounts,* Microsoft (August 20, 2019), https://www.microsoft.com/security/blog/2019/08/20/one-simple-action-you-can-take-to-prevent-99-9-percent-of-account-attacks/
8. Dr. Nick Oberheiden, *5 Cybersecurity Risks and 3 Obligations for Law Firms,* Nat'l L. Rev (Jul. 8, 2021), https://www.natlawreview.com/article/5-cybersecurity-risks-and-3-obligations-law-firms
9. Ries, *supra* note i.

Mediating Employment Cases: The Critical Elements for Success

Richard Vangelisti
Vangelisti Mediation

Employment mediations present unique challenges to resolution. Unlike a routine personal injury matter, an employment case involves adverse parties who are or were in a relationship by virtue of the employment. The factual disputes are often complex, and emotions can run high on both sides. However, in my experience mediating employment cases, employment practitioners can and do overcome these challenges to successfully mediate their case when they: (1) understand the interests of the parties; (2) schedule the mediation to balance information and costs; (3) craft a thorough but flexible case evaluation that accounts for both tangible and intangible costs; (4) determine who should (and should not) participate; (5) exchange essential information; and (6) skillfully manage emotions. These critical elements for success are discussed in further detail below.


RICHARD VANGELISTI

1) Understand the Interests of the Parties

The plaintiff and defendant share some mutual interests in the mediation process. Both sides want to efficiently put the dispute behind them, find out what the other side's best offer is, and learn some new information to help make a settlement decision. Thereafter, the interests diverge. Plaintiffs often want to be heard, demand accountability, and obtain compensation. Defendants may want to seek validation of their actions from a court or jury, avoid risk of liability, save fees and costs, and establish a reputation for appropriate handling of claims. If the plaintiff's claims are covered by insurance, the focus may vary. For example, the insurer may have a lower or higher tolerance for risk and the costs of litigation.

2) Schedule the Mediation to Balance Information and Costs

As with trial, mediation may fully resolve the case, so it should be scheduled for a time when both parties are adequately prepared to do so, bearing in mind the ever-present tradeoff between gathering additional information and avoiding further costs. While informal resolution is intended to avoid costs, the success of the negotiation will depend on whether each party's expectations are appropriately formulated by information.

However, counsel should be mindful of where they schedule the mediation session along the information-gathering continuum to ensure they will be able to obtain key information necessary to evaluate the case and remove potential barriers to settlement. A typical employment case may proceed from request for personnel file to demand letter, internal investigation, BOLI proceeding, filing of lawsuit, discovery, dispositive motions, and finally to trial. Counsel should confer on what point in time would provide each party sufficient information to mediate.

3) Craft a Thorough but Flexible Case Evaluation that Accounts for Both Tangible and Intangible Costs

Once sufficient information is available, counsel must evaluate the case. A solid case evaluation should analyze the probability of success of each party's claims/defenses, with adjustment for advocacy biases and the client's unique interests and risk tolerance.[1] It should also estimate the likely tangible and intangible costs of proceeding with the litigation. The case evaluation should be sufficiently qualified to prepare the client to adjust expectations at mediation and make a sound settlement decision even when "surprise" information is revealed for the first time at mediation.

The evaluation should also balance the likelihood of success with the anticipated costs of litigation, both tangible and intangible. Counsel in employment cases readily estimate the tangible costs of attorney's fees and other expenses of litigation, trial and appeal, but often struggle to account for the real but intangible costs to their client of continuing litigation.

For the plaintiff/former-employee, common intangible costs are personal stress and distraction from goals. For the defendant/employer, intangible costs may include disruption to business and relationships with suppliers or customers; lost business opportunities; deleterious effect on reputation and brand; potential for future lawsuits; and risk of

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government investigations or regulatory action. Though these intangible costs can be difficult to quantify, some acceptable methods to calculate exist: (a) management/employee time multiplied by an hourly rate; (b) percentage of overhead; (c) what the business would pay to avoid the intangible costs; (d) cost to repair reputation/brand; and (e) lost business.

4) Determine Who Should—and Should Not—Participate

Counsel should ensure that helpful persons attend the mediation and unhelpful persons do not. This may seem obvious, but it especially holds true in employment mediations. As discussed below, emotions can run high on both sides. On the plaintiff's side, a termination may have affected a spouse, and they may have a heavy hand in any settlement decision. On the defense side, the employer's representative at the mediation (e.g., the human resources manager) may have been directly involved in the employment decisions. Having this person with direct knowledge of the facts at the mediation can be helpful. But a participant who is in the "hot seat" defending their own employment decisions may be too personally or emotionally involved to make sound settlement decisions.

5) Exchange Essential Information

Information is essential to any negotiated resolution. A lawyer should ask: "Have I given the other side the information it needs to set its authority and accept my offer?" In an employment case, the defendant will more accurately set its authority if it has a damages calculation supported by documents, along with information on mitigation and subsequent employment history.

Each side's damages calculation is affected by the probabilities of success on the merits. Counsel's judgment as to these probabilities is informed by the informal and formal discovery. One side may have some "game changer" information, but the opposing party cannot appreciate the risk of the information if they are unaware of it.

Because employment cases can be very fact dependent, it can be helpful for counsel to exchange mediation statements. These "exchange statements" may be modified from the confidential mediation statements provided only to the mediator if needed.

6) Skillfully Manage Emotions

Employment mediations can be highly emotional on both sides. The plaintiff's identity may have been closely associated with their work and employer, particularly if they were a long-term employee with positive performance reviews. Likewise, the employer may feel betrayed by the plaintiff and offended by their allegations of illegal acts, especially in the context of a small or family-operated business, or if the employer coached the former employee for an extended period before termination.

If each side to an employment dispute is not heard, understood, and acknowledged, emotions may pose an obstacle to settlement. The mediator plays a key role in managing the emotional component of a mediation. Counsel, however, can take steps to account for the emotional undercurrents as well.

First, prepare your client for the inevitable ups-and-downs of the mediation process itself. Remind them that if the case settles, *both* sides will have compromised after having learned new information. Second, ensure that your client has been heard and allowed to vent, even if it is just to the mediator, and given the opportunity to respond to the allegations or new information. Third, ensure that communications are respectful.

Finally, a person's emotions can be defused if, after being heard, they are acknowledged in some sincere way. Some lawyers are masterful at acknowledging the opposing side and clearing the way for a settlement, even while communicating disagreement on the issues and intent to litigate if the case does not settle. An effective acknowledgment can take many forms, including an expression of appreciation for negotiating in good faith, a sincere effort to understand the other party's perspective, or even, if appropriate, conceding some issues for purposes of mediation.

Conclusion

An employment practitioner can increase their odds of successfully navigating the challenges of mediating employment cases by attending in advance to these critical elements of success. I have also found that the lawyers who have professional relationships with one another generally achieve better results for their respective clients. In those cases, the mediation process is more efficient and likely to succeed, and ultimately the clients are more satisfied with their lawyer and the result. With careful planning, practice, and professional skill, mediation can be a powerful and effective tool for resolving even the most difficult and complex employment cases.

Endnote

1. For more information on adjusting for advocacy biases, see Richard Vangelisti, *Advocacy Biases in Case Evaluation,* The Verdict™ (OADC), 2019 Issue 4, at 6-7.

