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**SUNRIVER, OREGON**

Location for OADC Annual Convention

June 16-18, 2022

Cover photo courtesy of Jeanne Loftis
**President’s Message**

Get in the Game: A Message to Young Lawyers

Katie L. Smith, Walhood Law Group

“Don’t worry about being ‘successful.’ Strive for the truest, highest expression of yourself ... and then use that expression in service to the world.” —Oprah Winfrey

The practice of law and delivery of legal services—how we present a case at trial, connect with our clients and colleagues, market our legal services, and operate in a physical office—has fundamentally changed. It is undeniable that legal practices have evolved significantly over the past 10 years and particularly in the past 2 years. Young lawyers are uniquely positioned to help the profession address these changes, so I urge you to Get in the Game!

Now is the time when young lawyers can help redefine how we practice law in Oregon. I know the phrase “millennial” has been thrown around so carelessly and casually by many that it has left a bad taste among many who fit within that generation.

But the millennial generation and those who follow in your footsteps should wear that generational stamp with a badge of honor. Young lawyers today are well-educated, worldly, committed to their true selves and accepting of the same from others, and in touch with the social and political landscape. When you combine your fearless and adventurous spirit, your open-minded and embracing attitude, your comfort with technology, and your legal education, you can modernize our profession and ways of thinking and improve the way we serve our clients.

The more involved you are in OADC and in your legal community, the more you will cultivate relationships that will allow you to be a better leader and give you the opportunity to have an effect and make an impact on the legal profession and local communities.

Get involved by getting in the game. Make yourself known. Shake the hand of (or elbow bump) somebody you haven’t met before, tell them about your story, find out about their story, expand your reach, and develop relationships. Don’t let this time in your life go by without having maximized your opportunities to establish a platform upon which you can build your practice and your leadership for your community and our justice system.

How can you get involved, you ask? OADC is an organization of like-minded civil defense practitioners. As an organization, we are volunteer-run and volunteer-driven: we depend on volunteers within our legal community to develop and direct all the benefits and services available through OADC. One way to get involved is to do so through OADC. See below for ways you can participate.

Young lawyers have so much to offer our legal community. How you think, how you hold yourself, how you operate and how you view the world. Our profession is evolving, and we need young lawyers to help shape that evolution. Whether your involvement is through OADC, within your firm, or some other legal or community organization, the simple message to you is get in the game and make your mark!

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Get in the Game with OADC! Here are some ideas for joining the team.

Become a Practice Group or Affinity Group Leader
OADC has 13 different practice groups and affinity groups run by a team of volunteer leaders. The leaders of these groups develop and implement the exchange of information among their respective groups by planning and offering educational sessions and networking opportunities. The involvement and engagement of the OADC Practice and Affinity groups is essential to the mission of OADC, and with your involvement you can help shape our organization, while developing your own relationships and walking your own path to leadership. Our OADC Board Members have come up through the ranks of the Practice and Affinity Groups. I began as the publications liaison for the Construction Practice Group and today I am humble to serve as the OADC President. Make that your future.

Become an Editor
The Verdict™ is one of the most highly regarded legal publications across the country. Many other defense organizations aspire to produce such a well-composed, professional, and content-filled publication. The Verdict™ is made possible by the hard work and dedication of its editorial staff. Become one of the editors of this fine publication!

Write for Us
The Verdict™ is published quarterly and delivered to OADC members and judges across the state. Author an article on a topic of interest to you, get published, and get your name recognized. Articles you author can be shared on your own LinkedIn account as well.

Engage and Network
To enhance your own professional development and make a difference in the legal community, you have to do more than talk about the changes that need to be made. You have to put yourself out there, make yourself known and speak up. Fortunately, OADC is the most welcoming group of legal professionals I know, so put any apprehension aside, attend an event, sit next to someone you don’t know, and introduce yourself. You may surprise yourself with the connections you make. If you are interested in becoming a leader, editor, or just want to talk more about how you can get in the game with OADC, please contact me!
Ghostbusters Meets Guardians of the Galaxy: Giving Life to the Council on Court Procedures

Honorable Susie L. Norby
Clackamas County Circuit Court

“If There’s Something Strange... in Your Neighborhood...”

