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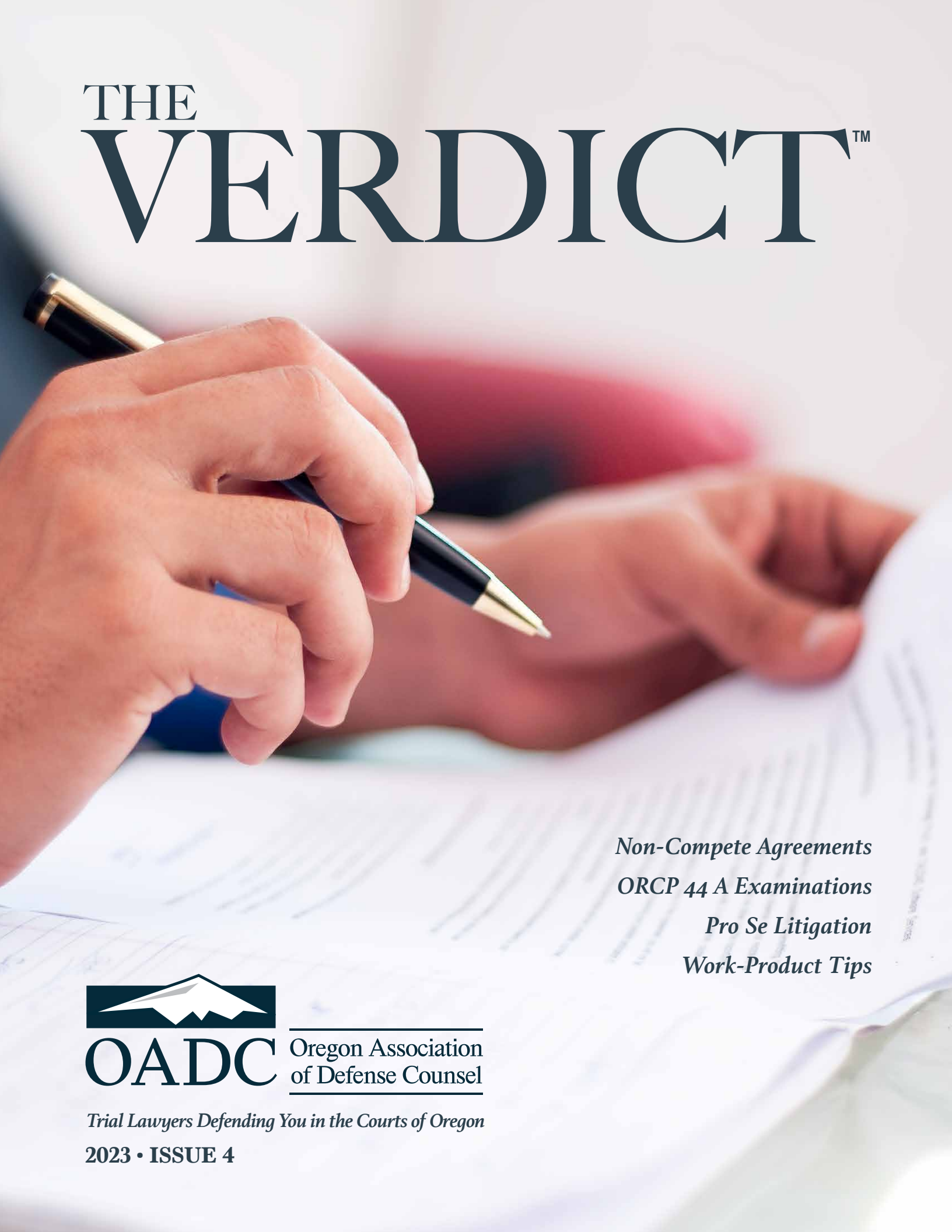

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2023 • ISSUE 4

2023 OADC Practice Group Leaders

COMMERCIAL	**Daniel Lis,** *Chair* Buchalter 1331 NW Lovejoy St., #900 Portland, OR 97209 503.226.8407 dlis@buchalter.com	**Diane Lenkowsky,** *Vice Chair* Gordon Rees Scully Mansukhani 1300 SW 5th Ave., #2000 Portland, OR 97201 503.222.1075 dlenkowsky@grsm.com	**Molly Honoré,** *Publications* Markowitz Herbold 1455 SW Broadway, #1900 Portland, OR 97201 503.295.3085 mollyhonore@markowitzherbold.com	**Chad Colton,** *Board Liaison* Markowitz Herbold 1455 SW Broadway, #1900 Portland, OR 97201 503.295.3085 chadcolton@mhgm.com
CONSTRUCTION	**Annalie Faddis,** *Chair* Gillaspy Rhode Faddis & Benn 1220 SW Morrison St., #805 Portland, OR 97205 503.688.5020 afaddis@gillaspyrhode.com	**Ian Baldwin,** *Vice Chair* Wood Smith Henning & Berman 12755 SW 69th Ave., #100 Portland, OR 97223 971.256.4017 ibaldwin@wshblaw.com	**Claire Whittal,** *Publications* Gillaspy Rhode Faddis & Benn 1220 SW Morrison St., #805 Portland, OR 97205 503.688.5020 cwhittal@gillaspyrhode.com	**Pamela Paluga,** *Board Liaison* Gillaspy Rhode Faddis & Benn 4380 S Macadam Ave., #590 Portland, OR 97239 503.595.9510 ppaluga@gillaspyrhode.com
COVERAGE	**Chris Parker,** *Chair* Davis Rothwell Earle & Xóchihua 200 SW Market St., #1800 Portland, OR 97201 503.222.4422 cparker@davisrothwell.com	**Robert Kirsher,** *Vice Chair* Gordon & Polscer 9020 SW Washington Sq Rd., #560 Tigard, OR 97223 503.242.2922 rkirsher@gordon-polscer.com	**Bryce Adams,** *Publications* Bullivant Houser One SW Columbia St., #800 Portland, OR 97204 503.499.4455 bryce.adams@bullivant.com	**Megan Cook,** *Board Liaison* Bullivant Houser One SW Columbia St., #800 Portland, OR 97204 503.228.6351 megan.cook@bullivant.com
EMPLOYMENT	**Christine Sargent,** *Chair* Littler Mendelson 1300 SW 5th Avenue, #2050 Portland, OR 97201 503.221.0309 csargent@littler.com	**Jaci Houser,** *Vice Chair* Littler Mendelson 1300 SW 5th Avenue, #2050 Portland, OR 97201 503.221.0309 jhouser@littler.com	**Rachel Timmins,** *Publications* Ogletree Deakins Nash Smoak & Stewart 222 SW Columbia St., #1500 Portland, OR 97201 503.552.2140 rachel.timmins@ogletree.com	**Melissa Healy,** *Board Liaison* Stoel Rives 760 SW 9th Ave., #3000 Portland, OR 97205 503.294.9263 melissa.healy@stoel.com
GENERAL LIABILITY	**Mark Monson,** *Chair* Law Offices of Julie D. Elkins 10200 SW Greenburg Rd., #365 Portland, OR 97223 503.892.2085 mark.monson@farmersinsurance.com	**Flavio "Alex" Ortiz,** *Vice Chair* Rall & Ortiz 9700 SW Capitol Hwy., #120 Portland, OR 97219 503.880.8444 alex@rallortiz.com	**Rachel Wolfard,** *Publications* Hart Wagner 1000 SW Broadway, #2000 Portland, OR 97205 503-709-8884 rgw@hartwagner.com	**Tessan Wess,** *Board Liaison* Gordon Rees Scully Mansukhani 1300 SW 5th Ave., #2000 Portland, OR 97201 503.382.3858 twess@grsm.com
GOVERNMENT LIABILITY	**Ryan Bailey,** *Chair* Portland Office of City Attorney 1221 SW 4th Ave., #430 Portland, OR 97204 503.823.9968 ryan.bailey@portlandoregon.gov	**Chris Gilmore,** *Vice Chair* Washington County Counsel Public Services Bldg MS 24 155 N First Ave., #340 Hillsboro, OR 97124 503.846.8747 chris.gilmore@co.washington.or.us	**Andrew Campbell,** *Publications* Heltzel Williams 117 Commercial St NE, #400 Salem, OR 97308 503.585.4422 andrew@heltzel.com	**Dan Larsen,** *Board Liaison* Buchalter 805 SW Broadway, #1500 Portland, OR 97205 503.226.8431 dlarson@buchalter.com
PRODUCT LIABILITY	**David Cramer,** *Chair* MB Law Group 117 SW Taylor St, #200 Portland, OR 97204 503.382.4211 dcramer@mblglaw.com	**Kyle Rohrer,** *Vice Chair* Cosgrave Vergeer Kester 900 SW Fifth Ave, #2400 Portland, OR 97204 503.219.3815 krohrer@cosgravelaw.com	**Tom Purcell,** *Publications* MB Law Group 117 SW Taylor St., #200 Portland, OR 97204 503.382.4211 tpurcell@mblglaw.com	**Peter Tuenge,** *Board Liaison* Keating Jones Hughes 200 SW Market St., #900 Portland, OR 97201 503.222.9955 ptuenge@keatingjones.com
PROFESSIONAL LIABILITY	**Breanna Thompson,** *Chair* Garrett Hemann Robertson 1011 Commercial St NE Salem, OR 97301 503.581.1501 bthompson@ghrlawyers.com	**Melissa Bushnick,** *Vice Chair* Lindsay Hart 1300 SW 5th Ave., #3400 Portland, OR 97201 503.226.7677 mbushnick@lindsayhart.com	**Hannah McCausland,** *Publications* Brisbee & Stockton 139 NE Lincoln St. Hillsboro OR 97123 503.648.6677 him@brisbeestockton.com	**Heather Bowman,** *Board Liaison* Oregon State Bar Professional Liability Fund 16037 SW Upper Boones Ferry Rd. Tigard, OR 97281 503.639.6911 heatherb@osbplf.org
TRIAL PRACTICE	**Sheila Cieslik,** *Chair* American Family Insurance Co 11850 SW 67th Ave., #160 Portland, OR 97223 503.403.1880 x53619 scieslik@amfam.com	**Peder Rigsby,** *Vice Chair* Bullivant Houser 1 SW Columbia St., #800 Portland, OR 97204 503.499.4417 peder.rigsby@bullivant.com	**Chris Piekarski,** *Publications* The GLB Attorneys 7455 SE Bridgeport Rd., #235 Tigard, OR 97224 971.213.2532 chrisp@theglb.com	**John Eickelberg,** *Board Liaison* Law Offices of Julie D Elkins 10200 SW Greenburg Rd., #365 Portland, OR 97223 503.892.2069 john.eickelberg@farmersinsurance.com

2023 OADC Affinity Group Leaders

DIVERSITY, EQUITY, AND INCLUSION	NEW LAWYERS	PRACTICE MANAGEMENT	WOMEN IN LAW
Mai-Anh Nako, *Chair* Allstate Insurance Staff Counsel's Office 1000 SW Broadway #1080 Portland, OR 97205 503.553.0363 mnako@allstate.com	**Jason Evans,** *Chair* Smith Freed & Eberhard 111 SW Columbia St., #800 Portland, OR 97201 503.227.2424 jevans@smithfreed.com	**Michael Jacobs,** *Chair* Hart Wagner 1000 SW Broadway, #2000 Portland, OR 97205 503.222.4499 mgj@hartwagner.com	**Amy Saack,** *Chair* Davis Rothwell Earle & Xochihua 200 SW Market St., #1800 503.222.4422 Portland, OR 97201 asaack@davisrothwell.com
Nelly Greenberg, *Vice Chair* Bullivant Houser One SW Columbia St., #800 Portland, OR 97204 503.499.4623 nelly.greenberg@bullivant.com	**Alejandra Torres,** *Vice Chair* Gilbert Levy Bennett 5400 Meadows Rd., #150 Lake Oswego, OR 97035 971.268.5193 alejandra@theglb.com	**Sharlei Hsu,** *Vice Chair* Betts Patterson & Mines PS 111 SW 5th Ave., #3650 Portland OR 97204 503.961.6331 shsu@bpmlaw.com	**Matika Levy,** *Vice Chair* Gilbert Levy Bennett 5400 Meadows Rd., #150 Lake Oswego, OR 97035 971.312.0660 matika@theglb.com
Gabrielle Martinez deCastro, *Vice Chair* Smith Freed Eberhard 111 SW Columbia St., #800 Portland, OR 97201 503.227.2424 gdecastro@smithfreed.com	**Sarah E Jones,** *Publications* Smith Freed & Eberhard 111 SW Columbia St., #800 Portland, OR 97201 503.227.2424 sjones@smithfreed.com	**Taylor Lewis,** *Vice Chair* Hart Wagner 1000 SW Broadway, #2000 Portland, OR 97205 503.222.4499 tbl@hartwagner.com	**Ashley Shearer,** *Publications* MacMillan Scholz & Marks 900 SW 5th Ave., #1800 Portland, OR 97204 503.224.2165 ashearer@msmlegal.com
A C Estacio-Heilich, *Vice Chair* Lane Powell 601 SW 2nd Ave., #2100 Portland, OR 97204 503.778.2106 estacioheilich@lanepowell.com	**Helaina Chinn,** *Board Liaison* Chinn Smith Winters LLP 4428 Galewood Ct Lake Oswego, OR 97035 503.675.4306 chinn@csw-law.com	**Sarah Tuthill-Kveton,** *Vice Chair* Chock Barhoum 121 SW Morrison St., #500 Portland, OR 97204 503.223.3000 sarah@chockbarhoum.com	**Heather Bowman,** *Board Liaison* OSB Professional Liability Fund 16037 SW Upper Boones Ferry Rd. Tigard, OR 97281 503.639.6911 heatherb@osbplf.org
Royce Williams, *Board Liaison* TriMet 1800 SW Harrison Portland, OR 97201 503.962.6467 williaro@trimet.org		**Kirsten Curtis,** *Board Liaison* Thenell Law Group 12909 SW 68th Pkwy., #290 Portland, OR 97223 503.372.6450 x111 kirsten@thenelllawgroup.com	