Oregon's Step Towards Bridging the Gap: Accessing Justice Through Paraprofessionals

Ashley L. Brown
Garrett Hemann Robertson

Imagine being served with a subpoena in a contested family matter and having no idea how to respond. Or imagine facing eviction from the only home you've ever known and having no idea how to fight the process. This is the sad reality of the four out of five Oregonians involved in family law or landlord-tenant law cases without the assistance of an attorney.[1] In order to serve these underrepresented Oregonians, the Oregon State Bar is taking steps to implement a Legal Paraprofessional Licensing Program that would allow licensed nonlawyers to provide limited legal services to underserved communities.

The concept of a legal paraprofessional is not new. In fact, several states either have adopted a legal paraprofessional program or are in the process of studying or developing a licensing program.[2] Individuals licensed through these programs may be referred to as a Licensed Legal Paraprofessional (LLP) or Licensed Paralegal (LP).

In 2019, the Oregon State Bar Board of Governors unanimously voted to form a committee to establish a licensing program that would allow non-lawyer paralegals to provide a limited scope of legal services to members of the community. The Paraprofessional Licensing Implementation Committee ("the Committee") is comprised of two judges, two paralegals, two attorneys in the area of family law, two attorneys in the area of landlord-tenant law, a representative of the New Lawyers Division, and a Public Member. Since its formation in 2020, the Committee has met regularly to formulate its recommendations for developing a regulatory framework for licensing paralegals in order to increase access to the justice system.

On November 20, 2021, the Committee provided its Licensing Recommendations to the OSB Board of Governors. This article summarizes the Committee's Licensing Recommendations and what is yet to come as the program continues its development.[3]

What Are the Licensing Requirements?
Four potential licensing pathways have been submitted for consideration:

Standard Education Application: Applicants must have an associate degree or higher in paralegal studies from an accredited paralegal program, and 1,500 hours of substantive experience.

Highly Experienced Paralegal: Current paralegals may obtain an education waiver if they can demonstrate either five years or 7,500 hours of substantive experience, with at least 1,500 hours of substantive experience in the last three years. Of those 1,500 hours, 500 hours are required in family law or 250 hours in landlord-tenant law in order to be licensed in those practice areas. An attorney will be required to attest to the applicant's completion of those hours. Completion of 20 hours of predetermined CLEs will also be required.

J.D. Waiver: Applicants with a J.D. can obtain licensing if they can show 750 hours of substantive paralegal work. J.D. applicants will not be required to complete 500 hours in family law or 250 hours in landlord-tenant law to receive certification in those practice areas.

Other Education: Applicants who have received a bachelor's degree or higher in any subject, or who have an associate degree in any subject and a paralegal certificate, can also receive licensing. Candidates who fall under this criterion will be required to complete 1,500 hours of substantive experience and 20 hours of CLEs.

The Licensing Recommendations recognize that existing rules regulating attorneys will need to be revised to include Licensed Paralegals. This includes but is not limited to the Oregon Rules of Professional Conduct, the OSB Rules of Procedure, and the OSB Bylaws. Additionally, landlord-tenant and family law statutes will need to be revised to include Licensed Paralegal representation.

Regardless of their certification path, each Licensed Paralegal will be subject to the same Rules of Professional Conduct and regulatory requirements as practicing attorneys, including IOLTA certification, mandatory CLE requirements, and malpractice insurance through the PLF.

What Practice Areas Are Included?
The Committee's proposed program would allow Licensed Paralegals to aid clients in a variety of family law and

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landlord-tenant law matters, including marriage dissolution, custody and parenting time, child support and spousal support, Oregon Residential Landlord/Tenant Act (ORS Chapter 90) cases, and forcible eviction and detainer proceedings.

Upon completing the licensing requirements, Licensed Paralegals will be able to meet with potential clients and enter into a contractual relationship; assist clients with drafting and/or completing pattern forms, pleadings, and documents, including orders and judgments; file documents and pleadings with the court; complete discovery and issue subpoenas; attend depositions (but not take or defend them); participate and assist with hearing and trial preparation; attend court appearances to provide permitted support and assistance in procedural matters; prepare for, participate in, and represent a party in settlement discussions; and assist with hearing, trial, and arbitration preparations.

The Committee also recommends that certain actions be excluded from a Licensed Paralegal's licensure, such as representing clients in appeals, stalking protective orders, juvenile cases, Family Abuse Prevention Act cases, and Elderly Persons and Persons with Disabilities Abuse Prevention Act cases.

What Are the Professional Liability Implications?

Under the current recommendations, Licensed Paralegals will be required to carry malpractice insurance through the PLF. Requiring Licensed Paralegals to adhere to the same insurance requirements of licensed attorneys appears to be a consistent approach by states who have adopted LP/LLP programs. For example, Arizona does not require its LP/LLPs to carry malpractice insurance, but they must adhere to Arizona's insurance disclosure rules, much like licensed attorneys.[4] LP/LLPs licensed in California are required to have a $100,000 surety bond.[5] Colorado is still in its drafting phase,

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but early developments indicate that, while attorneys are not required to carry malpractice insurance, it may be required for LP/LLPs.[6]

Have Any Concerns Been Raised?

Some opponents of the program contend that Licensed Paralegals will not be qualified to adequately represent clients' interests. Those in favor of the program counter that Licensed Paralegals can provide adequate representation in these limited categories of cases and that for many clients, the alternative to Licensed Paralegal representation would be self-representation, because of the client's inability to afford or otherwise retain an attorney. There is limited to no data from states that have already implemented LP/LLP programs as to claims or complaints filed against LP/LLPs alleging professional negligence.[7] While there remains a debate among some practitioners about whether Licensed Paralegals should be able to practice law in a limited context, the impact of the program with respect to professional liability has yet to be seen.

What Are the Next Steps?

The Paraprofessional Licensing Implementation Committee's Licensing Recommendations are a significant step towards providing affordable and accessible legal services to underserved members of the community. The Committee is also in the process of drafting revisions to the OSB Rules of Procedure[8] that would apply to licensed paralegals, as well as Rules of Professional Conduct for Licensed Paralegals.[9] The Committee is soliciting and accepting public comment on the proposed Licensing Recommendations. A summary of the comments received so far can be found at the Committee's website.[10] The public comments will be considered at the Board of Governors' meeting in February where individuals will also have the opportunity to provide testimony on the current proposal and anticipated regulatory structure. The proposal will likely go to the Oregon Supreme Court for consideration later this spring.

States that have implemented LP/LLP programs are seeing benefits to the communities they serve. As of March 2021, Utah had 19 licensed LLPs providing family law, landlord-tenant, and debt collection legal services. On November 29, 2021, the Arizona Supreme Court approved 10 applicants for licensure to provide family law, limited jurisdiction civil, limited jurisdiction criminal, and administrative law legal services.[11] As of December 2021, 13 legal paraprofessionals had been accepted to the Minnesota Legal Paraprofessional Pilot Project and were collectively representing clients in 17 cases (75 percent of which were family law cases; the remainder were housing cases).

Conclusion

This article is not intended to comprehensively address all aspects of Oregon's Legal Paraprofessional Licensing Program. For more information and updates on recent developments since this article was written, please visit paraprofessional.osbar.org.