A long time ago, in a legal system far, far away, Oregon had a canon of laws so antiquated that it was aptly named “the Deady Code.” This ghost of the past—compiled and annotated by Judge Matthew Deady 160 years ago—haunted civil procedure in Oregon from 1862 to 1977.

As early as the mid-1920s, Oregon’s bench and bar resolved to exorcise that ghost and create a better civil procedure blueprint. But finding a ghostbuster squad to liquify the Deady Code was not easy. Legislators sidestepped the daunting rule renovation venture. A 1939 OSB Committee considered empowering the Supreme Court to enact new trial court rules, but bar members voted against it, wanting litigators and trial judges to influence rule reform. A 1962 proposal for a new state constitution again tried to shift rulemaking to the Supreme Court but failed.2 The Deady Code remained undead.

“Who You Gonna McCall?”

Finally, in 1975, Governor McCall’s visionary Commission on Judicial Reform, the Oregon State Bar, and the state’s judiciary cooperatively deduced that an ideal ghostbuster squad must extend beyond the legislature and the Supreme Court to include trial judges and lawyers with broad perspectives. They jointly created the Council on Court Procedures with 23 volunteers: one Supreme Court Justice, one Court of Appeals Judge, eight trial court judges, six plaintiff litigation attorneys, six defense litigation attorneys, and one public member.3 In 1977 these ghostbusters liquified the Deady Code with rule-reforming plasma guns and modernized Oregon’s civil procedure. By 1979, the Council had created Rules 1-64 to guide civil procedure through trial completion. After publication, public comment and acceptance by the legislature, those rules were enacted, and buried the laws of yesteryear. By 1981, Rules 65 through 85 completed Oregon’s new Code of Civil Procedure. The Deady coda came to life.

Interface—The Final Frontier

After the original ghostbuster Council vanquished the Deady Code and created a more evolved civil procedure process, it resolved that the new rules must not only live but thrive. So, the Ghostbuster Council members mutated into “Guardians of the Galaxy (of Civil Procedure Rules).” Their new mission: to continually study Oregon civil procedure laws, reexamine existing rules and seek out new ideas and viewpoints.

As egalitarian as the Council members are, even broader inclusion of trial lawyer ideas is key to its mission. Each biennium, the Council distributes surveys inviting Oregon attorneys to suggest ideas for rule improvement. Responses land on the desk of the Council’s own Miss Moneypenny—an Executive Assistant with epic skills. Dozens of ideas are sent by lawyers, judges, and organizations that interact with civil courts. They are compiled into a chart for Council members to review and decide which to focus on in that biennium. Once choices are made, committees are formed, sleeves are rolled up, and debates and re-writing begin.

We Ain’t Afraid of No Consensus!

Oregon’s Council on Court Procedures is anomalously democratic compared to other courts’ civil procedure rulemaking overlords. Most federal and state rulemaking power is held exclusively by the highest-ranking judges. Even states with rulemaking committees typically invite only judges to join. Oregon is different. By statute, there are more attorneys on the Council than judges. A quorum requires approval by plaintiff litigators, defense litigators, and judges.

Since today’s civil procedure code is comparatively young, each new proposal for change is cautiously considered. The Council’s Saturday morning monthly meetings last several hours, with some members zealously defending existing rule language while others champion the proposed change. Sometimes a single rule change debate spans many meetings, yet never reaches a point of consensus that advances it for publication to the bar and submission to the legislature. No Council member is immune to the consequences of rule changes, because Council members are not only volunteer Guardians of the Galaxy (of Civil Procedure Rules) but also inhabitants of the worlds affected by rule changes, who must live with Council decisions in their own professional lives.

Time-Space Continuum

Just as a superhero film takes years to produce, so does a rule change take two years to complete. The Council’s own Steven Spielberg, Executive Director Mark Peterson, has harnessed enthusiasm and harmonized discord of ardent Council members for 17 years.