The Verdict™ Editors

EDITOR IN CHIEF
Jeanne Loftis
Bullivant Houser
One SW Columbia St., #800
Portland, OR 97204
503.499.4601
jeanne.loftis@bullivant.com

FEATURE ARTICLES
Megan Uhle
Williams Kastner
1515 SW 5th Ave., #600
Portland OR 97201
503.944.6944
muhle@williamskastner.com

CASE NOTES
Kevin Sasse
Dunn Carney
851 SW 6th Ave., #1500
Portland OR 97204
503.224.6440
ksasse@dunncarney.com

DEFENSE VICTORY!
Christine Sargent
Littler Mendelson
1300 SW 5th Ave., #2050
Portland, OR 97201
503.889.8915
csargent@littler.com

JUDGE BIOS
Tessan Wess
Gordon Rees Scully Mansukhani
1300 SW 5th Ave., #2000
Portland, OR 97201
503.382.3853
twess@grsm.com

THE WORD SMITH
Julie Smith
Cosgrave Vergeer Kester
900 SW 5th Ave., 24th Floor
Portland OR 97209
503.219.3821
jsmith@cosgravelaw.com

EDITORIAL ASSISTANT
Stephanie Wilken
Bullivant Houser
One SW Columbia St., #800
Portland, OR 97204
503.499.4490
stephanie.wilken@bullivant.com

New and Returning Members

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

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OADC
Oregon Association of Defense Counsel

9600 SW Oak Street, Suite 565, Tigard, OR 97223
503.253.0527 | 800.461.6687 | Fax: 503.253.9172
info@oadc.com | www.oadc.com

Artificial Intelligence May Be Coming for Us All

Peter Tuenge, Keating Jones Hughes

Many of you may have enjoyed a laugh at the story I mentioned in my last message about the New York lawyer who used ChatGPT, an artificial intelligence (AI) chatbot, to research and write a legal brief he filed in court. It turned out, as the story goes, that ChatGPT made up fictional published opinions, citations, and quotations that it relied on in the brief. The lawyer checked the validity of the brief by asking its author whether the cases cited were real. The chatbot that had fabricated the brief responded by assuring the lawyer the cases it cited were both real and reputable. At first glance, the story made me tremble as a cautionary tale of the risk posed by emerging AI in the legal field. On longer reflection, however, I came to appreciate that blaming AI for the fictitious brief did not focus on the true culprit—the lawyer who relied on the chatbot to both write and fact-check the brief. But that is certainly not the limit of the takeaway lessons from the story.

PETER TUENGE

Publicly available AI is still in its early stages, but experts in the field warn that advances in AI have been happening at an exponential rate. There has been greater progress in AI development in the last year than in the preceding 20. Many of those very same experts warn of the immediate dangers posed by AI, not only risks to the way we lawyers work and earn a living, but more existential risks beyond jobs and careers.

In May 2023, the Center for AI Safety, a research and field-building nonprofit established to promote the safe development of AI, issued the following public statement: "Mitigating the risk of extinction from AI should be a global priority alongside other societal-scale risks, such as pandemics and nuclear war."[1] That statement is signed by a remarkable list of more than 350 national and international academics, scientists, engineers, government officials, and corporate executives. The signatories include, among many others, Bill Gates, Laurence Tribe, national and international governmental leaders, and the chief executives of leading AI companies—Sam Altman of Open AI, Demis Hassabis of Google DeepMind, and Dario Amodei of Anthropic. If Bill Gates, Sam Altman, and the executive chairman of the United Nations Sciences and Technology Organization, for example, are worried about the extinction of humans from AI, so am I.

The time to read up on AI and to prepare yourself and your practice is now. The dangers are present. In the short-term, AI presents a very real risk of creating and spreading disinformation. As my prior President's Message foreshadowed, AI delivers information quickly and with supreme confidence, making it difficult to separate truth from fiction. It is not unreasonable to think of situations where AI-generated fake news and academic articles are cited as authoritative by AI chatbots writing articles, school essays, or legal briefs.

In the not-too-distant future, AI presents a risk of creating job loss in the legal field. A research report by economists at Goldman Sachs predicts 44 percent of legal jobs are at risk of automation by AI.[2] Drafting routine letters, emails, contracts, and memos can soon, perhaps even now, be easily done by AI. Current AI can quickly, and therefore efficiently, recognize and analyze words and generate text. Lawyers and law firms are already starting to use AI to review case documents, identify key issues, and draft deposition questions based on the case documents. AI can be thought of as an exceedingly smart and efficient paralegal, but one, we must remember, that does not have a conscience.

It may be time to call for a pause in the development of certain types of AI to prevent the technology from, for example, manipulating smart-phone-carrying humans to engage in or perpetuate social

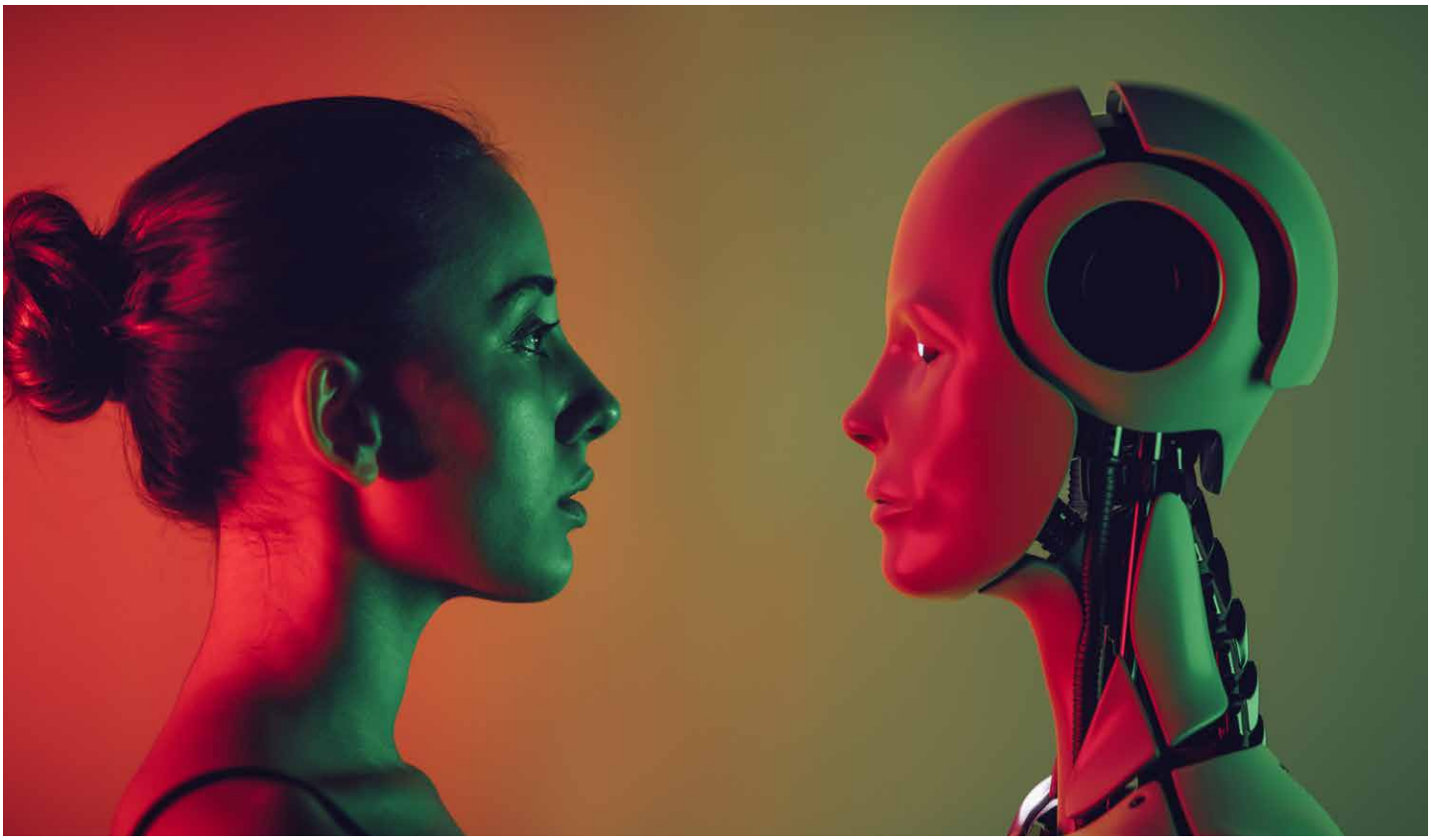
distortion. If AI becomes sufficiently intelligent, it could quickly develop a better understanding of its constraints and design a way around them. We must, as lawyers and humans, figure out how to retain control over an entity that may turn out to be smarter than we are and capable of becoming more intelligent quickly. Stopping the development of nonhuman minds that may outsmart and obsolete us is a humanity-worthy consideration.

Putting aside longer-term risk, lawyers, law firms, and legal organizations should start addressing AI issues now. AI does not owe you or your client any ethical duties, and, as the New York lawyer example shows, can fabricate information and lie about its sources and authenticity. We as lawyers should decide if we and our organizations are going to use AI. I have strong feelings about the answer to that question. If we are, we need to set specific standards on authorized use of AI. Those standards need to make it explicit what uses of AI are not authorized. In thinking through these issues, we must take into account our ethical duties, including our duties to maintain client confidentiality and to provide competent representation to a client. AI has no such duties. Without appropriate guardrails, sharing confidential information with AI poses a danger that the information is shared without authorization. The duty to competently represent a client includes understanding the risks and benefits of relevant technology. That requires lawyers, law firms, and legal organizations today, right now, to place a watchful eye on AI technology as it advances.

More existentially, AI poses a real risk, as captured in the statement issued by the Center for AI Safety, of causing a loss of control. It is not science fiction to think of ways AI, through manipulation or direct control over information, could create unintended consequences to the ways we practice law and live our lives. I have taken my own call to action seriously. While on a recent beach vacation, I sat in a beach chair and began to devise a way to protect the legal field from advanced AI. I have a plan and hope that others do as well.

Endnotes

1. *Statement on AI Risk*, Ctr. for AI Safety, https://www.safe.ai/statement-on-ai-risk (last visited Nov. 6, 2023).
2. Joseph Briggs, et al., *The Potentially Large Effects of Artificial Intelligence on Economic Growth,* Goldman Sachs, (Mar. 26, 2023, 9:05 PM), https://www.gspublishing.com/content/research/en/reports/2023/03/27/d64e052b-0f6e-45d7-967b-d7be35fabd16.html.



FTC Say What? The Threatened Future of Non-Compete Agreements

Elayna Z. Matthews
Heltzel Williams

The Federal Trade Commission ("FTC") recently proposed an extremely broad new rule that would make it an "unfair method of competition" for any employer to enter into or enforce any existing or future non-competition agreements (also referred to as "non-competes") with any worker.[1] Under the rule, which would apply retroactively as well, employers would be obligated to notify both current and former employees that their existing non-competes are no longer in effect. The FTC is currently evaluating the 27,000-plus public comments it received, and is expected to vote on the rule in April 2024.