Endnote

1. *See* Paraprofessional Licensing Implementation Committee Licensing Recommendations, at page 2, n 4, *available at* https://paraprofessional.osbar.org/files/2021_PPLIC_BOGReport.pdf. *See also* Janey Haas, *Examining the Pro Se Justice Gap,* Oregon State Bar Bulletin (July 2021); Elizabeth Castillo, *Oregon Proposal Considers Licensing Paralegals to Provide Some Legal Services,* Oregon Public Broadcasting (Jan. 4, 2022), *available at* https://www.opb.org/article/2022/01/04/oregon-proposal-considers-licensing-paralegals-to-provide-some-legal-services-2/.
2. This includes 18 states: Arizona, California, Colorado, Florida, Hawaii, Illinois, Minnesota, Montana, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington.
3. A complete copy of the Licensing Recommendations, including comprehensive lists of the types of legal actions that Licensed Paralegals should and should not be allowed to perform, can be found at https://paraprofessional.osbar.org/files/2021_PPLIC_BOGReport.pdf.
4. Arizona Code of Judicial Administration § 7-210(J)(4), *available at* https://www.azcourts.gov/Portals/0/admcode/pdfcurrentcode/7-210%20New%2001-2021.pdf?ver=2020-11-05-165322-110.
5. *See* The State Bar of California, *Frequently Asked Questions: California Paraprofessional Program,* https://www.calbar.ca.gov/paraprofessionals-FAQ.
6. Currently Colorado has no requirement that attorneys have malpractice insurance coverage, though the subcommittee recommends that LLPs be required to have malpractice insurance if attorneys are required to have malpractice insurance. See Colorado Paraprofessionals and Legal Services (PALS) Subcommittee, *Preliminary Report Outlining Proposed Components of Program for Licensed Legal Paraprofessionals* (May 2021), *available at* https://coloradosupremecourt.com/PDF/AboutUs/PALS/PALSprelimrept%20Final%20as%20amended%20by%20Advisory%20Comm%205-21-21.pdf.
7. Minnesota's complaint process can be found at https://mncourts.gov/Help-Topics/Legal-Paraprofessionals-Pilot-Project.aspx. As of December 2021, no complaints had been filed against any of the LP/LLPs in the Pilot Program.
8. Proposed Changes to OSB Rules of Procedure, *available at* https://paraprofessional.osbar.org/files/BR-mark-up.pdf.
9. Proposed Changes to Oregon Rules of Professional Conduct for Licensed Paralegals, *available at* https://paraprofessional.osbar.org/files/ORPC-mark-up.pdf.
10. Summary of Public Input on Paralegal Licensure Proposal, https://paraprofessional.osbar.org/files/Summary-of-LP-web-comments-121621.pdf.
11. See *Arizona Supreme Court News Release, Arizona Supreme Court Leads Nation in Tackling Access to Justice Gap with New Tier of Legal Services Providers* (Dec. 9, 2021), available at https://www.azcourts.gov/Portals/0/LP%20Program/LP%20Exam%20Statistics/120921LSP(1).pdf?ver=AvYF-pVBnErq6DlwxzZlFmQ%3d%3d.

Recent Case Notes

Sara Kobak, Schwabe Williamson & Wyatt
Case Notes Editor

Civil Procedure

Oregon Courts Lack Authority to Dismiss Claims as a Sanction for Pre-Litigation Destruction of Evidence

In *Markstrom v. Guard Publishing Company,* 315 Or App 309, 501 P3d 71 (Oct. 27, 2021), the Oregon Court of Appeals held that the trial court lacked authority to dismiss plaintiff's claims as a sanction for her pre-litigation conduct.

Plaintiff worked as a reporter for defendant, a newspaper. During her employment, plaintiff became pregnant and requested to use family leave intermittently during her pregnancy. On the same day that plaintiff made the request, she was given a written reprimand related to her work performance. Plaintiff ultimately was placed on a performance-improvement plan a few months later. The following month, plaintiff began her family leave. Defendant instructed that plaintiff not work or access her work email during her leave. Defendant subsequently learned that, in violation of the express instruction, plaintiff was accessing and deleting her work email during her leave. After plaintiff declined a severance package to quit voluntarily for her misconduct, defendant terminated plaintiff while she was still on leave. Plaintiff then brought this action alleging gender discrimination, ORS 659A.030(1)(a) and (b), and violation of Oregon's family-leave law, ORS 659A.150 to 659A.186.

During discovery, defendant discovered that plaintiff had not only accessed her work email during her family leave, but also had forwarded and deleted around 400 emails and had deleted text messages with her union representatives. Once the case had been tried to a jury, but before the jury returned a verdict, the trial court determined that the only appropriate sanction for plaintiff's destruction of evidence was dismissal of her claims. As authority for the sanction of dismissal, the trial court cited ORCP 46 D, as well as relied on its authority under ORS 1.010 to "provide for the orderly conduct of proceedings."

Plaintiff appealed. The Court of Appeals reversed and remanded, holding that the trial court had failed to "properly support its exercise of discretion." *Markstrom v. Guard Publishing Company,* 294 Or App 338, 344, 431 P3d 443, rev den, 364 Or 849, 442 P3d 1120 (2019).

On remand, the trial court dismissed plaintiff's claims again, explaining that it had the authority to punish pre-litigation conduct under ORS 1.010 and ORCP 46 D. Plaintiff again appealed, arguing that the trial court had exceeded its authority and abused its discretion.

The Court of Appeals—for a second time—reversed and remanded. First, the court held that under the recent decision of *Laack v. Botello,* 314 Or App 268, 498 P3d 830 (2021), a court must have statutory authority to strike pleadings or claims as a sanction; a court had does not inherently possess such authority. Second, the Court of Appeals held that the trial court also lacked authority under ORCP 46 D to dismiss plaintiff's claims. It explained that ORCP 46 D authorizes sanctions in only two circumstances: "when a party (1) fails to appear for a deposition or (2) fails to 'comply with a request for production submitted under ORCP 43 after proper service of the request.'" Because neither ORCP 46 D, nor any statute, explicitly authorized dismissal as a sanction for plaintiff's conduct in this case, the Court of Appeals held that the trial court lacked authority to dismiss the claims, and it reversed and remanded.

■ ***Submitted by Jacqueline Houser***
Lewis Brisbois

Oregon Court of Appeals Affirms Dismissal for Lack of Personal Jurisdiction Where Claims Were Not Closely Related to the Defendant's Activities in Oregon

In *Cox v. HP Inc.,* 317 Or App 27, — P3d — (Jan. 12, 2022) ("Cox II"), the Oregon Court of Appeals affirmed the dismissal of an out-of-state defendant, concluding that the relationship between plaintiff's claims and defendant's activities in Oregon were insufficient to support exercising specific personal jurisdiction.

Plaintiff alleged severe injuries when a hydrogen generator exploded at HP's Corvallis campus. Plaintiff brought products liability and negligence claims against, among other entities, Spirax. Spirax is a Delaware corporation with its principal place of business in South Carolina. As relevant here, Spirax manufactures drain traps, which are used to control the use of fluids in hydrogen

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generators. It sold the drain traps at issue to a company named Proton Energy, which incorporated the traps into its hydrogen generators at its Connecticut facility. HP purchased the generators from Proton.

After the action was filed, Spirax moved to dismiss for a lack of personal jurisdiction. In support, Spirax demonstrated that drain traps accounted for a tiny fraction of its entire sales in the United States from 2016-2018; it sold only two drain traps in Oregon during that period; and its total sales in Oregon during this time accounted for less than one percent of its total sales in the United States. Spirax acknowledged that it had "purposefully availed itself of the privilege of doing business in Oregon"; it argued, however, that the trial court lacked specific personal jurisdiction over it because plaintiff's claims were unrelated to its Oregon activities.