CONTINUED ON NEXT PAGE
The first step in the rule change process is action-packed. Its arc begins in August of odd-numbered years when committees are formed to configure and consider new projects. To approve a rule change proposal, a majority vote during a full Council meeting attended by a quorum of members must deem it worthy. Once a proposal is approved, which takes several months, Moneypenny converts it into final form for publication to all Oregon bar members to critique. The Council reviews every comment, then votes on whether to deliver final amendment proposals to the state legislature.

When the next long legislative session begins, neither the Senate nor the House vote on the Council’s proposals. The law requires that they be published with the Oregon Revised Statutes the following January. The legislature retains the option to enact other rules, modify a change, or reject a recommendation, and remains the entity that rulemaking power would revert to if the Council is disbanded. But for 45 years, the legislature has welcomed nearly all Council creations. The Guardians of the (Civil Procedure Rules) Galaxy continue to find favor with lawmakers the Council was created to help.

**Rulemaking Kryptonite**

Though the Council’s superpowers may seem limitless, there are two forms of kryptonite that unfailingly repel a rule amendment proposal. The first arises from ORS 1.735(1), which authorizes the Council to make rules “governing pleading, practice and procedure ... in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant.” When a rule change proposal may affect a litigant’s substantive rights, the Council is powerless to approve it. Many biennial survey comments lament the Council’s inaction on substantive issues, urging it to be bolder. Alas, only the legislature has the superpower to alter substantive law.

The second form of kryptonite arises from ORCP 1B, which requires: “These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.” Other biennial survey comments question whether the Council purposely alters rules to make litigants’ lives more difficult. It does not. On the contrary, whenever a proposal threatens the just, speedy, and inexpensive determination of any action, it is in jeopardy. The Council members retreat unless there is no other way to craft a necessary rule improvement.

**Edge of Tomorrow**

The Council on Court Procedures busted the ghosts of the past, guards civil procedure in the present, and shapes Oregon’s court processes for the future, a mission of galactic proportions. There were only four Ghostbusters, and only five Guardians of the Galaxy. Even if Agent 007 and Superman vote, too, the Council would not reach a quorum. A dozen more volunteers comprise our 23-member Civil Justice League. Council member identities shift continuously; each is appointed for four years and must pass their cape to a new crusader after eight years. Leadership power is balanced by rotating plaintiffs’ attorneys and defense attorneys as Chairperson in each new biennium.

Every Council on Court Procedures volunteer knows that Oregon’s Rules of Civil Procedure are imperfect. It is a perpetual challenge to protect, revise, and harmonize rules while modernizing parts that no longer function well, and balancing interests of all who work for civil justice. Serving on the Council is a privilege and a unifying pursuit, akin to jury service. Unlikely collaborators unite—people from divergent legal standpoints and dissimilar communities. These protectors, critics, and visionaries clash and collaborate over the rules in a cacophony of voices, rising and falling for hours as members passionately debate whether rule changes would bring clarity or calamity. Then, at meeting’s end, dissonance resolves into conviviality, as combatants retreat into friendships forged in the verbal fire.

Oregon civil procedure has come a long way since the exorcism of the Deady Code 45 years ago. Council on Court Procedure volunteers are not cinematic action heroes unifying to protect people from mythic threats. But they are steadfast allies bound by a shared mission to protect Oregon’s procedural code from the threat of obsolescence. No one need buy a ticket to see the Council or pay money to read stories of the Council’s adventures. Council meetings are open to the public and meeting minutes are posted on its website.4 You don’t need a superpower to be a potential future Council member either—just litigation experience, a collaborative nature, and a love of law. For Council on Court Procedure members, a sense of duty is mandatory, but capes and intergalactic ancestry are, surprisingly, optional.

**Endnotes**

1 NOTE ABOUT THE AUTHOR: Hon. Susie L. Norby has served as a trial judge in Clackamas County since 2006 and on the Council on Court Procedures since 2017. She spearheaded the Council’s recent overhaul of ORCP 55, in response to a survey comment that simply read: “ORCP 55 is a mess. Can you do something about that?” Other biennial survey notes sometimes criticize the Council based on misconceptions about why the Council exists, how it works, and who is on it. This article is an explanatory response, unanimously approved by all Council members. The Council thanks OADC for its support of the Council and enthusiastic willingness to publish this to its members.