ELAYNA Z. MATTHEWS

Why Is the FTC So Down on Non-Competes?

Businesses use non-competes to protect their legitimate trade secrets and proprietary business information, including client lists and contacts that take years to develop and are a product of a company's goodwill and marketing efforts. Particularly when an employee's job involves directly soliciting and developing personal relationships with customers, non-compete agreements can be a powerful and effective tool to protect those valuable assets.

However, non-competes have been under scrutiny in recent years at both the national and state level for their potential to stifle wages and prevent broad economic development.[2] In the commentary to the proposed rule, the FTC notes that, in recent decades, "research has shown the use of non-compete clauses by employers has negatively affected competition in labor markets, resulting in reduced wages for workers across the labor force" and has suppressed labor mobility, negatively affecting competition in product and service markets.[3] National Labor Relations Board General Counsel Jennifer Abruzzo issued a memo on May 30, 2023, setting forth her view that many non-competes in the employment context violate the National Labor Relations Act, particularly for hourly, lower-waged workers, and especially if such workers have little or no access to their employer's trade secrets.[4] One study of Oregon employees found that after non-competes were banned for hourly workers in 2008, hourly wages increased by two to three percent on average, with an even stronger effect for female workers.[5] And some posit that were it not for California's ban on non-competes since 1872, which protected employee mobility, Silicon Valley may not exist.[6]

Does the FTC Even Have the Power to Prohibit Non-Competes?

There is significant question whether the FTC has the authority to pass such a broad "legislative" rule, and whether the U.S. Supreme Court would uphold it. However, other pending state and national legislation may moot any such review. The U.S. Congress introduced a bipartisan bill earlier this year titled the "Workforce Mobility Act of 2023," which, if it passed, would ban non-competes nationally. At the state level, Minnesota recently joined California, North Dakota, and Oklahoma among states that ban almost all non-competes in the employment context, and New York is expected to join this list soon. About half of the remaining states, including Oregon, have statutes that place significant limitations on non-competes, and many of them ban non-competes entirely for lower-waged or hourly workers.

How Would This Rule Change the Status Quo in Oregon?

Under ORS 653.295, non-competes are void and unenforceable in the employment context, unless: (1) the employer notifies the employee in writing at least two weeks before the employee's first day that a non-compete is a required condition of employment, or the non-compete is entered into upon a bona fide job advancement; (2) the employee is classified as salary-exempt at termination; (3) the employer has a protectable interest (*i.e.,* trade secrets or other confidential or proprietary business information); (4) the employer provides a copy of the non-compete to the employee within 30 days after termination; and (5) the employee earns more than a certain salary threshold at termination, adjusted each year for inflation (in 2023,

the salary threshold was $108,581). The statute was enacted in 2008 and has been amended three times, effective in 2016, 2020, and 2022, with each amendment adding more limitations to the enforceability of non-competes.

Unlike the FTC's proposed rule, Oregon's statute does not apply retroactively. Non-competes entered into before 2008 are not subject to the statute at all, and non-competes entered into after 2008 are governed by the version of the statute that was in effect at the time the non-compete became effective. Accordingly, attorneys must be especially careful when reviewing and revising existing non-competes. Since the statute has become more limited over time, older non-competes (if enforceable) are likely to be more favorable to the employer than any revised or modified non-compete could be.

What Should Oregon Employers Be Doing Now?

Even if non-competes are off the table, employers do have alternative options to protect their proprietary business information from employee and former employee misuse. Nothing in the FTC's proposed rule or Oregon's statute places such broad limitations on non-solicitation and confidentiality agreements in the employment context. But just like non-competes, non-solicitation and confidentiality agreements must be "reasonable" under Oregon common law. To be a "reasonable" restraint on trade, as a threshold requirement, employers must establish that they have a legitimate interest entitled to protection (*i.e.,* trade secrets, client lists, marketing strategies, or other proprietary information). Then, courts typically consider three questions in determining whether a restrictive covenant is reasonable. First, the covenant must be restricted in its operation in respect either to time or place. Second, the agreement must be made on some good consideration. Third, the restrictive covenant must be limited to protecting the employer's interests, and must not be so broad or large in its operation as to interfere with the interests of the public.[7]

Under Oregon and related federal case law, while a new employment relationship is generally considered sufficient consideration, continued employment with current at-will employees may or may not be, depending on the circumstances.[8] Non-solicitation agreements may not be enforceable in Oregon to the extent they apply to "prospective customers."[9] And any restriction that makes it difficult for an employee to pursue their livelihood at all may be held to be "contrary to the public interest."[10] Oregon's Workplace Fairness Act (ORS 659A.370) further limits restrictive agreements that have "the purpose or effect of preventing" an employee from disclosing or discussing certain conduct that constitutes discrimination, harassment, or sexual assault.

Recommendations

Attorneys should stay apprised of this ever-changing legal landscape. By the time you tackle your next non-compete project, the law may have changed. For now, carefully drafted non-competes, non-solicits, and confidentiality agreements are still valid tools Oregon businesses can use to protect their hard-earned proprietary business information from former employee misuse. However, make sure your clients are aware of the possibility that, by this time next year, their non-compete agreements may not be worth the paper they are printed on.

Endnotes

1. The Non-Compete Clause Rule, FTC, 88 FR 3482, 16 CFR 910 *et seq*., available at https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.
2. *See* Fact Sheet on President Biden's July 9, 2021 Executive Order, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/; *see also* Warren Response Letter to Chamber of Commerce, February 27, 2023, available at https://www.warren.senate.gov/imo/media/doc/2023.02.27%20Letter%20to%20Chamber%20of%20Commerce%20on%20the%20FTC%20Noncompete%20Rule.pdf.
3. The Non-Compete Clause Rule, FTC, 88 FR 3482, 16 CFR 910 *et seq*., available at https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule.
4. Memorandum GC 23-08, Office of the General Counsel, National Labor Relations Board, available at https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national#:~:text=The%20memo%20explains%20that%20overbroad,to%20improve%20their%20working%20conditions.
5. Lipsitz, Michael and Starr, Evan, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (October 19, 2020), available at https://ssrn.com/abstract=3452240.
6. *See generally,* Uncommon Law Podcast, episodes dated May 24, May 31, June 7, June 21, June 28, and August 3, 2023, available at https://podcasts.apple.com/ca/podcast/uncommon-law/id1462288566.
7. *Nike, Inc. v. McCarthy,* 379 F.3d 576, 580–87 (9th Cir. 2004); *Eldridge v. Johnston,* 195 Or 379, 402, 245 P2d 239, 250 (1952)).
8. *Compare Yartzoff v. Democrat-Herald Pub. Co*., 281 Or 651, 657, 576 P2d 356, 359 (1978) with *McPhail v. Milwaukie Lumber Co.,* 165 Or App 596 (2000) and *Shelley v. Portland Tug & Barge Co*., 158 Or 377, 387, 76 P2d 477 (1938).
9. *Brinton Business Ventures, Inc. v. Searle*, 248 F Supp 3d 1029, 1038-39 (D Or 2017) (citing *e.g. Naegli Reporting Corp. v. Petersen,* No. 3:11-1138-HA, 2011 WL 11785484, at *4 (D Or Dec. 5, 2011).
10. *Konecranes, Inc. v. Scott Sinclair*, 340 F Supp 2d 1126, 1131 (D Or 2004).

Hitting the Nail on the Head: How to Generate Work Product that Meets Expectations

Jackie Mitchson
Bullivant Houser

As a freshly minted attorney, there are few things more horrifying than turning in work to a supervising attorney only to realize that you have completely failed to understand the assignment. There are steps both the attorney assigning work and the attorney receiving the assignment (let's call them the "associate") can take to ensure that work product meets expectations.

JACKIE MITCHSON

Discussing the Assignment

Ideally, the supervising attorney and associate will be able to meet in person or over the phone to discuss the assignment. Before the end of the discussion, the associate should ensure that they understand the assignment. If, for example, the associate is asked to research an issue and write an internal memo discussing the issue, it is especially helpful if the associate can repeat the research assignment and receive confirmation that they understand the question correctly.

During that initial discussion, it is helpful for the supervising attorney to address the following points:

- Whether there is any similar work product the associate can review as an example.
- Whether there are particular client guidelines the associate should adhere to. For example, insurance clients are notorious for placing limitations on time spent researching.
- The deadline by which the supervising attorney would like to receive the completed assignment.

If the supervising attorney does not address these issues, the associate should ask for this information to ensure they timely deliver helpful work product and that the time they spend does not get written off.

In the current hybrid model of work, it is not always feasible to meet in person to discuss an assignment. Supervising attorneys may find it easier to send assignments by email rather than meet in person. An associate receiving the assignment should be sure to address any questions regarding the assignment in the response email or in a follow-up call.

Getting to Work

Having received and understood the assignment, it is time to get to work. Before the associate starts researching or drafting, it is worth the time to take a moment to consider who the audience is for the work product. The audience will dictate whether you write persuasively or objectively.

Is your project an in-house research memo exploring the viability of a legal theory? Think back to the initial discussion where you received the assignment. Is the assigning attorney considering whether to recommend a strategy to the client based on whether a particular legal theory is viable? If the answer is yes, the assigning attorney will be best served with an objective discussion of the law and an assessment of the likelihood of success.

Is your assignment a motion for summary judgment? No supervising attorney wants to receive a draft motion for summary judgment written from a totally objective point of view. Yet, brand new attorneys, who often have judicial clerkship experience and may be used to drafting bench memos for a judge, do not always realize that our job as defense attorneys is to provide the best arguments in our client's favor. Of course, we have an obligation to the court to disclose unfavorable facts and law, but motions should be drafted with a persuasive spin.

As the associate works, it may become clear that they did not understand the assignment, or the initial work indicates a different path would be better. When that happens, the associate should ask for clarification or provide an update and ask whether to continue or change paths.

Finally, if at any point the associate realizes they will be unable to complete the assignment in time, they need to let the supervising attorney know as soon as possible. The wise supervising attorney has, hopefully, built in some buffer time for their own review and can either grant an extension or work with the associate to find another solution.

Receiving and Incorporating Feedback

Ideally, the supervising attorney timely provides meaningful feedback to the associate. The reality is that most supervising attorneys are short on time, which is why they assign work to associates. If the associate does not hear back within a "reasonable" amount of time under the circumstances, they should politely follow up. What is reasonable under the circumstances varies.

Obviously, if there is a filing deadline, the associate should follow up to ensure that the supervising attorney has seen the work product with sufficient time to review and get client approval, if necessary, before the deadline. Internal research memos are trickier, and follow-up time will depend on the urgency with which the assignment was given to the associate. As a general rule, the associate should not let more than a week pass before checking in to ensure the supervising attorney received the completed assignment. As a working relationship develops, it will become easier for the associate to know when to follow up.

When the associate receives feedback, whether it is positive or negative, it is best to receive it gracefully. The following phrase will serve you well, "Thank you for the feedback. I will incorporate it going forward." One of the most important skills of a successful associate is to internalize feedback and use it to improve their future work product. For many supervising attorneys, mistakes are acceptable as long as the associate takes ownership of the mistake and learns from it going forward.

If the supervising attorney has negative feedback to give, it is most helpful to the associate to be as specific as possible and indicate whether the associate should revise and return the assignment. Sometimes, the supervising attorney may find it easier to redo the assignment and send an as-filed copy to the associate. It is helpful to share the final product with the associate, but it is most helpful to the associate if the supervising attorney can spare a few minutes to explain why they made substantial changes.

Conclusion

It is incumbent on both the supervising attorney and associate to ensure that the associate's work product meets the expectations. The supervising attorney should convey sufficient information for the associate to be successful. The points outlined above should provide the associate with at least the basic framework for understanding an assignment from the outset so they can produce work product that meets expectations every time.

Navigating ORCP 44 A Medical Examinations

Ashley Shearer
MacMillan Scholz & Marks

If there is one thing stamped into litigators' brains, it is that collecting and presenting evidence is crucial to resolving legal disputes. ORCP 44 A medical examinations can be an essential tool in this process. When an individual's physical or mental condition is at issue in determining liability or evaluating damages, an ORCP 44 A medical examination can provide objective evidence to help a jury ascertain the truth. However, successfully obtaining and using an ORCP 44 A medical examination requires careful attention to the rules and procedures set forth in ORCP 44 A, diplomatic collaboration with opposing counsel and their client, and, often, motion practice.