Relying, in part, on *Cox I,* the Court of Appeals agreed with Spirax. The court summarized the requirements for personal jurisdiction under the United States Constitution's Due Process Clause. Under those requirements, a defendant must have a minimum relationship with the forum state. A plaintiff's claims also must arise out of, or relate to, the defendant's activities in the forum state to such an extent that the defendant purposefully avails itself of the state's jurisdiction.

After a fact-intensive inquiry, the Court of Appeals concluded that plaintiff's claims were unrelated to Spirax's contacts with Oregon. First, there was little evidence that Spirax marketed its drain traps to Oregon customers, in particular. Second, Spirax did not systematically market itself or sell its products to cultivate a reputation as a reliable drain trap manufacturer in Oregon. Third, there was no evidence that Spirax benefitted from the protection of Oregon laws related to the claims at issue because Proton was not an Oregon business.

Finally, the Court of Appeals concluded that personal jurisdiction was also inappropriate under a "stream-of-commerce" theory. It emphasized that only two of its products ended up in Oregon between 2016 and 2018, and Spirax did nothing more to specifically direct its business toward Oregon. The plaintiff has petitioned for review to the Oregon Supreme Court.

■ ***Submitted by Will Gunnels***
Bullivant Houser Bailey

The Oregon Court of Appeals Holds that Trial Court Abused Its Discretion in Denying a Motion to Amend an Answer to Remove an Inconsistent Admission

In *RLF Liquidating, LLC v. McDonald Brothers, Inc.,* 318 Or App 321, - P3d - (March 16, 2022), the Oregon Court of Appeals held that the trial court abused its discretion in denying defendants' motion to amend their answer to remove an inconsistent admission about a tolling agreement.

Defendants hired plaintiff, a law firm, to represent them on certain financial transactions. Defendants paid plaintiff for some, but not all, of the invoiced amounts for plaintiff's legal services. In March 2012, defendants and plaintiff signed an agreement to toll the statute of limitations for plaintiff's claim against defendants for the unpaid amounts. The agreement provided that the statute of limitations would be tolled until one party provided written notice to the other party to terminate the agreement. In 2013, plaintiff subsequently sent a written demand for payment to defendants, threatening that plaintiff might take immediate judicial action to collect the owed amount. Shortly after plaintiff's written demand for immediate payment, defendants filed bankruptcy. Plaintiff filed a claim in defendants' bankruptcy proceeding, but the bankruptcy case ultimately was dismissed before plaintiff's claim was resolved.

In 2018, roughly five years after its written demand for immediate payment, plaintiff filed a collection action against defendants to recover the unpaid legal fees. In their answer, defendants asserted a statute of limitations defense. Defendants, however, also admitted to the allegations in the complaint asserting that a tolling agreement was in effect. Plaintiff moved for summary judgment on the statute of limitations defense, arguing that the defense failed as a matter of law in view of defendants' admission to the validity of the tolling agreement. Defendants responded by moving to amend their answer to remove their admission that the tolling agreement was still in effect, explaining that their admission was made in error. The trial court denied defendants' motion to amend. At trial, after finding that defendants' admission was "conclusive" as to the validity of the tolling agreement, the trial court subsequently entered judgment against defendants.

On appeal, the Oregon Court of Appeals reversed. Applying the factors from *Ramsey v. Thompson,* 162 Or App 139, 986 P2d 54 (1999), on amendments of pleadings, the court first noted that defendants' proposed amendment sought to remove an erroneous general admission that was in conflict with a specific alleged affirmative defense. The court also found that the proposed amendment was not prejudicial to plaintiff because plaintiff was aware from the outset that defendants challenged the timeliness of plaintiff's collection action.

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Although defendants could have filed the motion to amend sooner, the court also found that timing considerations did not support denial of the motion because the motion was filed six weeks before trial and promptly after plaintiff filed its summary judgment motion. Finally, as to the colorable merit of the proposed amendment, the court found that the amendment would have removed an inconsistency in defendants' answer and clarified a significant legal issue in the action. Based on those considerations, the court held that the trial court abused its discretion in denying the amendment, and it reversed and remanded.

■ ***Submitted by Sara Kobak***
Schwabe, Williamson & Wyatt

Negligence

The Economic-Loss Rule Bars Claim for Negligent Probation Supervision

In *Diamond Heating, Inc. v. Clackamas County,* 316 Or App 579, — P3d — (Dec. 29, 2021), the Oregon Court of Appeals held that the economic-loss rule barred a claim against a county corrections department and a probation officer alleging negligent failure to monitor and enforce compliance of a probation order. Plaintiff was a heating company that employed a financial bookkeeper and manager who embezzled more than $200,000 from the business. During its investigation of the embezzlement, the plaintiff company learned for the first time that the bookkeeper was on probation for prior embezzlement convictions at the time of her hiring. The terms of the embezzling bookkeeper's probation, however, prohibited her from taking job duties that involved handling money without her probation officer's approval, and she also was required to provide "full disclosure" of her criminal history to any employer. After learning of these probation conditions, the plaintiff company claimed that the county corrections department and the probation officer negligently supervised the bookkeeper and failed to enforce the terms and conditions of probation, resulting in a substantial financial loss to the company.

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The county corrections department and probation officer successfully moved to dismiss the action pursuant to ORCP 21 A(8) for failure to state ultimate facts sufficient to constitute a claim. Defendants argued that the economic-loss rule barred the plaintiff company's claim. The economic-loss rule is a limitation on negligence liability, providing that a negligence claim for purely economic loss requires a plaintiff to allege facts sufficient to establish that defendants owed a duty of care to the plaintiff beyond the common-law duty of reasonable care. The parties agreed that the plaintiff company here suffered a purely economic loss. The sole issue was whether defendants owed some special duty of care to the plaintiff company. Unless the plaintiff company could show such a duty, the economic-loss rule barred the claim.

In seeking to avoid dismissal, the plaintiff company argued that the probation order gave rise to a special duty from defendants to the plaintiff company to monitor the embezzling employee's compliance with the terms of her probation. The Court of Appeals disagreed, noting that the probation restrictions were directed to the embezzling employee and did not specifically compel defendants to act for the benefit of anyone. Further, the court declined to infer that the probation order was intended to protect businesses such as the plaintiff company. Because there was no special duty from defendants to the plaintiff company, the negligence claim was barred by the economic-loss rule. In so holding, the court emphasized the idea that the economic-loss rule was an important limitation against "potentially broad liability" and "unbounded litigation" and that deciding the case differently would increase the burdens of probation supervision beyond sustainable limits.

A dissent from Judge Bronson James opined that the conversion of monies by an embezzler should not be considered a purely economic loss subject to the economic-loss rule. Judge James further argued that the majority's concern regarding unbounded litigation and broad liability were misplaced given the specific facts of the case.

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

Attorney Fees

ORCP 68's Pleading Requirements Apply to Claims for Attorney Fees under ORS 20.105

In *Albrecht v. Emmert,* 317 Or App 42, — P3d — (Jan. 12, 2022), the Oregon Court of Appeals confirmed that the pleading and timing requirements for attorney-fee claims under ORCP 68 apply to claims seeking attorney fees for frivolous claims under ORS 20.105.