2 For a more in-depth account of the history leading up to the creation of the Council on Court Procedures, see Frederic R. Merrill, The Oregon Rules of Civil Procedure – History and Background, Basic Application, and The “Merger” of Law and Equity, 65 Or L Rev 527 (1986).

3 ORS 1.730

Oregon has seen a number of new employment laws passed in the last year. Every employer and employment law practitioner in the Beaver State should be aware of the following new laws, discussed below: SB 169, HB 2935, HB 4002, SB 567, HB 3041, and US Senate Bill 2342.

New Non-Compete Agreement Restrictions
Senate Bill 169 was passed last year and amends ORS § 653.295. The bill imposes new restrictions on all non-compete agreements entered into after January 1, 2022. The six new updates are: (1) agreements are void instead of voidable; (2) a new notice requirement; (3) tightening of post-employment restrictive period; (4) written requirement; (5) a revised minimum salary threshold; and (6) a revision to the white-collar exemption.

Noncompliant Agreements Are Void Instead of Voidable
Non-compliance with the statutory requirements now renders non-compete agreements void and unenforceable, whereas previously, the statute provided that non-complying agreements were only “voidable.”

Notice
A notice requirement is now imposed both before employment commences and after employment concludes. The amendments preserve the preexisting requirement that the employer give the employee written notice that a non-competition agreement is required as a condition of employment at least two weeks before the employee’s first day. In addition, the amendments add a new requirement that the employer must also provide a copy of the signed non-compete agreement to the employee within 30 days of the employee’s termination.

Scope—Time and Geography
The amendments reduce the enforceable length of an agreement from 18 to 12 months. If the agreement exceeds this time, the remainder of the term in excess is void and may not be enforced. As before, geography will be restricted to a geographic area and specified activities, all of which are reasonable in relation to the services performed by the employee.

Noncompetition Agreements Must Now Be in Writing
The new amendments remove the words “oral, express or implied” from the definition of “Noncompetition agreement.” Along with providing an employee two weeks of notice before the first day of employment, notice must be provided in a written employment offer.

Salary Threshold
The employee signing the non-compete agreement must meet the minimum salary threshold. The total amount of the employee’s annual gross salary and commissions at the time of the employee’s termination must exceed $100,533. This amount will be adjusted annually for inflation pursuant to the Consumer Price Index for All Urban Consumers, West Region (All Items), as published by the Bureau of Labor Statistics of the United States Department of Labor immediately preceding the calendar year of the employee’s termination. Previously, the salary threshold was determined by the median family income for a four-person family, as determined by the United States Census Bureau for the most recent year available at the time of the employee’s termination.

Written Provisions of White-Collar Exemption
In addition, if an employer wants to avail itself of the white-collar exemption for the time the employee is restricted from working, the employer must provide the greater compensation equal to at least “50 percent of the employee’s annual gross base salary and commissions at the time of the employee’s termination” or “$100,533, adjusted annually for inflation pursuant to the Consumer Price Index for All Urban Consumer, West Region (All Items), as published by the Bureau of Labor Statistics of the United States Department of Labor immediately preceding the calendar year of the employee’s termination.” This agreement must be in writing and cannot exceed 12 months. Previously, the agreement did not have to be in writing and was allowed to extend to 18 months. Also, as reflected in the prior amendment, previously, the employer was required to provide the greater compensation equal to at least 50 percent of the employee’s annual gross base salary and commissions or the median family income for a four-person family.
Oregon CROWN Act Amends Oregon Discrimination Laws

Effective January 1, 2022, Oregon’s new CROWN Act bans employers from discriminating against hairstyles associated with race. The term CROWN Act stands for “creating a respectful and open world for natural hair.” While ORS § 659A.030 had already prohibited discrimination based on race, House Bill 2935 clarifies the meaning of race to include “physical characteristics that are historically associated with race including but not limited to natural hair, hair texture, hair type, and protective hairstyles.” A protective hairstyle is defined as a “hairstyle, hair color or manner of wearing hair that includes, but is not limited to, braids, regardless of whether the braids are created with extension or styled with adornments, locs and twists.”  