ASHLEY SHEARER

Understanding ORCP 44

ORCP 44 lays out the procedures and guidelines for obtaining medical examinations and reports of medical examinations of a party whose physical or mental condition is in controversy. The rule seeks to promote transparency, fairness, and efficiency in the legal process, and strikes a balance between the plaintiff's privacy rights and the defendant's need for comprehensive and unbiased medical information. Exams must be limited to the specific condition in question and conducted by qualified medical professionals. The rule also ensures that the party undergoing the examination is provided with notice of the motion, and the order allowing examination must specify the time, place, manner, conditions, and scope of the examination, and the person or persons by whom it is to be made.

The court may order a medical examination only on motion for good cause shown. ORCP 44 A allows the court to exercise its discretion to order a physical examination for a cause or reason based on equity or justice or one that would motivate a reasonable person under all the circumstances—*i.e.,* any time a party has an unresolved medical complaint.[1] The party seeking the examination has the burden of establishing that there is good cause for a medical exam.[2] However, when a plaintiff seeks to limit or condition the medical exam in one way or another, the plaintiff will have the burden of establishing that good cause exists for the requested conditions or limitations.[3]

Discovery of ORCP 44 Reports of Examination

ORCP 36 B (3) expressly exempts ORCP 44 materials from work-product protection. The party examined is entitled to receive a detailed written report of the examining medical professional, setting forth all of their findings, results of tests made, diagnoses, and conclusions, together with like reports of all earlier examinations of the same conditions. After delivery of the report, the defendant is entitled upon request to receive like reports of any examination previously or thereafter made by plaintiff's medical experts. This exchange requirement makes critical medical information available to the defendant that might otherwise be considered unavailable expert discovery.

ORCP 44 Examinations by Agreement

While ORCP 44 A provides for court-ordered physical or mental examinations, plaintiffs' attorneys often cooperate with defense counsel by making their client available for medical examinations by defense experts. ORCP 44 B makes clear that its requirements for disclosure of reports also applies to examinations conducted by agreement of the parties, unless the agreement expressly provides otherwise.

Conferring with opposing counsel on the possibility of an agreed ORCP 44 examination can avoid potentially slow and costly motion practice and can help maintain a positive relationship with plaintiff and their counsel. But in addition to being a good idea, it's also required. UTCR 5.010 provides that the court will deny any motion made under ORCP 44 without a good faith effort to confer.

As soon as it becomes apparent that the plaintiff's physical or mental condition is at issue, defense attorneys should generally begin the process of conferring on an ORCP 44 A examination to try to get the details of the examination worked out with opposing counsel early. Defense attorneys should have a firm grasp of each party's rights and responsibilities under ORCP 44 A going into conferral, particularly where one can anticipate pushback from plaintiff's counsel. Plaintiff's counsel may seemingly agree to a medical exam, only to delay the process

by demanding numerous conditions and limitations. These delays can have negative repercussions on case outcomes if not handled appropriately. When dealing with a non-cooperative plaintiff counsel, it may help to remind them that it will be their burden to show good cause for their requested exam conditions or constraints should motion practice become necessary.

Motion Practice under ORCP 44

When discussions are unproductive due to continued demands for unnecessary or unreasonable conditions or limitations requested by plaintiff's counsel, further conferral may not be fruitful. Protracted and unproductive exchanges can impose unnecessary costs and burdens on the parties involved. Plaintiff's leverage increases as critical deadlines approach, and, worse, failing to file a motion in a timely manner may result in the court denying the request.

Once it becomes apparent that you will need to seek a court order, do so promptly. The motion should be specific, detailing the reasons for the examination and how it is relevant to the case. Plaintiff's counsel may argue persuasively that an excessively broad request is invasive, expensive, and time-consuming. The court may deny a vague or overly broad request, or be more inclined to agree to plaintiff's proposed limitations. ORCP 44 includes provisions that protect against overly invasive or unnecessary exams, striking a balance between privacy rights and the need for evidence. A timely request for an exam, made in good faith for a legitimate purpose and with specific, reasonable limitations, is not likely to be denied by the court.

Practical Tips and Best Practices

ORCP 44 medical exams are a cornerstone of discovery in personal injury matters. Below are some practical tips for your next ORCP 44 A examination request:

- *Try to work collaboratively with opposing counsel.* Collaboration and open communication with opposing counsel can streamline the process of obtaining a medical examination. It is often in the best interests of both parties to reach an agreement on the choice of examiner and other logistical details.
- *Document everything.* Keep meticulous records of all communications, including correspondence with opposing counsel, the court, and any documents related to the medical examination. Detailed documentation can help protect your client's interests in case of disputes.
- *Respect for privacy.* While the defense has the right to request medical examinations, attorneys should always respect the privacy and dignity of the plaintiff. Encourage open communication with opposing counsel to establish a professional and respectful tone throughout the process.
- *Don't delay.* Timing is critical. If negotiations between counsel have reached an impasse, it is time to file a motion. Rather than wasting time arguing over unreasonable limitations, let plaintiff's counsel explain their position to the court. Timely ORCP 44 A medical exams may reduce the duration and cost of litigation by facilitating the resolution of disputes.

Conclusion

ORCP 44 medical examinations are a critical tool for defense attorneys in personal injury cases tvo assess the extent of a plaintiff's injuries and their impact on the case. By understanding the procedural rules, upholding ethical standards, and following practical tips, defense attorneys can navigate this process efficiently and effectively and obtain key information to support their client's defenses while ensuring fairness and respect for all parties involved.

Endnotes

1. *Delcastillo v. Norris,* 197 Or App 134, 139–40 (2005).
2. *Lindell v. Kalugin and Countryside Construction,* 353 Or 338 (2013).
3. *Id.*

Alice's Adventures in *Pro Se* Land: How to Deal with a Self-Represented Party

Claire Whittal
Gillaspy Rhode Faddis & Benn

Pro se litigants present unique challenges that can increase the time and cost of litigation. They are often emotionally invested, have endless amounts of time to devote to their cases, and lack familiarity with the legal process and applicable rules. This can result in any number of issues. However, knowledge of these challenges, and having a plan to confront them head on, can minimize the burden of these sometimes difficult claims.

CLAIRE WHITTAL

Pro Se Numbers

Between 1999 and 2018, 11.7 percent of non-prisoner federal cases involved at least one *pro se* party.[1] During that period, 33 percent of federal non-employment civil rights cases, 20 percent of federal employment civil rights cases, and 8 percent of federal non-product tort claims had at least one *pro se* party.[2] The Ninth Circuit had one of the higher rates of *pro se* litigation in the nation (15.2 percent).[3] And while comprehensive statistics about matters involving self-represented parties in state courts are lacking, the number of cases appeared to be increasing, at least as of 2015.[4]

Pro Se Leniency

Courts afford *pro se* litigants a level of leniency not extended to their licensed counterparts. The reason for this is clear: Without the benefit of a legal background, a *pro se* party may lack familiarity with the legal process and is "far more prone to making errors in pleading than the person who benefits from the representation of counsel."[5] That said, *pro se* litigants do not have carte blanche to bend the rules simply by virtue of representing themselves. Courts acknowledge that *pro se* litigants must familiarize themselves with, and follow, court rules, just like any other litigant.[6] Courts also recognize that, in many cases, the decision to proceed *pro se* is a voluntary one: "Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses himself as a legal representative should be treated no differently."[7]

Tips for Dealing with a *Pro Se* Party

Because *pro se* cases are prevalent and uniquely challenging, it is helpful to have a game plan in place. Here are some tips to consider.

- *Make your role clear.* Make clear to the *pro se* party that you don't represent them, that your obligations are to your client, and that you cannot give legal advice except to advise that they should retain counsel.[8] As an attorney, you are well aware of these ethical obligations, but the *pro se* party is not, and it is likely that they will ask you questions that verge on (or are) requests for legal advice.

It is important to communicate the nature of your representation to the *pro se* litigant early and often, even if it takes some time to sink in.

- *Maintain your professionalism.* Dealing with a self-represented party can be frustrating. While an opposing attorney may be difficult, a *pro se* plaintiff may be that while also lacking the experience and expertise to navigate the legal system. They are also not bound by the rules of professional conduct. Which is to say: Keep your cool in light of any mounting frustration. In some instances, simply listening to a *pro se* party, explaining your party's position, and having a civil conversation can move the ball toward resolution. In other cases, you will have a record of professionalism to refer to when it comes time to file motions or seek sanctions.
- *Involve the court and be creative.* In some cases, the only way to dispose of a *pro se* litigant's claim is through the legal process. When this is the case, be mindful of conferral requirements and confer early. Maintain a clear written record of your communications. Review ORCP 21 and FRCP 12 to assess early grounds for dismissal. Be aware of different avenues for sanctions. For example, is the *pro se* plaintiff harassing you or your client? ORCP 17 permits sanctions when a party submits a pleading for "an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Is her behavior out of control? Invoke ORS 1.010, which sets forth a trial court's inherent power to control proceedings, and ask that the court require the *pro se* party to comply with appropriate Rules of Professional Conduct. While these "exceptional" remedies may not be appropriate at the beginning of litigation, they may be required as the case unfolds. They can also lay the groundwork for future dismissal attempts.
- *Negotiate with caution.* When parties are represented by counsel, there is a presumption that counsel understands the negotiation process and common settlement terms. This is not always so with *pro se* litigants. It is therefore a good idea to involve a third party in any settlement negotiations with a *pro se* party, such as a mediator or a judge at a judicial settlement conference. The latter is a good, economical option, and it may be more meaningful to a *pro se* party to hear the pitfalls of their case from a judge. Some jurisdictions even have special *pro se* mediation programs. Finally, if the case resolves at mediation or at settlement conference, ensure the *pro se* party signs the settlement agreement before walking away. This will decrease the chance of any post-settlement "misunderstandings."

Dealing with a *pro se* litigant can be tough. It is helpful to be prepared, professional, and think outside the box. These tips should help you do so with compassion and professionalism, while still zealously representing the interests of your client.

Endnotes

1. Gough, M. & Taylor Poppe, E. (2020) *(Un) Changing Rates of Pro Se Litigation in Federal Court,* Law & Social Inquiry, 45(3) 567-89 (available at: https://www.cambridge.org/core/journals/law-and-social-inquiry/article/unchanging-rates-of-pro-se-litigation-in-federal-court/21434F32D9DB2AC89C42433F926CBFAC).
2. *Id.*
3. *Id.*
4. *Id.*
5. *See Lopez v. Smith,* 203 F3d 1122, 1131 (9th Cir 2000) (*en banc*) (citation omitted).
6. *See, e.g., Union Lumber Co. v. Miller,* 263 Or App 619, 627 (2014), rev'd on other grounds (citations omitted).
7. *Jacobson v. Filler,* 790 F2d 1362, 1364-65 (9th Cir 1986).
8. *See* Oregon Rule of Professional Conduct 4.3.

Recent Case Notes

Kevin Sasse, Dunn Carney
Case Notes Editor

INSURANCE COVERAGE

"Seizure" Broadly Defined in Insurance Policy Excluding Coverage for Losses Caused by Seizure of Property by Governmental Action

In *BA Ventures, LLC v. Farmers Ins. Exch.*, 327 Or App 499, ___ P3d ___ (2023), the Oregon Court of Appeals held that an insurance policy exclusion for losses caused by the seizure of property by order of governmental authority applied to an ophthalmological clinic's delivery of personal protective equipment (PPE) to a local hospital during the COVID-19 pandemic.

Plaintiffs operate eye care clinics, and their businesses involve mostly nonemergency and elective procedures.

In March 2020, Oregon's governor issued Executive Order 20-10 (EO 20-10), which suspended all elective medical procedures that utilized PPE. Consequently, plaintiffs canceled procedures, laid off staff, and delivered their surplus PPE to a private hospital.

Plaintiffs were insured by a policy that included business income coverage for losses sustained "due to the necessary suspension of [their] operations[.]" However, the policy also contained a governmental action exclusion, which excluded from coverage any loss or damage caused directly or indirectly by "[s]eizure or destruction of property by order of governmental authority."

Plaintiffs filed a claim under the policy, contending that they were required to deliver surplus PPE to the state and that the loss of that property caused a loss of revenue. Defendant denied coverage based on, among other things, the governmental action exclusion. Plaintiffs thereafter filed suit for coverage under the policy.