ORS 20.105 provides that a court shall award attorney fees to a prevailing party if the opposing party asserts a claim or defense with no objectively reasonable basis for its position. In this case, plaintiffs prevailed in a series of local administrative proceedings and then brought an action in the trial court for declaratory and injective relief related to zoning regulations and restrictions on non-conforming uses. Plaintiffs did not raise an entitlement to attorney fees under ORS 21.105 in their complaint or reply. Plaintiffs ultimately prevailed on their claims and obtained a judgment in the trial court. Subsequently, 56 days after entry of the judgment, plaintiffs filed a motion for attorney fees under ORS 20.105, alleging that defendants had no objectively reasonable basis to have denied plaintiffs' claims. The trial court denied plaintiffs' motion for failing to comply with ORCP 68, which generally requires that a party must assert an attorney-fee claim in its pleadings and file a detailed statement of the amount of attorney fees not later than 14 days after entry of judgment. ORCP 68 C(2)(b) also requires that if a party does not file a pleading asserting a claim for attorney fees, it can do so in a motion or in response to a motion. Plaintiffs here failed to assert a claim for attorney fees in any pleading or motion filed with the trial court prior to the judgment. The court also noted that plaintiffs did not submit any statement of time, services, or fees reasonably incurred.

Plaintiffs contended that because they sought attorney fees pursuant to ORS 20.015, they did not have to comply with the general requirements of ORCP 68. In taking that position, plaintiffs argued that attorney fees under ORS 20.015 should be treated as sanctions for misconduct and as attorney fees granted by orders, which are treated somewhat uniquely under ORCP 68 C(1)(b). That subsection provides that attorney fees granted by order do not need to comply with the general requirements of ORCP 68. The Court of Appeals disagreed and held that the trial court correctly denied plaintiffs' attorney-fee claim under ORS 20.015 for failing to comply with the requirements of ORCP 68.

■ ***Submitted by Ellen M. Rall***
Hart Wagner

Workers' Compensation

Oregon Court of Appeals Clarifies that ORS 656.019 Does Not Provide a Substantive Exception to the Exclusive-Remedy Provision of the Workers' Compensation Scheme

In *Bundy v. NuStar GP LLC,* 317 Or App 193, - P3d - (Jan. 26, 2022), the Oregon Court of Appeals held that ORS 656.019 does not provide a substantive exception to the exclusive-

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remedy provision of Oregon's workers' compensation scheme.

In this case, plaintiff was granted a workers' compensation claim after being exposed to dangerous levels of diesel, gasoline, and ethanol fumes while employed by defendant as a terminal operator. Later, when plaintiff sought further compensation for additional conditions arising out of the same incident, defendant denied the request, claiming that "plaintiff's work exposure was not the major contributing cause of the subsequent conditions." Because plaintiff was unable to prove otherwise, the Workers' Compensation Board agreed with defendant.

Plaintiff then filed a civil action, arguing that his claim fell within an exception to the immunity from civil actions ordinarily afforded to employers by the "exclusive remedy provision" of Oregon's workers' compensation statutory scheme, ORS 656.018. But the trial court was unpersuaded. After an unsuccessful appeal, plaintiff sought and was granted review by the Oregon Supreme Court, which eventually remanded the case in part for the trial court to determine whether the legislature intended for ORS 656.019 to act as a substantive exception to the exclusive-remedy provision. On remand, the trial court undertook the appropriate statutory construction analysis and concluded that it did not.

The Oregon Court of Appeals affirmed. In doing so, the Court of Appeals underwent its own statutory construction analysis and concluded that the plain text of ORS 656.019 and the context in which the statute was enacted both indicate that the legislature intended the statute to serve only as a procedural limitation on claims authorized elsewhere—not as its own substantive exception to ORS 656.018. After citing several examples of the procedural nature within the statute's text, the court ultimately noted that the "strongest indication" that ORS 656.019 was intended only as a procedural limitation was the language of subsection (1)(b), which reads that "[n]othing in this subsection grants a right for a person to pursue a civil negligence action that does not otherwise exist in law." Based on its holding, the Court of Appeals affirmed.

■ ***Submitted by Malcolm S. MacWilliamson***
Schwabe, Williamson & Wyatt

Public Accommodations

The Oregon Court of Appeals Upholds Ruling that the Free Exercise Clause Does Not Allow Discrimination on the Basis of Sexual Orientation by Places of Public Accommodation

In *Klein v. Oregon Bureau of Labor and Industries,* 317 Or App 138, - P3d - (Jan. 26, 2022), the Oregon Court of Appeals considered whether its previous rulings regarding defendant's liability for discrimination under ORS 659A.403 comport with the Free Exercise Clause of the First Amendment in view of recent Supreme Court decisions. Ultimately, the court reaffirmed its holdings as to defendant's liability for discrimination, but it reversed and remanded for further fact-finding proceedings regarding the damages award issued against defendant.

In this case, plaintiffs initially filed complaints with the Oregon Bureau of Labor and Industries (BOLI) against defendant, alleging that he discriminated on the basis of sexual orientation when he refused to provide a wedding cake to plaintiffs, a same-sex couple, on the basis of his religious beliefs. After a contested hearing, the Administrative Law Judge (ALJ) determined that defendant had violated ORS 659A.403, an anti-discrimination statute which prohibits places of public accommodation from discriminating on the basis of sexual orientation. The ALJ also determined that the Free Exercise Clause did not protect defendant from liability. The ALJ then awarded damages against defendant.

Defendant appealed. After the Oregon Court of Appeals upheld BOLI's determinations and the Oregon Supreme Court denied review, defendant petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court ultimately vacated and remanded the Court of Appeals' decision for reconsideration in light of its ruling in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 584 U.S. - , 138 S Ct 1719, 201 L Ed 2d 35 (2018). On remand, defendant argued that another recent Supreme Court case, *Fulton v. Philadelphia,* - U.S. - , 141 S Ct 1868, 210 L Ed 2d 137 (2021), also required reconsideration of the previous analysis.

On remand, the Court of Appeals affirmed in part and reversed in part, addressing *Fulton* and then *Masterpiece Cakeshop* in turn. The court first disagreed with defendant's argument that, under *Fulton,* ORS 659A.403 is not a "generally applicable" law for purposes of a Free Exercise Clause analysis. The court first wrote that "under *Fulton,* to be 'generally applicable,' a law cannot

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RECENT CASE NOTES
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have carved-out individual exceptions." It then reasoned that because ORS 659A.403 does not allow for individual exceptions, *Fulton* did not alter the court's previous conclusion that ORS 659A.403 is a "generally applicable" law that, when applied to defendant, did not violate defendant's rights under the Free Exercise Clause.

The Court of Appeals then addressed the effect of *Masterpiece Cakeshop,* focusing on the principle of state neutrality toward religion set forth in the case. The court noted that only one instance of non-neutrality arose in the underlying proceedings, during the damages portion. Because the underlying fact-finding process undertaken to determine the defendant's liability was conducted with the requisite neutrality, the court affirmed its findings that the defendant had violated ORS 659A.403 and was not protected by the Free Exercise Clause. In contrast, because the damages portion of the proceedings did not comport with the First Amendment's principle of neutrality, the court reversed the damages and remanded for further proceedings related to the remedy.

■ ***Submitted by Malcolm S. MacWilliamson***
Schwabe, Williamson & Wyatt

Damages

Oregon Court of Appeals Allows NIED Claim to Proceed Without Allegations of Physical Impact

In *I.K. v. Banana Republic, LLC,* 317 Or App 249, — P3d — (Jan. 26, 2022), the Oregon Court of Appeals reversed a trial court ruling dismissing a claim for negligent infliction of emotional distress for failure to state a claim. The case turned on whether plaintiffs were required to plead that they suffered some kind of "physical impact" in order to recover damages for negligent infliction of emotional distress. The court held that plaintiffs were not required to do so in the circumstances alleged.