Oregon’s CROWN Act applies both in education and employment settings. House Bill 2935 is one of several similar acts that have passed across the nation after news stories spread regarding high school students who were excluded from sports due to their hair style. For example, on March 4, 2021, a Parkrose High School volleyball player was forced to remove her beads from her hair in order to play. Valid dress code policies may still be enforced as long as the employer provides, on a case-by-case basis, reasonable accommodation of an individual based on the health and safety needs of the individual “and the dress code or policy does not have a disproportionate adverse impact on members of a protected class to a greater extent than the policy impacts persons generally.”  

Employers with grooming and dress code policies should review them to assure the policies do not run afoul of Oregon’s new CROWN Act and further, should provide training to managers regarding the new law.

Overtime for Agricultural Workers

Under the Fair Labor Standards Act, farmworkers and agricultural employees have long been exempted from federal overtime rules, with few states making separate provisions. During the 2022 Session, the Oregon Legislature passed HB 4002, which will begin phasing agricultural workers into the category of workers entitled to overtime, starting in 2023. HB 4002 establishes overtime pay requirements for agricultural workers in Oregon after 40 hours per week, with the requirements phased in over a five-year period, starting with 55-hours per week for 2023-2024, 48 hours per week in 2025-2026, and then 40 hours per week beginning in 2027.

The bill also creates a refundable tax credit to provide economic support to employers when they provide overtime pay for agricultural workers. Oregon joins California and Washington as the tenth state to recently pass such legislation.

Oregon Clarifies Gender Identity as a Protected Class

House Bill 3041 broadens Oregon’s state statutes to include “gender identity” within the definition of “sexual orientation” for all Oregon laws that use that term. This includes Oregon’s housing, employment, public accommodation, education, healthcare, and law enforcement profiling laws. Gender identity is defined as “an individual’s gender-related identity, appearance, expression or behavior, regardless of whether the identity, appearance, expression or behavior differs from that associated with the gender assigned to the individual at birth.” This bill was declared an emergency and made effective immediately upon signing on June 23, 2021.

Oregon Prohibits Discrimination in Healthcare Settings

SB 567 prohibits the denial of medical treatment or restriction of allocation of medical resources to patients. The bill clarifies that healthcare providers in Oregon cannot deny medical treatment or limit the allocation of medical resources based on a patient’s race, color, national origin, sex, sexual orientation, gender identity, age, or disability. The new requirement is intended to prevent discrimination towards those who might be deprioritized for life-saving resources based on a protected class. This bill was declared an emergency and made effective immediately upon signing on July 19, 2021. All healthcare providers should review their internal policies to ensure compliance with the new requirement.

Congress Bans Forced Arbitration of Sexual Assault and Harassment Claims

On March 3, 2022, President Biden signed Senate Bill 2342 to end forced arbitration in workplace sexual assault and harassment claims. The legislation gives individuals who are alleging sexual assault or sexual harassment the right to void arbitration agreements that require their claims to be decided in arbitration. The new law applies to both “predispute arbitration agreements” and “predispute joint-action waivers.”

The validity of arbitration agreements pertaining to these claims will be determined by federal law. In addition, only courts, not arbitrators, can apply this new law to arbitration agreements.

Conclusion

In sum, both the Oregon and federal legislatures have recently enacted several new laws that may require immediate action from employers and/or future planning. As some workers continue to return to office in 2022, it is important that employers review and update their most recent handbooks and provide additional training to employees on these new laws.

Endnotes
1 ORS 8 659A.001 (10)
2 ORS 8 659A.030 (5)
3 See ORS 8 174.100 (4)
4 Forced Arbitration of Sexual Assault and Sexual Harassment Act, 9 U.S.C. 8 401 (1)- (2) (2021)
5 9 U.S.C. 8 402 (a).
Diversity and inclusion in the workforce can be a difficult topic to discuss effectively. This is so despite its status as, arguably, one of the most—if not the most—prevalent challenges facing all sectors of the employment marketplace today. It is easy to highlight an issue. It is far more difficult to discuss practical approaches and solutions. This article explores why diversity and inclusion in the workplace is so important and suggests some strategies for productive discussions and specific, concrete steps an employer can take to begin the process of meaningfully incorporating principles of diversity, equity, and inclusion into its core values.