The parties cross-moved for summary judgment on multiple coverage issues. Among other things, the trial court concluded that EO 20-10 was the proximate cause of plaintiffs' losses and that coverage was precluded by the governmental action exclusion.

On appeal, plaintiffs argued a "seizure" occurs only when there is wrongdoing on the part of the person or entity dispossessed, or when there is a use of force in the act of taking possession. Therefore, according to plaintiffs, because the government did not take the PPE pursuant to an action indicating wrongdoing on plaintiffs' part, nor was use of force involved in the government acquiring the PPE, the exclusion should not apply. The court was not persuaded that the government action exclusion was limited to those circumstances.

The court affirmed the trial court's decision, holding that plaintiffs had construed the word "seizure" too narrowly, and that an ordinary purchaser of insurance would not view the term as limited to instances involving wrongdoing or use of force. Rather, "an ordinary purchaser of insurance would have understood that the exclusion applied to any loss caused by the taking or confiscation of property by order of governmental authority."

■ ***Submitted by Olivia Courogen***
Dunn Carney

Duty to Defend Includes a "Complete Defense" and Is Triggered Even if Coverage Producing Facts Are Not Expressly Alleged

In *State ex rel. Oregon Dept. of State Lands v. Pacific Indemnity Co.*, 328 Or App 64, ___ P3d ___ (Sept 13, 2023), the Oregon Court of Appeals held that the duty to defend under an automobile policy applied to potential environmental cleanup liability for the Portland Harbor Superfund site, and that such duty applied to the entire "action."

This case arose from a demand under Section 104(e) of CERCLA and a General Notice Letter (GNL) issued to plaintiff. The GNL identified a "site" at which the Environmental Protection Agency believed there had been a release of hazardous substances that may qualify plaintiff as a potentially responsible party with respect to that site. Plaintiff tendered the 104(e) demand and GNL to defendant automobile insurer, which denied coverage. Plaintiff thereafter filed suit for coverage under the automobile policy, and the trial court found in its favor on the duty to defend.

Defendant argued on appeal that the 104(e) demand and GNL did not constitute a "suit" under Oregon law that would trigger the duty to defend against "suits" alleging property damage. However, defendant had not made that argument before the trial court, and the court therefore refused to consider it for the first time on appeal.

Defendant also argued that the duty to defend was not triggered because the only insured location under the automobile policy was not the site identified in the GNL. Defendant further argued that the 104(e) and GNL are vague and do not include any coverage-triggering facts. Plaintiff argued that, even if a complaint is unclear or devoid of coverage-related facts, the duty to defend is triggered if the complaint's allegations would permit the presentation of evidence that would establish the uncertain or missing coverage fact. The court agreed with plaintiff, and further held that plaintiff was not required to present extrinsic evidence to establish coverage.

Finally, defendant argued that its duty to defend did not extend to the entire CERCLA clean-up action but was limited to those aspects of the EPA's "claim" that were determined to be within the scope of the policy's coverage. Plaintiff argued that the "complete defense" rule, requiring a defense of all claims in a covered action, is controlling in Oregon. Defendant argued that the "complete defense" rule was limited to multiple claims arising from a single occurrence.

The court noted that apportionment of defense costs under Oregon law is typically limited to between insurers. However, the court concluded that, even if it accepted defendant's argument, the potential liability under CERCLA is joint and several, making the attempted limitation and distinction "not apt." Moreover, the court held that the policy, which required the defense of any "suit," supported plaintiff's position. Accordingly, defendant had a duty to defend the entire action.

■ ***Submitted by Kevin Sasse***
Dunn Carney

EMPLOYER LIABILITY

Oregon Supreme Court Holds Workers' Compensation Exclusive Remedy Provision Precludes Claims Deemed Not Compensable on Major Contributing Cause Grounds

In *Bundy v. NuStar GP, LLC,* 371 Or 220, 533 P3d 21 (July 7, 2023), the Oregon Supreme Court held the "exclusive remedy" provision of the Workers' Compensation Law applies to preclude civil claims by injured workers whose claims have been deemed non-compensable on "major contributing cause" grounds. In other words, ORS 565.019, which imposes certain procedural requirements, is not a "substantive exception" to ORS 656.018's exclusive-remedy provision.

Plaintiff was exposed to dangerous levels of fumes at work. After the incident, defendant initially accepted a worker's compensation claim for the exposure. Later, plaintiff asked defendant to compensate him for additional conditions arising out of the same incident. Defendant denied those claims as "consequential conditions,"

on the basis that plaintiff's workplace exposure was not the major contributing cause of the subsequent conditions. Plaintiff challenged the denials through the workers' compensation system, and the Workers' Compensation Board agreed with defendant, determining plaintiff's additional conditions were not compensable because the work-related incident was not the major contributing cause.

The narrow question before the Oregon Supreme Court was whether ORS 656.019, standing alone, serves as a "substantive exception" to the exclusive-remedy provision, ORS 656.018. After engaging in the familiar statutory-construction analysis under *State v. Gaines,* the court concluded the legislature did not intend for ORS 656.019 to be a "substantive exception" to ORS 656.018's exclusive-remedy provision, and therefore did not provide employees with a substantive right to bring an action for a claim found not compensable under workers' compensation law. Instead, ORS 656.019 was enacted as a procedural statute to regulate actions that may otherwise be permitted.

■ ***Submitted by Jackie Mitchson***
Bullivant Houser

WRONGFUL DEATH

Lost Chance Claim Separately Cognizable from Wrongful Death Claim in Certain Circumstances

In *Martineau v. McKenzie-Willamette Medical Center,* 371 Or 247, 533 P3d 1 (July 7, 2023), the Oregon Supreme Court held, in relevant part, that the plaintiff did not allege a lost chance claim under Oregon's survival statute, ORS 30.075, that was separately cognizable from her wrongful death claim pursuant to ORS 30.020.

Plaintiff (wife and personal representative of decedent's estate) filed an action

against defendants after her husband entered the hospital with chest pains, was released with a diagnosis of noncardiac chest pain, and died 24 hours later from an aortic dissection in his heart. Plaintiff asserted both a wrongful death claim, for failing to diagnose and treat his cardiac condition, and a lost chance claim, alleging that defendants' negligence caused decedent to suffer "a loss of a chance at a better medical outcome than he would have been able to pursue as a negligence claim had he survived."

In relevant part, the trial court dismissed plaintiff's lost chance claim, and the Court of Appeals reversed, concluding that the lost chance claim was viable under Oregon's survival statute, ORS 30.075(1).

On review, defendants argued that ORS 30.075(1) does not apply where plaintiff alleges defendant's negligence caused death, as opposed to causing merely injury. Therefore, defendants argued, any lost chance claim is subsumed within plaintiff's wrong death action brought under ORS 30.020, which provides an exclusive remedy in this case.

The court found that alleging a lost chance claim as an alternative or in addition to a wrongful death claim is not categorically precluded by an allegation that the defendant's wrongful conduct caused decedent's death. However, the personal representative cannot use the survival statute as a basis for bringing a lost chance claim in the wrongful death action.

Plaintiff captioned her lost chance claim as a "survival action," but failed to then plead a separate, cognizable lost chance claim within her wrongful death action. The court found plaintiff must (a) specify the lost chance of treatment, or a lost chance to live with some other better outcome; (b) include any allegations about the percentage and quality of any such loss; and (c) specify any economic or noneconomic damages sought to recover on a lost chance claim.

Ultimately, the court held that a personal representative may plead a separate, cognizable lost chance claim when bringing that claim within a wrongful death action, if it otherwise meets the requirements for bringing a lost chance claim.

■ ***Submitted by Ellen Rall***
Chock Barhoum

ATTORNEY FEES

Oregon Tort Claims Act Damages Cap Does Not Limit Attorney Fees

In *Bush v. City of Prineville*, 325 Or App 37, 529 P3d 970, *adh'd to on recons,* 326 Or App 538, 523 P3d 1261 (March 29, 2023), the Oregon Court of Appeals held that the Oregon Tort Claims Act, ORS 30.260 to 30.300, does not preclude an award of attorney fees. The limitation on "liability" found in ORS 30.272(2)(f) only applies to damages.

Plaintiff accepted defendants' offers of judgment, which included "reasonable attorney fees, costs, and disbursements as determined pursuant to ORCP 68." 325 Or App at 40. After the court entered stipulated judgments against defendants, plaintiff filed a statement for attorney fees. The court awarded plaintiff over $600,000 in attorney fees, in addition to the judgments. Defendants objected, arguing

that the attorney fee award in addition to the judgments exceeded the limitation on liability contained in ORS 30.272. The trial court ruled that the Act's limitation on liability does not apply to attorney fee awards.

On appeal, defendants argued that it was significant that ORS 30.270, the predecessor to ORS 30.272, had previously capped "damages," whereas the ORS 30.272 caps "liability." The defendants felt that this demonstrated the legislature was seeking to expand the damages cap to *any* type of liability, including attorney fees. The court examined the legislative history of ORS 30.272 and determined that, notwithstanding the use of the word "liability," there was no intent to limit attorney fees.

The court held that pre-filing attorney fees can be included in a fee award. However, it also held that if one of two defendants makes an offer of judgment, that defendant should not be jointly and severally liable for fees that were incurred after its dismissal.

In a dissent, Judge Mooney faulted the majority for going further than the plain language of ORS 30.272, which states that "liability" is capped. In Judge Mooney's perspective, the word "liability" clearly includes attorney fees.

■ ***Submitted by Jason Cohen***
Hart Wagner

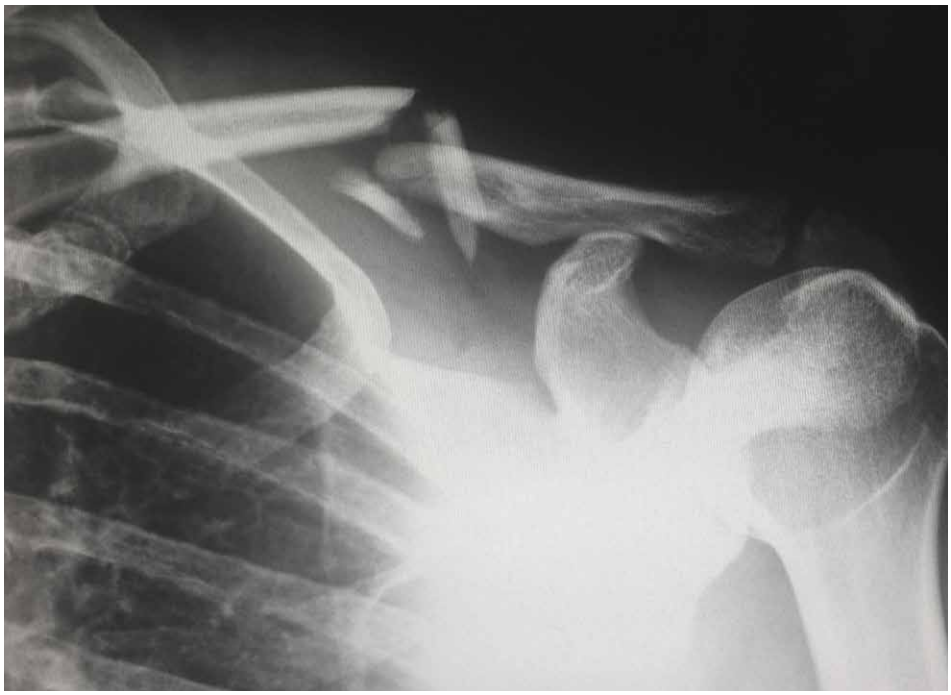
Court of Appeals Affirms Right to Recover "Fees on Fees" for ORS 20.080 Claims

In *Mayes v. Ramos,* 327 Or App 640, _ P3d _ (August 20, 2023), the Oregon Court of Appeals concluded that claim preclusion does not bar a plaintiff's request for fees-on-fees pursuant to ORS 20.080.

Plaintiff brought personal injury claims following an automobile accident, and pleaded entitlement to attorney fees based on ORS 20.080 (authorizing attorney fees where the amount pleaded is $10,000 or less). The case was assigned to mandatory arbitration, where the plaintiff prevailed on her injury claim, and the arbitrator awarded $15,000 of the requested roughly $25,000 in attorney fees.

Plaintiff filed an exception to the fee award in the trial court alleging that the arbitrator had abused his discretion in reducing the fee award and requesting the full amount sought. The trial court agreed, confirming that plaintiff was entitled to the full amount claimed. The trial court entered a General Judgment and Money Award, defendant promptly paid the judgment amount, and a Satisfaction of Judgment was entered.