The facts begin with a pharmacist named Chan, who was fired when his employer discovered that he had been secretly recording other employees while they were using the pharmacy's restroom. Both the police and the Oregon Board of Pharmacy opened investigations, and, in the meantime, Banana Republic hired Chan to work as a sales associate at one of its stores. Chan, once again, secretly placed a camera in the store's employee restroom and recorded other employees while they were using the restroom.

Plaintiffs were both employees of Banana Republic. Plaintiffs sued the company for negligent hiring and retention, alleging that it should have known that Chan had been fired from his previous job for recording employees while they were using the restroom. They alleged that they suffered mental and emotional pain as a result of Chan's actions. Banana Republic moved to dismiss, arguing that Oregon does not recognize negligent infliction of emotional distress claims without allegations of physical impact. While Banana Republic admitted that the rule requiring such allegations has exceptions, it argued that none applied.

On appeal, the Court of Appeals acknowledged the general rule prohibiting recovery of emotional distress damages absent physical impact. It also explained that the rule's exceptions allow recovery where the defendant violated a "legally protected interest" independent of the plaintiff's interest in being free from negligent conduct. Such a "legally protected interest" is one that has "an independent basis of liability separate from the general duty to avoid foreseeable risk of harm." The interest must be "of sufficient importance as a matter of public policy to merit protection from emotional impact." If a plaintiff establishes an independent legally protected interest, "then, generally speaking, the pain for which recovery is allowed includes virtually any form of conscious suffering, both emotional and physical" that foreseeably resulted from the violation.

Applying those standards, the court concluded that plaintiffs had a legally protected interest in being free from the emotional distress of being secretly video recorded while using a private employee restroom. That interest, the court ruled, allowed their negligent infliction of emotion distress claims to proceed. The court grounded its conclusion in the common-law right to privacy. It also referenced case law arising under the reasonable search-and-seizure guarantee of Article I, Section 9, of the Oregon Constitution, which has repeatedly recognized a right to privacy in the use of restrooms, and various Oregon statutes, which criminalize recording individuals in a state of nudity without their consent. Importantly, the court noted that not all privacy violations will support emotional distress damages. Instead, "the nature and context of the invasion influences the extent to which privacy is legally protected and can be the basis for a successful emotional distress claim."

■ ***Submitted by Chester D. Hill***
Cosgrave Vergeer Kester

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.

***Hickey v. Scott*, S068871, A173320. 310 Or App 825, 492 P3d 123 (2021). Oral argument scheduled for May 3, 2022.**

In this action for forcible entry and detainer (FED), residential tenants argued that they were entitled to dismissal on the ground that the landlord's written notice of termination for nonpayment of rent specified that the amount of rent due was $1,700, but the FED court later found that the amount actually due was a lesser amount. On appeal, the Oregon Court of Appeals held that the termination notice was valid. As interpreted by the Oregon Court of Appeals, ORS 90.394(3) requires a notice of termination to specify the dollar amount that the landlord claims is necessary to cure the nonpayment. If the tenant pays a lesser amount and contests the remaining amount owed, the FED court must determine the amount owed, but the notice of termination remains valid. The Oregon Supreme Court granted the tenants' petition for review. On review, the primary question presented is: "(1) In an FED action, is a termination notice valid if it demands an amount of rent greater than the amount a tenant actually owes?"

***Chaimov v. State of Oregon*, S069038, A169203. 314 Or App 253, 498 P3d 830 (2021). Oral argument scheduled for June 8, 2022.**

In this declaratory judgment action, the Oregon Court of Appeals concluded that Legislative Counsel's services to agencies in the drafting of legislation are legal services to a "client" within the meaning of OEC 503. Based on that conclusion, the Oregon Court of Appeals held that the communication from agencies to Legislative Counsel requesting bill drafts are protected communications exempt from disclosure under the Public Records Law. The Oregon Supreme Court granted review. On review, the question presented is: "Whether Legislative Counsel's drafting of legislative measures that have been proposed by executive agencies creates a privileged attorney-client relationship that covers communications between Legislative Counsel and those agencies?"

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PETITIONS FOR REVIEW
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***Buero v. Amazon.com Services, Inc.*, S069135. Oral argument scheduled for June 8, 2022.**

In this case presenting a certified question from the Ninth Circuit, plaintiff filed a class-action complaint alleging that defendants violated Oregon's wage and hour law by failing to compensate employees for time spent waiting for and passing through mandatory security screenings. The district court granted defendants' motion for judgment on the pleadings, concluding that Oregon wage and hour law incorporates the standard set forth in the Portal-to-Portal Act, 29 U.S.C. § 254. Plaintiff appealed the district court's order, and the Ninth Circuit certified the legal question to Oregon Supreme Court. The certified question asks: "Under Oregon law, is time that employees spend on the employer's premises waiting for and undergoing mandatory security screenings compensable?"

***Walton v. Neskowin Regional Sanitary Authority* - S069004, A168358. 314 Or App 124, 498 P3d 325 (2021). Oral argument scheduled for Sept. 30, 2022.**

In this inverse condemnation action, plaintiffs filed a complaint seeking compensation for the physical occupation of a sewer line on plaintiffs' property. Defendant moved for summary judgment, arguing that plaintiffs' claim was barred by the six-year statute of limitation under ORS 12.080. On appeal, the Oregon Court of Appeals agreed with defendant, holding that an action based on a physical occupation taking must be commenced within six years. On review before the Oregon Supreme Court, the issue is: "Whether a constitutional taking claim based on a physical occupation fully accrues and the statute of limitation begins to run before the government refuses to provide just compensation."

Honorable Michele Rini

Washington County Circuit Court

A BIOGRAPHY

Most judges don't spend their first day on the bench by returning to the same desk they had been using for years. However, that was exactly what Judge Michele Rini did. While her role as a circuit court judge began on October 1, 2021, Judge Rini is no stranger to the Washington County Courthouse. For more than fifteen years she has served as a *pro tem* judge and juvenile referee in Washington County.

In retrospect, Judge Rini attributes her path to a legal career to her early exposure to Perry Mason and appreciation for his ability to perpetually crack the case with a smoking gun or courtroom confession. Her early career provided her with wide exposure to many substantive areas of law and the courtroom work she desired, including public defense, civil, and family law. When a *pro tem* position opened in Washington County, Judge Rini leapt at the opportunity. Judge Rini learned that she enjoyed making decisions based on the evidence before her, even more than she enjoyed advocating for a client's position. As a result, Judge Rini spent almost 15 years hearing juvenile matters, with 10 of those years spent also hearing landlord-tenant, support enforcement, and small claims matters prior to her appointment to the circuit court bench.

Given that Judge Rini has been actively and intimately involved in court operations since the start of COVID-19, I asked her to reflect on her own experience in this context. Judge Rini was working full time in the juvenile department at the start of the pandemic, and due to the need for expeditious relief in matters such as in-custody delinquency cases and dependency shelter hearings, there

HONORABLE MICHELE RINI

was an immediate necessity to adopt new procedures. As a result, the juvenile department embraced the technology that we have all now implemented, with two juvenile courtrooms operating completely remotely by July 2020. Perhaps counterintuitively, this has led to greater hearing participation, particularly in dependency cases, and has resulted in Judge Rini having more timely, direct, and quality information to consider when making decisions related to a child's welfare, up to and including remote dependency trials.