**Significance and Importance of Diversity and Inclusion**
A workforce is more creative, more innovative, and more resilient when it is made up of members with varying qualities, characteristics, experiences, and ideas. But for a diverse group of workers to work cooperatively and thrive, a workplace must also foster a culture of inclusion—actual recognition and respect of the uniqueness of each individual. Without these central tenets of inclusion, a statistically diverse workplace may still fail to achieve its full potential. Inclusion can be achieved through the establishment of policies and practices that are designed to ensure all individuals have equal access to opportunities and resources that they can use to contribute to organizational success. An oft-quoted statement readily summarizes the interplay of the two concepts: “Diversity is being invited to the party. Inclusion is being asked to dance.”

While there is no denying that substantial progress has been made in diversity and inclusion over the past decades, the legal field still has a long way to go. Current surveys show that, nationally, “[n]early all people of color are underrepresented in the legal profession compared with their presence in the U.S. population. For example, 4.7% of all lawyers were Black in 2021—nearly unchanged from 4.8% in 2011. The U.S. population is 13.4% Black.” Diversity and inclusion initiatives can provide a platform to help ensure these voices are not overlooked and serve as springboard for necessary progress towards a legal field that is more representative of our larger community.

**Getting Your Discussion off the Ground**
Starting a conversation regarding diversity and inclusion in the workplace can be a daunting task that can make managers feel they are walking on eggshells. When sensitive subjects are handled poorly, they have the potential to open rifts between decisionmakers and the balance of their workforce. In the Oregon legal field, incoming hires are increasingly in tune with prevalent social issues, making it especially important for management to demonstrate an ability to engage in productive dialogues.

While such conversations can be difficult, recent surveys of the ABA membership have suggested that they are becoming far more commonplace. When polled about how often, compared to a year ago, ABA members had conversations with colleagues about racial justice issues, 60 percent of respondents reported they had had such conversations either “more” or “much more” often than the year prior. Of course, this does not mean the conversation is an easy one to start. The following section outlines some proposed discussion points and foundational steps that law firms and employers can deploy to begin (or continue) a targeted effort to elevate the voices of their underrepresented groups.

**Implementation and Development**
Once the topic has been broached, there are several concrete actions a firm should take. First, management should work to develop and communicate consensus and awareness regarding the importance of diversity and inclusion in the workplace. With law firm structures lending themselves to be naturally led from the top, the importance of management understanding and impressing themes of diversity and inclusion cannot be emphasized strongly enough in writing alone. Diversity and inclusion-focused CLEs are now readily available and should be attended, at

**CONTINUED ON NEXT PAGE**
a minimum, by the leadership of each firm wishing to incorporate principles of inclusion into their day-to-day operations. Next, consider forming a diversity committee. Such committees are central to the success of any diversity and inclusion effort, and will serve two critical purposes, in addition to a host of others. First, a committee will act as the means by which the organization’s diversity concepts and efforts are developed and implemented.9 A committee can ensure that ideas do not fail to come to fruition simply because they run out of steam. It is no secret that law firms are already laden with projects that require extended working hours and leave little room for much of anything else in day-to-day operations. A diversity committee can ensure that key efforts to promote diversity and inclusion do not become that “anything else” at risk of falling to the wayside and can hold leadership accountable for the success of the initiative.8 Second, a diversity committee can act as a liaison between the organization’s workforce and management. A strong diversity committee will include at least one member of the organization’s leadership in order to send a message of involvement and cooperation.9 Third, task the committee with formulating a clear, written diversity and inclusion policy that specifically outlines the organization’s commitment to improvement, its goals for the program, and the means by which it will go about achieving those goals.10 The committee and management should work together to assess the areas where diversity and inclusion can be most improved within the organization, soliciting input from staff and anyone else not directly involved as appropriate. Publishing the final policy to the organization will communicate the firm’s goals and intentions to staff and anyone else not directly involved with the policy’s development. Publication of a written policy also provides transparency that will aid accountability—a necessary element to any successful diversity and inclusion initiative—and provide a baseline against which future efforts can be measured.11 Accountability and measurable progress are key because diversity and inclusion is not achieved by simply stating that inclusion principles are an organizational focus or that the organization has been made diverse from a statistical standpoint. A successful initiative requires ongoing action, and clearly stated policies and goals will help in evaluating that action and ensuring continued commitment to implementation from organizational leadership.