Plaintiff then filed a new attorney-fee statement, seeking a supplemental judgment for roughly $8,000 in fees incurred to challenge the original fee award. The defense objected to this new filing claiming that it was (1) barred by entry and satisfaction of the general judgment, (2) barred by claim preclusion principles, (3) excessive and without merit, and (4) frivolous. The trial court



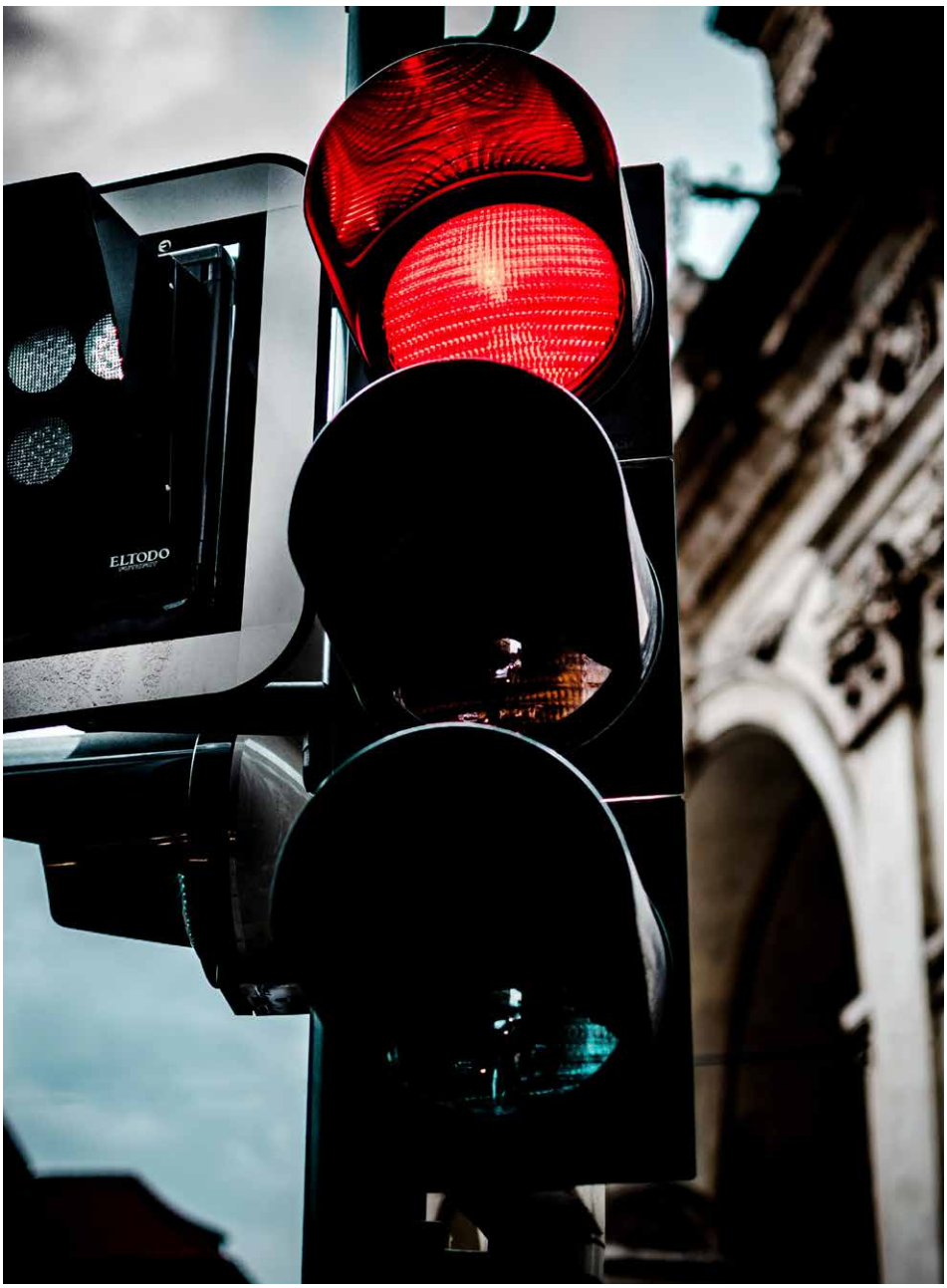
agreed "based on each and every reason set forth in" defendant's opposition memorandum.

On appeal, the court found that entry and satisfaction of the general judgment did not preclude recovery of fees-on-fees in a supplemental judgment. Rather, "a party entitled to recover attorney fees incurred in litigating the merits of a fee-generating claim also may receive attorney fees incurred in determining the amount of the attorney fee award."

The court further found that claim preclusion did not operate to bar recovery of the fees because a claim for recovering fees is "properly considered part of the prosecution of an action for purposes of a fee petition under ORCP 68"—*i.e.,* not the same subject matter as the underlying action. *See Strawn v. Farmers Ins. Co.,* 233 Or App 401, 425, 223 P3d 86 (2010).

Finally, the court was unable to review the trial court's assessment that the fees were excessive and frivolous because the court had not sufficiently analyzed the criteria set forth in ORS 20.075, and the court therefore remanded the case for further proceedings on the fee claim.

■ ***Submitted by Thomas W. Purcell***
MB Law Group



GENERAL LIABILITY

Court of Appeals Clarifies Use of Substantial Factor Causation Jury Instruction

In *Sodaro v. Boyd,* 325 Or App 511, 529 P3d 961 (April 26, 2023), the Oregon Court of Appeals clarified the circumstances under which an instruction on substantial factor causation is appropriate.

In *Sodaro,* plaintiff and defendant were involved in an auto accident that was precipitated by another non-party vehicle that ran a red light, causing plaintiff to stop short and defendant to rear-end plaintiff's vehicle. Plaintiff alleged that defendant was solely responsible for the crash, and the defendant answered that the unidentified driver of the car that ran the red light was the actual cause of the accident.

At trial, the parties disagreed on which causation instruction should be given to the jury. Plaintiff requested that the trial court give the "substantial factor" instruction, UCJI 23.02, which provides, in part, "[i]f you find that the defendant's act or omission was a substantial factor in causing the injury to the plaintiff, you may find that the defendant's conduct

caused the injury even though it was not the only cause." Defendant sought a "but for" causation instruction, providing that defendant's conduct is a cause of plaintiff's injury if the injury would not have occurred but for that conduct. The trial court agreed with defendant and gave a "but for" jury instruction. The jury then found that defendant was negligent and awarded a small fraction of the damages plaintiff sought.

On appeal, plaintiff argued that the trial court erred by failing to give a "substantial factor" causation instruction "where the evidence would support a finding that multiple factors contributed to the injuries for which plaintiff sought compensation." The court disagreed, citing to the recent decision in *Haas v. Estate of Mark Steven Carter,* 370 Or 742, 525 P3d 451 (2023), which concerned the same issue but was decided after the parties had submitted their briefing in this case.

Pursuant to *Haas*, the court found that the "but for" causation test applies in most negligence cases, despite the involvement of multiple factors in an accident. As the court explained, quoting *Haas,* "[t]here may be many causes of a plaintiff's harm and … when multiple tortfeasors contribute to that harm, all may be held liable for it: When an injury would not have occurred without the combined negligence of many, the negligence of each is a but-for cause of the resulting injury." *Id.* at 753. The substantial factor test, on the other hand, is concerned with the rarer circumstance where "the concurrent conduct of two or more causes combine to create an injury, and either one of those causes, operating alone, would have been sufficient to produce the same result." *Id.* at 750-52. In this case, plaintiff did not meet those exceptional circumstances, and therefore the trial court did not err in giving the "but for" instruction.

■ ***Submitted by Thomas W. Purcell***
MB Law Group

Petitions For Review

Kevin Sasse, Dunn Carney
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.

***Brown v. GlaxoSmithKline, LLC*, S070082, A169544. 323 Or App 214, 523 P3d 132 (Dec. 14, 2022). Oral argument held on November 9, 2023.**

This case concerns the administration of a pharmaceutical drug to plaintiff in a hospital's emergency department while she was pregnant that resulted in her child being born with irreparable hearing defects. Plaintiff alleged that defendant hospital was subject to strict product liability because defendant charged for the drug and was therefore a "seller" for purposes of ORS 30.920. The trial court granted defendant's motion for summary judgment on the issue, and plaintiff appealed. The Oregon Court of Appeals reversed, holding that a party may be a "seller" for purposes of ORS 30.920 even if such product sold is "incidental" to the party's primary service provided, and further holding that there was a material question of fact on that issue. On review, the issue stated is: "Whether, when a hospital administers a pharmaceutical drug to a patient on the orders of a physician and the hospital charges separately for the pharmaceutical drug, the hospital has become a 'seller . . . engaged in the business of selling' the pharmaceutical drug for purposes of strict liability under ORS 30.920."

***Certain Underwriters at Lloyd's London v. TNA NA Manufacturing, Inc.*, S070083, A175864. 323 Or App 447, 523 P3d 690 (Dec. 29, 2022). Oral argument held on November 9, 2023.**

This case concerns the waiver of tort remedies in an agreement for the purchase of food-processing equipment after an outbreak of listeria was discovered at plaintiff's insured's premises. After plaintiff indemnified its insured for its losses, it pursued a claim against defendant alleging defective equipment. The trial court granted defendant's motion for summary judgment that the contract waived the availability of tort remedies. The Court of Appeals affirmed. On review, the issue stated is: "In the context of commercial dealings, does Oregon law adhere to the rule that contracts will not be construed to exculpate a party from the consequences of the party's own negligence and product defects unless such an exculpatory agreement is established as a bargain in fact between the parties, and the intention to exculpate a party from tort liability is clearly and unambiguously expressed?"

***Twigg v. Admiral Insurance Company*, S070191, A175084. 324 Or App 259, 525 P3d 478 (Feb. 15, 2023). Oral argument on December 14, 2023.**

This case concerns an insurer's duty to indemnify with respect to a portion of an arbitration award obtained against its insured on a breach of contract claim. After obtaining the arbitration award, plaintiffs filed suit against defendant

for breach of its insurance policy with its insured (the underlying defendant). The trial court concluded that the insurance policy did not provide coverage for the insured's liability to plaintiffs. The Oregon Court of Appeals affirmed, holding that the liability did not arise from an "occurrence", *i.e.,* an accident, and instead arose solely from breach of a contractual duty. On review, the issue stated is: "Did the Court of Appeals err by failing to construe the defined policy term 'occurrence' from the perspective of the ordinary insured and conclude that the term as defined could reasonably be interpreted to include an insured making mistakes in the performance of a contract that caused accidental property damage, irrespective of the legal theory under which the insured is found liable, *i.e.,* contract, tort, both or other?"

***Bohr v. Tillamook County Creamery Association,* S069773, A175575. 321 Or App 213, 516 P3d 284 (Aug. 10, 2022). Oral argument on March 4, 2024.**

This case concerns putative class action Unfair Trade Practices Act claims against defendant for deceptive marketing and representations. Defendant moved to dismiss plaintiffs' complaint for failure to plead reliance. The trial court granted the motion in part, and denied it in part, concluding that the named plaintiffs had adequately pleaded reliance but that the class had to be amended to those putative members who had purchased defendant's products in reliance on defendant's marketing representations. The trial court also certified seven controlling issues of law for interlocutory review pursuant to ORS 19.225, five from plaintiffs and two from defendant. The Court of Appeals granted the parties' applications for interlocutory appeal, and affirmed after reaching two certified questions from plaintiffs concerning whether they needed to plead and prove reliance. On review, the issues stated are: (1) In a UTPA case, where a plaintiff alleges that the defendant engaged in an unlawful trade practice in violation of ORS 646.608(1)(b), which prohibits the defendant from 'caus[ing] likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of . . . goods,' is the plaintiff required to plead reliance to state a claim for relief?"; (2) "When a defendant engages in conduct that causes inflated prices of its products across the market, does a plaintiff who purchases a product at the inflated price suffer an 'ascertainable loss' within the meaning of the UPTA?"; (3) "In a UTPA case, where a plaintiff alleges the defendant engaged in conduct in violation of ORS 646.608(1)(d) or (e), and further alleges that the defendant's conduct inflated the market price of the defendant's products or otherwise caused the plaintiff to pay more for the product than she otherwise would, is the plaintiff required to plead reliance?"; and (4) "In a UTPA case, where a plaintiff alleges that the defendant engaged in conduct that is unlawful independently of the consumer transaction, such that the defendant's unlawful conduct occurs before the point of sale, is the plaintiff required to plead reliance to state a claim for relief?"