Juvenile law is a distinct practice area. Judge Rini explained that this is due to the fact that juvenile actions involve a confluence of both criminal and civil law and procedure. Accordingly, Judge Rini has encountered numerous civil litigators in her courtroom without the applicable working knowledge of these unique provisions of Oregon law. Therefore, Judge Rini recommends that civil practitioners confronted with a juvenile action seek out a colleague who has specialized experience in juvenile matters before appearing for the first time in juvenile court.

■ ***Joel C. Petersen***
Hodgkinson Street Mepham

Honorable Sean Armstrong

Marion County Circuit Court

A BIOGRAPHY

With terrain as steep and rocky as the desert is dry, chukar partridge—nicknamed the "devil bird"—find home in some of the most unforgiving parts of the western United States. Leaving even the most experienced hunters exhausted and often empty-handed, a day spent toting a shotgun and following a wiry bird dog over uneven terrain is not unfamiliar to a chukar hunter. But in that misery lies opportunity, of testing one's limits and adapting to wind, weather, elevation, and habitat in pursuit of a successful hunt. This is an opportunity embraced by Judge Sean E. Armstrong.

Arduous as hunting the elusive bird is, Judge Armstrong finds that not only does chukar hunting provide a solemn retreat for mind and body, it also serves as a reminder of the "wise counselor" role that good attorneys play in a client's life. At various stages in a case and a career, attorneys are tasked with navigating rocky relationships between opposing parties—and sometimes even opposing counsel. Walking a person through such difficult landscapes with compassion, grace, and respect for the system, Judge Armstrong notes, is part of what makes both the practice of law and being the arbiter of such disputes worth the journey.

After graduating from the College of William and Mary in Williamsburg, Virginia, Judge Armstrong began his legal career by attending the night school program at George Mason University Law School while working as a police officer. He completed his final year of law school at Lewis and Clark Law School where he

HONORABLE SEAN ARMSTRONG

thought the bird hunting might be pretty good. He was right. He met his wife, Chelsea, who now practices family law in Salem, while clerking at the Multnomah County District Attorney's Office, and also practiced insurance defense in Salem. Not long after, his practice shifted to family law and civil litigation at Garrett Hemann Robertson, initially as an associate and then as a shareholder before joining the bench in 2016.

Judge Armstrong's docket includes criminal, civil, and family law matters. He is a frequent CLE presenter on complex family law matters, enjoys hearing a well-reasoned motion for summary judgment on his civil docket, and works hard to ensure his courtroom is an appropriate venue for respectful resolution of legal disputes. But his favorite work is creatively mediating disputes between parties, whether they be civil, criminal, or family matters.

Central to Judge Armstrong's philosophy in practice, his observations from the bench have only galvanized one principle: personal credibility is the lifeblood of a lawyer's practice. That is, whether a lawyer's argument finds its legs in a courtroom or whether counsel choose professionalism over obstruction while working through discovery issues, lawyers live and die by their personal credibility with opposing counsel, with the court, and even with their clients. Indeed, loudly stating a position gains little ground whether in Judge Armstrong's courtroom or on the phone with opposing counsel. Rather, it is when attorneys serve as a trusted resource to the court, when their word to opposing counsel is respected, and when other lawyers can rely on them to do what they say that the profession serves its role.

That quality, Judge Armstrong posits, is what enables attorneys to navigate treacherous terrain wherever encountered—in the courtroom, with opposing counsel, or while counseling a client on a difficult issue. Like getting the devil bird, gaining the upper hand in negotiation or winning on summary judgment is not always guaranteed, but it is also not really the point. Rather, the hard work of developing and maintaining personal integrity and professionalism as a lawyer, though it may also result in a big paycheck or a big win in court, is really its own reward.

■ ***Gilbert A. Cotto-Lazo***
Garrett Hemann Robertson

Legislative Update

Rocky Dallum, Tonkon Torp
OADC Lobbyist

Oregon lawmakers adjourned the 2022 Legislative Session on March 4, after funding a slew of ambitious priorities while nonetheless staying true to the original intended purpose of short sessions: budget adjustments and legislative fixes. In a session that featured a significant budget surplus against a backdrop of equally significant leadership changes, OADC's work was limited to a small handful of policies. Election season is now already heating up, and OADC will turn from advocacy to joining other Oregonians in observing what could shape up to be a historic chapter in Oregon politics.

ROCKY DALLUM

On the budget front, the legislature allocated over $2.5 billion in 2022, an unprecedented amount for a short session. The funding bump was the result of significant increases in government revenues from the budgeted amount finalized in June 2021. This was due to a variety of factors, including both higher-than-expected tax revenues and increased federal COVID-relief funding.

That enormous budget surplus allowed funding for a number of priorities. Over $600 million went to affordable housing and homeless services (whether that money impacts Oregon's current crisis is yet to be seen), and over $200 million will be spent on the governor's workforce development initiative "Future Ready Oregon." The surplus had OADC, other legal organizations, and many legislators optimistic that we could secure an appropriation to continue increasing judicial salaries. OADC submitted testimony supporting SB 1581, a bill introduced at the request of Chief Justice Walters. While signals late in session seemed positive, the bill died, and no appropriation was ultimately made for the increase. OADC will continue to partner with the Oregon Judicial Department, the Oregon State Bar, and others to advocate for adequate compensation for Oregon's bench as well as other access-to-justice issues as we look towards next year's session.

OADC will continue to partner with the Oregon Judicial Department, the Oregon State Bar, and others to advocate for adequate compensation for Oregon's bench as well as other access-to-justice issues as we look towards next year's session.

With the limit on bills during the constitutionally confined 35-day session, OADC had only a handful of other policy bills to track for members, all three relating to employment practice. The most divisive topic of the session was HB 4002, which implements overtime requirements for agricultural workers. Two other employment bills also passed: SB 1586 clarifies and expands the restrictions on Non-Disclosure Agreements, and SB 1515 made several definitional changes to Oregon's paid family and medical leave insurance program.

The session also featured substantial turnover in leadership positions. It began with the swearing-in of new House Speaker Dan Rayfield (D-Corvallis), who replaced Tina Kotek after she resigned in January to focus on her gubernatorial campaign. It has been a tumultuous year in the legislature, with 10 percent of the legislative seats changing since the adjournment of the 2021 session in July. Fortunately, new legislators avoided some of the drama from prior sessions as we saw fewer controversial or highly partisan bills and a significant budget surplus (leaving legislators left fighting over what new programs to fund, as opposed to arguing over budget cuts).

In general, the legislative session functioned largely as designed over a decade ago: the focus remained mostly on budget adjustments (albeit involving a significant adjustment) and technical changes and clarifications to recent legislation.

Over the coming weeks and again in the fall, Oregon state leadership and many Oregonians will shift focus from policy and budget to politics. We will again see significant turnover in the legislature as many incumbents are retiring and redistricting creates several new open seats. And of course, we are all already seeing the build-up of a fascinating governor's race with two well-known Democrats in former Speaker Tina Kotek and State Treasurer Tobias Read, an extensive list of potential Republican candidates, and the ambitious campaign of former Democratic legislator Betsy Johnson, who is now running as a non-affiliated candidate.

Defense Victory!

Will Gunnels, Bullivant Houser Bailey
Interim Defense Victory! Editor

Motion to Dismiss Granted in its Entirety—Dismissing Four Counts of Negligence

On December 22, 2021, Multnomah County Circuit Court Judge Benjamin Souede granted a motion to dismiss in favor of one defendant in *Douglas Brown, et al. v. Caterpillar Inc., et al.*, Case No. 21CV14209. Diane Lenkowsky of Gordon Rees represented defendant Mark Meredith, dba Mark Meredith Construction. Plaintiffs were represented by Randolph Pickett of Pickett Dummigan McCall.