From there, “next steps” become more nebulous, and must be evaluated on a case-by-case basis. A 30-person firm’s subsequent steps will likely look much different from those of a multinational organization. Training, education, mentoring, and recruitment are all tools that firms can use to make meaningful progress towards their stated diversity and inclusion goals. Many of the references cited in this article provide excellent, detailed discussions of how to tailor each of those tools to best suit your unique organization.

**Conclusion**

These are by no means the exclusive steps to success. Every organization is different, and different personalities and leadership methods will naturally require adaptation. However, these foundational concrete steps can assist in developing a fruitful diversity and inclusion program that benefits both the organization and its individual members. From a strong initial foundation, an organization can continue to grow by evaluating the plethora of available resources on diversity and inclusion principles and applying them to its own unique structure and personnel. Taking decisive and coordinated action now to embody the principles of diversity and inclusion in the mission and culture of our firms will plant the seeds necessary to ensure the future strength and success of Oregon’s legal profession.

**Endnotes**

5. IILP Review 2017, supra, n. 1, at 43-44.
6. Id., at 44.
8. Piilola, supra, n. 1, at 44.
9. Id.
10. Id., at 44-45.
11. Scharf, et al., supra, n. 6 at 27 ("There is no one right [accountability] measurement ‘tool’ but the absence of any [accountability] tool should raise a red flag").

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**Features**

The Verdict™

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DIVERSITY AND INCLUSION continued from previous page
Product Liability
Court of Appeals Reminds Defendants to File Rule 21 Motions

In Hoff v. Certainteed Corp., 316 Or App 129, 503 P3d 457 (Dec. 8, 2021), the Oregon Court of Appeals highlighted the value of early motions to make pleadings more definite and certain, to raise objections to jury instructions, and to make objections to the verdict before the jury is discharged.

The trial court entered judgment against defendant following a jury verdict for plaintiff on a strict-liability asbestos claim. The jury determined defendant—the last remaining out of ten original defendants after the others were dismissed or settled—was 35 percent at fault for manufacturing and selling asbestos-containing products that were a substantial factor in plaintiff’s mesothelioma.

First, the Court of Appeals held there was sufficient evidence to infer that plaintiff had exposure to defendant’s products. At trial, there was evidence that plaintiff’s employer often used defendant’s products on different job sites and that plaintiff often worked at job sites where he would have been exposed to the products if used. Together, the Court of Appeals held that the trial evidence created a reasonable inference sufficient to overcome defendant’s motion for directed verdict. Plaintiff did not need to show specific exposure, or use of defendant’s product at a particular worksite, to support a finding that he was exposed to defendant’s product.

Second, defendant assigned error to the trial court’s decision to grant leave to plaintiff to amend his complaint after the trial and seek greater damages than he originally pled to conform with the jury verdict. Before trial, the complaint alleged plaintiff’s wife suffered $1 million in damages for loss of consortium, but the prayer asked for $2 million for that claim. Defendant did not move to make this discrepancy more definite and certain. Defendant also did not object to the jury instruction on loss of consortium that did not include an award amount that the jury could not exceed. After the jury returned a verdict finding $4 million in loss-of-consortium damages, defendant did not object to the verdict as exceeding the damages alleged in the pleadings (or otherwise objection that there was any irregularity in the proceeding) before the jury was discharged.

Defendant subsequently filed a post-trial motion to reduce the loss of consortium damages to $1 million in conformance with the pleadings and evidence. The trial court found, however, that defendant had waived objections to the verdict. Instead of reducing the verdict, the trial court allowed plaintiff to amend the complaint and seek $4 million for loss-of-consortium damages. The trial court then entered judgment of $1.4 million, or 35 percent of $4 million.