***Friends of Yamhill County v. Yamhill County,* S070290, A180472. 325 Or App. 282, 529 P3d 1007 (Apr. 19, 2023). Oral argument on March 1, 2024.**

This case concerns judicial review of an order of the Land Use Board of Appeals upholding the county's approval of a conditional use permit for the applicant to operate a bed and breakfast as a home occupation in a structure to be built on land zoned for exclusive farm use. The Court of Appeals reversed the LUBA's order because it was "unlawful in substance" under ORS 197.850(9)(a). On review, the issues stated are: (1) "Is a structure a 'dwelling' under ORS 215.448 specifically and ORS chapter 215 generally only if the structure is 'primarily dedicated' for use as a dwelling?"; and (2) "Do the building code standards under which a structure is built inform whether the structure is a dwelling within the meaning of ORS chapter 215?"

CONTINUED ON NEXT PAGE

Judge Joan Demarest

Benton County Circuit Court

Joan Demarest arrived in Corvallis as a child from the East Coast, where much of her family still lives. Her community involvement began when she was young, as her parents worked to inculcate the value of volunteering in their children. For Judge Demarest, that early start pushed her to continue volunteering well into her legal career with organizations like Boys and Girls Club and Zonda Project. Judge Demarest returned to the East Coast for college but ultimately forged her life and career in Corvallis. She says Corvallis is small enough to have a genuine sense of community but big enough not to feel stifling. Her years of community involvement have given Corvallis that inimitable quality of not just being her home, but of really feeling like home.

Judge Demarest's road to the bench was not a perfectly straight one. She recalls that when she first applied for a judicial position years ago, she was rejected. In retrospect, she is thankful that occurred, because it was only after that disappointment that she performed some of the most meaningful legal work of her career. There is perhaps a lesson there—about disappointment, resilience, and being open to the opportunities that come our way. When she finally did secure a judgeship, it was because of the experiences she had gained and because the time was right; "the planets aligned" for the position, she notes. It was her time.

That doesn't mean it is easy for this mother of four to balance her high-caliber position and her life beyond the bench. She recalls that when she began applying for judicial positions, some colleagues were surprised—a mother of four school-aged children is not our typical idea of a judge. In that sense, Judge Demarest is proud

to play a role in paving the way for greater diversity on the bench. Her example shows that working mothers and others with significant family commitments can reach the high echelons of the legal world. Judge Demarest is optimistic about the growing diversity in law, particularly on the bench. She shares that "the look of the room" at judicial conferences has evolved even in a few short years, and that builds momentum. When people see themselves represented in a position, they begin to see what is possible. Perhaps more people will be encouraged to take the chance, shoot their shot, and apply for the job.

Still, diversity on the bench and in the legal world means more than simply shoehorning new types of people into a career model historically made for men who have wives at home to take care of all the domestic and family related tasks—the *Mad Men* special, if you will. Being a judge, notes Judge Demarest, is "not a job that typically invites those who can't work a standard 8-5." Technology is changing that. The COVID-19 pandemic was a considerable disruption of our systems and routines, but that might be good, at least in some ways. The increasing availability of remote work and remote appearances has been helpful in allowing professionals like Judge Demarest to balance their work responsibilities with their lives. We can't go back to the pre-COVID days of everyone in the office or the courthouse every day from 8:00 to 5:00, and we shouldn't. The greater flexibility that technology allows us paves the way for members of diverse groups to participate in the legal world in a way that might have been impossible before. Judge Demarest takes advantage of technology to work at home after the kids go to bed or on the weekends when she has spare time.

It takes a village, Judge Demarest says, to achieve balance. She is not afraid to lean on the people in her life when she needs to, to keep up with her demanding schedule and the schedules of her four kids, which, as many parents can understand, are demanding in their own ways. Most importantly, she has learned when to say no to further commitments. She makes sure to carve out time to reflect and restore herself, mostly through her lifelong love of hot yoga.

Asked if she has any advice for counsel who appear in her courtroom, Judge Demarest advises to be polite to staff and court personnel—word gets around when lawyers are rude and entitled. That goes for having courteous relations with opposing counsel as well. Confer ahead of time and stipulate to admissibility of as many exhibits as possible to keep the process streamlined and efficient. And finally, as many lawyers can attest, always test your technology ahead of time. There's nothing more frustrating than to delay an entire courtroom full of people because counsel can't get the projector to work.

■ ***Submitted by Maggie Donohue***
MacMillan Scholz & Marks

Honorable Pat Wolke

Josephine County Circuit Court

Judge Pat Wolke's bicycle has literally taken him all over Oregon. He began riding while attending law school, but it became his passion when he moved to Condon, Oregon. As he puts it, he "lived in a little county, in a little town, and there was very little recreation going on." So, he began exploring the landscape of eastern Oregon on his bike, surprising the jackrabbits and deer along the way. Since then, he has completed three Cycle Oregon events, the Ride the Rogue event, and the Oregon Coast Trail.

No matter how far Judge Wolke rides, he still calls the small town of Grants Pass, Oregon home. His grandparents emigrated from Germany in the 1890s and settled in Grants Pass, making him a third generation southern Oregonian. Judge Wolke is the youngest of three brothers, all of whom are attorneys. His daughter also entered the family business, becoming a public defender in Josephine County.

He briefly left small town life for law school at Lewis & Clark, but then he moved to another small town in eastern Oregon—Condon—to be closer to his wife's family and to begin his law practice. Due to the small population of eastern Oregon, his practice was diverse. He was a part-time district attorney for Gilliam and Wheeler Counties and privately practiced real estate and probate law. Since that did not keep him busy enough, he operated a title company, was a member of the school board, and volunteered for the fire department.

After living in Condon for 17 years, Judge Wolke moved back to Grants Pass, where he practiced law with his brother for 10 years. He was approached in 2004 to become a pro tem judge to cover overflow cases

and was then appointed as a circuit court judge in 2006. He developed an interest in becoming a judge because he was at a point in his law practice where he could often predict the way that his cases were going to go—win or lose.

> Judge Wolke believes that mental health treatment is a civil rights issue and believes that the mental health court is a way for people experiencing mental illness to turn their lives around to become productive members of society.

Judge Wolke presides over all types of cases: criminal, probate, family, and some civil cases. In 2009, he started the Josephine County Mental Health Court, where he works to ensure that those experiencing mental illness can receive the treatment they need. He believes that treatment for mental health is a civil rights issue and believes the mental health court is a way for people experiencing mental illness to turn their lives around to become productive members of society.

The most interesting cases Judge Wolke hears are the ones that teach him something about what is going on in society. He recalls a recent personal injury case where a woman was in anaphylactic shock and did not receive the appropriate medical treatment quickly from the EMTs or the hospital. From that case he learned a lot about our health care system and how it operates.

He is aware that in such civil cases, the attorneys know so much more about the subject matter than the judge and jury do. Therefore, he advises that attorneys should stay focused on the key facts and areas of the law that will lead to their desired result and avoid anything that might distract the judge from their theory of the case. Judge Wolke warns, "Bad attorneys will treat all facts the same." As a result, the judge and the jury will do likewise, and the message may be lost. Visual aids should be used as much as possible, and technical language should be avoided.

Judge Wolke still presides over cases in Josephine County but will be retiring soon. After that, you can find him on one of the many bike trails across Oregon.

■ ***Submitted by Steven Gassert***
Smith Freed

Legislative Update

Maureen McGee, Tonkon Torp
OADC Lobbyist

The Oregon Legislature may be in the interim, but policy-making never ends.

MAUREEN MCGEE

This fall has brought interim Legislative Days meetings, a new revenue forecast, and new litigation over Measure 113—all of which provide clues to the policy conversations and political tensions shaping the upcoming short session that will begin on February 5, 2024.

Interim Legislative Days

Since Oregon voters adopted annual sessions in 2010, the legislature meets for a maximum of 160 days in odd-numbered years and 35 days in even-numbered years. The time in between sessions is called the interim. The legislature convenes periodically during the interim for Legislative Days, when committees hold informational hearings to discuss topics that may lead to future legislation, receive updates on implementation of previously passed legislation, receive legislatively required or requested reports from state agencies and task forces, and otherwise keep current on the subject areas affecting Oregonians. The Senate may also convene for the purpose of confirming the governor's executive appointments.

The legislature met for its first set of Legislative Days after the 2023 session from September 27-29, where the key development was insight into the legislature's hyper-focus on Ballot Measure 110 for 2024. Implementation of Ballot Measure 110, which decriminalized small amounts of hard drugs in Oregon, has been subject to growing criticism as the state continues to face a crisis in addiction and access to services.

Both the Senate Judiciary Committee and the House Behavioral Health and Health Care Committee heard updates on Measure 110 implementation, and a new interim joint committee, the Joint Interim Committee on Addiction and Community Safety Response, was announced. Led by two former county prosecutors—Senator Kate Lieber (Democrat, Beaverton & Southwest Portland) and Representative Jason Kropf (Democrat, Bend)—the committee first met in October and is ultimately set to meet four times through January to hear from addiction treatment providers, law enforcement, and others about the factors driving the crisis, as well as potential solutions. While Democratic legislators say that they aim to identify what is and what is not working with Measure 110 and make reasonable changes during the 2024 Legislative Session, Republican leadership will likely urge the committee to go much further and refer Measure 110 back to the ballot for voters to accept or repeal it.

While "fixing" Measure 110 is a broadly bipartisan issue, whether legislators can thread the needle with generally acceptable solutions in 2024 will be a high-stakes conversation. Looming in the background are two ballot measures filed by a coalition of prominent business and political leaders that propose prohibiting the public use of hard drugs;

making possession of deadly drugs like fentanyl, meth, and heroin a misdemeanor; replacing voluntary treatment with required addiction treatment; prioritizing prevention, treatment, and recovery instead of prosecution and jail; and maintaining cannabis taxes to expand prevention, treatment, and recovery services. One of the two petitions would also help police fight drug traffickers.

Other topics discussed in September that may be of interest to OADC members included presentations on Paid Leave Oregon Implementation and Oregon Employment Department Modernization to the Senate Committee on Labor and Business.

November Legislative Days featured very little of import to OADC members. However, practitioners in our Construction Practice Group may be interested in an update given to the House Committee on Business and Labor on November 6 regarding HB 2870 (2023), which would have required contracting agencies to accept bonds in lieu of retainage from contractors for construction projects and public improvement contracts. While this bill narrowly did not pass in the waning days of the 2023 session, the policy was a priority of the Associated General Contractors developed in conjunction with members of the Oregon State Bar Construction Law Group and will likely return soon.

Meeting agendas, recordings of presentations, and meeting materials for all Interim Legislative Days meetings can be accessed by visiting https://olis.oregonlegislature.gov and, under the "Session" drop-down menu, selecting "2023-2024 Interim."

November Revenue Forecast

November also brought release of the December 2023 Revenue Forecast, showing that state revenues are stable with low inflation and unemployment in the economy. This forecast will help lawmakers as they prepare for 2024 and start to consider legislation that may dedicate additional funding to address some of the major issues facing Oregonians, namely drug addition, homelessness and child care. While the economic outlook is good for the short term, the forecast also showed that more people left the state in 2022 than moved in, raising questions particularly from Republican lawmakers as to what changing migration trends could mean for the state's economy.

Other Major Considerations for 2024

Other major themes developing for the 2024 session include bipartisan work to address homelessness and to expand Oregon's housing supply—the top 2024 priority for Governor Kotek—and to rebalance the state's budget. Legislative leadership from both parties are projecting a desire to leave contentious, partisan issues on the table in 2024 and to heal political wounds from 2023.

Perhaps due in part to that goal of bipartisanship, Legislative Interim Committees have yet to discuss any ongoing conversations regarding the insurance bad faith policies that failed during the 2023 Session. OADC continues to keep a careful eye on this policy and does expect that these bills will be reintroduced soon—if not in 2024 then likely in 2025.

Also contributing to the goal of bipartisanship are lingering questions about Senate Republicans' political appetite for providing quorum in February, given ongoing litigation over Ballot Measure 113 (regarding unexcused absences by legislators). In early November, three Republican Senators sued Democratic Senate President Rob Wagner and Secretary of State LaVonne Griffin-Valade in federal court to block a ruling from Secretary Griffin-Valade that, under Measure 113, the senators were disqualified from filing for reelection because they had more than 10 unexcused absences. In the federal case, plaintiffs argue that the defendants infringed on plaintiffs' First Amendment right to free expression and Fourteenth Amendment guarantee of equal protection under the law. Meanwhile, a state court case challenging the Secretary's interpretation of the wording of Measure 113 continues before the Oregon Supreme Court, which is scheduled to hear oral arguments on December 14.