Plaintiffs brought four negligence counts against defendant Mr. Meredith—including negligence based on common law, Employers' Liability Law ("ELL"), and the Oregon Safety Employment Act ("OSEA")—after plaintiff alleged that he was injured while retrieving a trailer from Mr. Meredith's property and attempting to load the trailer alongside a county road adjacent to the property. Defendant filed a motion to dismiss for failure to state a claim, arguing that plaintiffs did not allege any facts to support indirect employer liability under ELL, that indirect employer liability was not available under OSEA, and that plaintiff's injuries were not foreseeable.

The court agreed with Mr. Meredith's arguments and dismissed the ELL and OSEA counts with prejudice. Finding that attempts to amend the common law

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DEFENSE VICTORY!
continued from previous page

negligence claim would not "inevitably be futile," the court dismissed that count without prejudice.

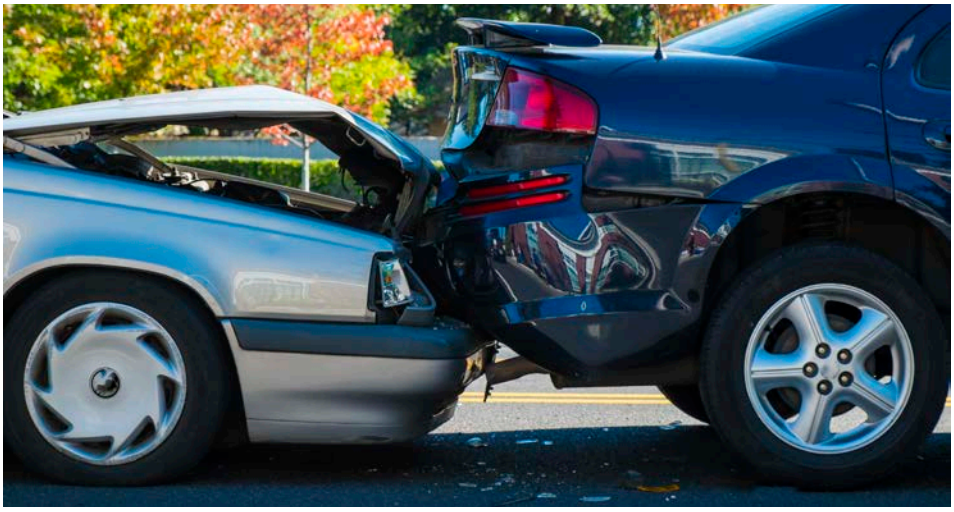
■ ***Diane Lenkowsky***
Gordon Rees Scully Mansukhani

Summary Judgment Granted for Community Development Program

On November 3, 2021, the Coos County Circuit Court granted summary judgment to Defendant Community Living Case Management ("CLCM") as to all claims against it in *Shirley Carter v. Community Living Case Management and Oregon Department of Human Services,* Case No. 20CV44439. Alex Hill of Bullivant Houser represented CLCM and Zachary Green of Tedesco Law Group represented plaintiff, who originally asserted claims for breach of contract, unjust enrichment, injunctive relief, and declaratory relief.

Plaintiff was a care provider for two adults with developmental disabilities. CLCM provides case management services to providers like plaintiff. Plaintiff regularly traveled to Arizona with her clients for extended periods. Although plaintiff's "snowbirding" was authorized in the care plan, the Oregon Administrative Rules provide that services taking place outside of the licensed adult foster home cannot exceed 45 days per plan year for purposes of payment. Plaintiff asserted that she had a perpetual waiver to this "45-Day Rule" and that CLCM unlawfully restricted her services in excess of the 45-Day Rule.

CLCM moved for summary judgment, and the court agreed that CLCM complied with the 45-day Rule and applicable OARs. Accordingly, it entered judgment in CLCM's favor.



■ ***Alex Hill***
Bullivant Houser Bailey

Court of Appeals Affirms a Defense Verdict in a Negligence Case

On December 1, 2021, the Oregon Court of Appeals issued an opinion affirming a defense verdict in the case of *Roberta Haas and Kevin Haas v. The Estate of Mark Steven Carter and State Farm Mutual Automobile Insurance Company,* 316 Or App 75 (2021). Edward Sears represented the Estate of Carter at the trial court level. Ralph Spooner represented State Farm at the trial court level and on appeal. Leslie Kocher-Moar represented the Estate of Carter on appeal.

The litigation related to an automobile collision in which a car driven by defendant Carter rear-ended plaintiffs' car. Both plaintiffs had surgery related to neck and back pain and other symptoms, and they sued Carter in negligence, seeking to recover medical expenses and other damages. Before trial, plaintiffs asked the court to deliver both of the uniform jury instructions related to causation, but the trial court gave only the but-for instruction, and the jury returned a defense verdict.

On appeal, plaintiffs argued that the court erred when it refused to deliver the substantial-factor jury instruction as a supplement to the but-for instruction, advocating for a rule requiring a substantial-factor instruction to be given in all cases in which there is evidence that the plaintiffs had underlying conditions that made them more susceptible to injury. In affirming the defense verdict, the court declined to adopt the rule proposed by plaintiffs and rejected the contention that the trial court had erred by declining to deliver the substantial-factor instruction. Plaintiffs have filed a petition for review to the Oregon Supreme Court.

■ ***Leslie Kocher-Moar***
MacMillan Scholz & Marks

The Word Smith

Julie A. Smith
Cosgrave Vergeer Kester

The Case Against Uppercase

The best part of writing a column about writing is that it gives me a forum for airing my own legal-writing pet peeves.


JULIE A. SMITH

Pet peeve number one: uppercase.

No, The Word Smith does not think legal writing should read like her teenager's text messages. Punctuation and capitalization do have their purpose.

But capitalization can make text harder to read. And we're in the communication business. Readability is the main goal.

Consider these illustrations:

> In its Second Affirmative Defense, Defendant alleges that Plaintiff's First Claim for Relief is barred by the statute of limitations.

vs.

> In its second affirmative defense, defendant alleges that plaintiff's first claim for relief is barred by the statute of limitations.

Is it grammatically appropriate to capitalize the titles of the parties, claims, and defenses? Maybe. But is it necessary? No.

For The Word Smith, at least, the second illustration is much easier to read than

the first. The First One Forces the Reader To Slow Down To Process Each Of the Capitalized Words. (See what I did there?)

The same logic applies to headings, especially the substantive ones. Sure, it is customary to use "title case" for headings. But it does make it slightly more difficult to get the gist of the arguments—which is the whole point of including the heading—when the first letter of each word in the title is capitalized.

Compare these two headings:

A. Plaintiff's Claim Is Time Barred Because It Accrued More Than Two Years Before Plaintiff Filed His Complaint

A. Plaintiff's claim is time barred because it accrued more than two years before plaintiff filed his complaint

Now imagine that you are a judge skimming through a dozen of these things.

Next time you're briefing a legal argument, give the use of uppercase some thought. Perhaps even consult the section in Oregon Appellate Court Style Manual on the "Use of Uppercase and Lowercase." You might notice that you are capitalizing far more than necessary.

Association News

New and Returning Members

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

Mary Butler
Bullivant Houser Bailey

Bonnie Calhoun
Keating Jones Hughes

Cristin Casey
Littler Mendelson

Paul Cirner
Ogletree Deakins Nash Smoak & Stewart

Andrea Clifford
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