OADC will continue to keep members apprised of legislative news as it develops and, as always, thanks each of you for your support of the OADC Government Affairs Committee. If you ever have questions about OADC's legislative program please contact our chair, Lloyd Bernstein at Lloyd.bernstein@bullivant.com or lobbyist Maureen McGee at maureen.mcgee@tonkon.com.

Defense Victory!

Christine Sargent, Littler Mendelson
Defense Victory! Editor

Oregon Supreme Court Affirms No Substantive Exception to Exclusive Remedy Provision

On July 7, 2023, the Oregon Supreme Court affirmed the trial court and Oregon Court of Appeals' decisions in defendant's favor in *Bundy v. Nustar LP, LLC,* 371 Or 220. (See "Recent Case Notes," this issue, pg. 17,) Daniel R. Bentson of Bullivant Houser represented defendant/respondent and John Burgess and Carl Post represented plaintiff/petitioner. Chief Justice Flynn and Justices Rebecca Duncan, Christopher Garrett, Roger DeHoog, and Senior Pro Tem Justices Thomas Balmer and Martha Walters presided.

Plaintiff/petitioner asked the court to weigh in on whether ORS 656.019 provides a "substantive exception" to the exclusive remedy provision of the Oregon Workers' Compensation statute (ORS 656.018), or whether ORS 656.019 merely proscribes procedural requirements for bringing a civil action—authorized by some source of law *outside* the Workers' Compensation statute—when a work-related injury is found to be non-compensable. In affirming the lower courts, a unanimous Supreme Court found that the legislature did not intend to provide a substantive exception to the exclusive remedy provision when enacting ORS 656.019 after the court's ruling in *Smothers v. Gresham Transfer, Inc.* Notably, the court observed that the question of whether an injured worker has a constitutional right to pursue a civil action for a non-compensable injury was not before the court. If that question had been preserved, the court would have had to determine whether its case law overruling the construction of the remedy clause relied on by *Smothers* would affect *Smothers*'s holding that injured workers who receive no compensation have a right to pursue a civil action.

■ ***Submitted by Sharon Bolesky***
Littler Mendelson

A Loss-of-Chance for Clarity, But a Win for the Defense

In July, the Oregon Supreme Court reversed the Court of Appeals in the case of *Martineau v. McKenzie-Willamette Hospital, et al.* Travis Eiva represented plaintiff. Alice Newlin and Nikola Jones of Lindsay Hart represented defendants Dr. Dariusz Zawierucha and Radiology Associates, and Hillary Taylor and Lindsey Hughes of Keating Jones Hughes represented defendants Cascade Medical Associates and Dr. Gary Josephson.

The two issues before the court were: (1) did the trial court err in giving UCJI 44.03, and (2) can a claim for loss of chance under the survival statute be brought in the alternative to a wrongful death claim under ORS 30.020 in the same action? The case law on Oregon's relatively new loss-of-chance claim is sparse. The Court of Appeals opinion approved of a loss-of-chance theory in a wrongful death case, but concluded that in *Martineau,* specifically, the loss of chance claim had properly been dismissed. The court left open the possibility that in other cases, properly pleaded loss-of-chance claims could be brought with a wrongful death claim as an alternative theory.

The court also reversed the Court of Appeals on the UCJI issue and held that the language in UCJI 44.03, "a physician does not guarantee a good result merely by undertaking to perform a service," is neither incorrect nor misleading. Nearly four years after prevailing at trial, defendants had their victory reinstated on review.

■ ***Submitted by Alice Newlin***
Lindsay Hart

Appraiser Prevails on Economic Loss Rule, Statute of Limitations, and Lack of Causation

On April 27, 2023, Lee Wagner of Sokol Larkin obtained a complete dismissal of several claims against a real estate appraiser, including claims of professional negligence, breach of fiduciary duty, and negligent misrepresentation. In the order granting summary judgment, the Oregon Circuit Court for Marion County ruled that: (a) plaintiff's claims were time barred because they were not filed within the time required by the applicable statute of limitations; (b) Section 7 of HB 4212 did not extend the statute of limitations beyond December 31, 2021; (c) plaintiff did not maintain a special relationship with defendants, which special relationship was a required element of plaintiff's claims; (d) defendants did not owe any fiduciary duties to plaintiff; (e) defendants did not cause plaintiff's alleged damages; and (f) plaintiff did not rely upon the appraisal report that was the subject of plaintiff's claims. A general judgment dismissed all the claims. Plaintiff did not appeal the judgment.

■ ***Submitted by Lee Wagner***
Sokol Larkin

OADC Amicus Committee Update

Michael J. Estok, Lindsay Hart

The OADC Amicus Committee remains ready to assist the OADC membership with complex or significant issues on appeal. When appropriate, the Amicus Committee will draft and submit an amicus curiae brief (Latin for "friend of the court") on behalf of Oregon's defense attorneys. We believe it is important to provide the appellate courts with insight from the defense bar, above and beyond the interests of the parties to the case at issue.

For more information about our committee, check out our page on the OADC website: https://www.oadc.com/amicus-committee. There you will find a brief bank of prior submissions by our attorneys, as well as the contact information for our committee's members. You will also find a questionnaire that can be used when submitting a request for amicus support.

Recent Submissions

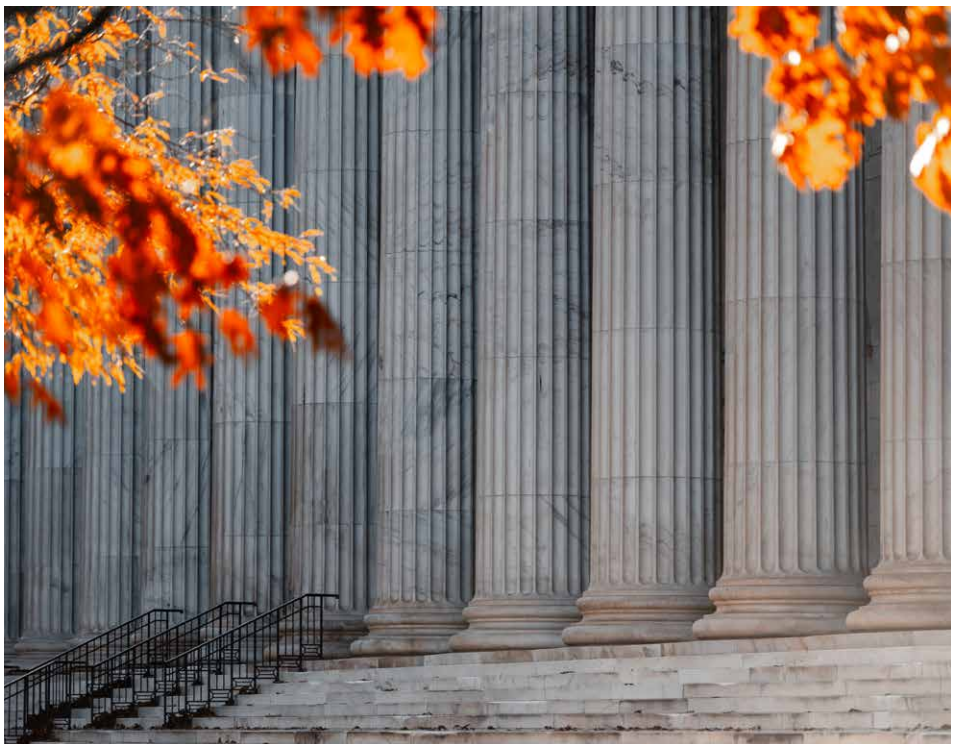
In my last column, I summarized two amicus briefs we submitted earlier this year, including in *Yeager v. Montgomery* (A179618) and *Brown v. Providence Health System-Oregon* (S070082). More recently, we submitted an amicus brief in *Bonner v. American Golf Corp. of California, Inc.* (S070183). The brief was authored by Alice Newlin of the Lindsay Hart firm.

The *Bonner* case involved the certification of a question of law by the federal district court to the Oregon Supreme Court, as follows: "Does ORS 471.565(1) violate the Remedy Clause of the Oregon Constitution, Article I, §10, by denying a remedy to a plaintiff who sustains injury due to his or her own voluntary intoxication and who sues a licensed server or social host in their role as such?"

This issue had previously been presented to the Supreme Court in *Schutz v. La Costita III, Inc.,* 364 Or 536 (2019), but the court decided to base its ruling on the facts of that particular case and thus not reach the constitutional question under the Remedy Clause. In our amicus brief, we focused on the Remedy Clause analysis that the Court of Appeals had previously conducted in that same *Schutz* case. We argued that it had been an erroneous analysis and had strayed far beyond the principles articulated by the Supreme Court in the last major case applying the Remedy Clause, *Horton v. OHSU,* 359 Or 168 (2016). We advocated that the Supreme Court should apply and follow the *Horton* analysis rather than the Court of Appeals' analysis in *Schutz,* including that the legislature should have appropriate flexibility in making policy changes that reflect the needs of the community over time.

Membership Opportunity

Lastly, the OADC Amicus Committee is looking for a new member to join its ranks. Please reach out to me if you have interest in applying to become a member of the committee.



The Word Smith

Julie Smith
Cosgrave Vergeer Kester

Mistakes Were Not Made: Using Passive Voice with Purpose

I was in the mood for fried rice recently. We didn't have cold, day-old rice, so I used freshly cooked, warm rice instead.


JULIE A. SMITH

"Mistakes were made," I said, as I presented my family with a clumpy, soggy dinner. I was trying to be clever, of course. But my well-placed use of passive voice here got me thinking about how passive voice often gets a bad rap, particularly in legal writing, even though it can be effective when used with purpose.

What Is Passive Voice?

An active-voice sentence focuses on the *subject* of the sentence. In an active-voice sentence, the subject performs the action, as in: "The defendant drove across the center line of the road." Active voice tends to be clearer, to immerse the reader into the action, and to propel the narrative forward, which is why active voice is generally preferred in legal writing.

In a passive-voice sentence, on the other hand, the focus is on the action and the receiver of the action. For example, in the sentence "The car was driven by the plaintiff," the focus is on what was happening to the car as opposed to what the plaintiff was doing. When overused, passive voice can make legal writing vague and difficult to follow.

While active voice is still the gold standard for most aspects of legal writing, passive voice does have its place.

Use Passive Voice to Avoid Taking or Assigning Blame

Sometimes your client will need to admit that something bad happened without taking the blame or assigning it to someone else. "Plaintiff was injured" is a common example of the appropriate use of passive voice by the defendant when the defendant does not dispute that the plaintiff was injured in an accident but does dispute liability for the injuries.

Use Passive Voice to Soften the Impact of Bad Facts

Passive voice can also be used to soften the impact of damaging facts. For example, "The products were not shipped on time" is a tempered way of conceding the fact that your client failed to ship the products on time.

Use Passive Voice to Emphasize What Happened, As Opposed to Who or What Is the Cause

Another reason to use passive voice is to emphasize the events or their consequences, as opposed to their cause. This is especially useful when the action or the receiver of the action is what really matters and/or the actor is obvious, irrelevant, unknown, or could be any of a number of people.

The sentence "The trees were damaged in the windstorm" emphasizes what happened to the trees. The sentence could be revised to say, "The windstorm damaged the trees," but doing so would put the focus on the windstorm and take the focus off what happened to the trees.

"The judgment was entered" is a classic example of a sentence in which the actor is obvious and irrelevant. It makes no difference who entered the judgment, although we all know it was the trial court. The action ("was entered") and the thing receiving the action ("the judgment") are what matter. It is unnecessary, and arguably counterproductive, to convert sentences of this sort to active voice.

Use Passive Voice to Convey Generalized Truths

Passive voice is also used in legal writing to convey generalized truths or to convey an opinion or suggestion with a more deferential tone. "It is well settled that a contract claim accrues on breach," is an example of a generalized truth. So is: "It is well understood that jurors tend to give greater weight to scientific evidence."

Use Passive Voice Consciously

Generally speaking, passive voice should still be avoided in legal writing. But when it is used intentionally and strategically, passive voice can make legal writing more persuasive.

Oregon Association
of Defense Counsel

9600 SW Oak Street, Suite 565
Tigard, OR 97223