Looking at the issue on appeal, the Court of Appeals first held that it was harmless error to grant plaintiff leave to amend the complaint after the trial because plaintiff never actually filed an amended complaint. Relatedly, the court held the $2 million sought in the loss of consortium prayer was sufficient notice despite the complaint’s inconsistent allegation for $1 million. In reaching that holding, the court noted it was defendant’s burden to force plaintiff to clarify the inconsistent pleading. Thus, the prayer afforded defendant notice under ORCP 67 C and the Fourteenth Amendment’s Due Process Clause that Defendant’s net exposure for loss of consortium was $2 million. Based on that determination, the court held that the judgment of $1.4 million could be enforced.

Submitted by Matthew N. Miller
Lindsay Hart

Employment
Court of Appeals Provides Counsel Benefit of the Doubt on Summary Judgment

In Boyd v. Legacy Health, 318 Or App 87, __ P3d __ (March 2, 2022), the Oregon Court of Appeals reversed the trial court’s dismissal of plaintiff’s claims for statutory retaliation and common-law wrongful discharge on summary judgment. In reversing the grant of summary judgment for the defendant hospital, the Court of Appeals held that genuine issues of fact existed about whether defendant had fired plaintiff because plaintiff engaged in a statutorily protected activity or an activity that fulfilled an important public duty.

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Plaintiff was a registered nurse. While he was working in an intensive care unit at the defendant hospital, an alarm associated with plaintiff’s assigned patient went off. Plaintiff’s coworkers initially were unable to find him, but plaintiff eventually was found sleeping under a blanket in the same patient’s room. Later during that same shift, plaintiff noticed that another nurse had made charting errors involving a different patient. After plaintiff reported the errors, his manager reviewed the record, but did not find any errors. The manager subsequently issued a written reprimand to plaintiff for sleeping on duty, which plaintiff denied.

Shortly after receiving the written reprimand, plaintiff went to the hospital on a night that he was off duty to access defendant’s medical-records systems. Plaintiff accessed the records to verify for himself whether he was right about the charting errors made by the other nurse. After reporting the errors again, plaintiff subsequently was terminated by a different manager for violating defendant’s privacy policies against accessing patient records without authorization.

Following his termination, plaintiff filed this action against the defendant hospital. Defendant filed a summary judgment motion on plaintiff’s statutory retaliation claims and common-law wrongful discharge, arguing that plaintiff had not engaged in protected activity.

On appeal, the Court of Appeals reversed. To start, the Court of Appeals determined that plaintiff did not concede on summary judgment that defendant fired plaintiff for a lawful reason. Even if accessing the chart was inappropriate, the court also held that such a conclusion would not necessarily resolve whether plaintiff was fired for that reason or, instead, was fired in retaliation for engaging in statutorily protected activity. Based on the record, the court held that genuine issues of fact existed about whether plaintiff’s conduct in accessing the patient records was the defendant hospital’s true motivation for terminating plaintiff.

After resolving those issues, the Court of Appeals also rejected defendant’s argument that plaintiff’s retaliation claim failed as a matter of law because plaintiff did not engage in protected activity. In doing so, the court disagreed with defendant’s argument that plaintiff’s conduct in reporting the charting error was only a general complaint regarding performance. Instead, the court found that there was a question of fact about whether plaintiff reported the errors based on a subjective, good-faith belief that the errors violated nursing standards and posed a risk to the health of a patient. Additionally, the court held that plaintiff raised fact issues regarding wrongful discharge because reporting the purported errors fulfilled an important public duty under law.

Finally, the court found a question of fact on causation based on the “cat’s paw” theory, holding that a retaliatory motive of the manager who issued the written reprimand could be imputed to the subsequent manager who terminated plaintiff. The court found that a jury could
reasonably infer the original manager either influenced, or was involved in, the decision to terminate plaintiff. Based on those conclusions, the court reversed and remanded.

Submitted by Melissa J. Bushnick
Lindsay Hart

Tort

Court of Appeals Allows Negligence Claim in Breach of Contract Case

In Moody v. Oregon Community Credit Union, 317 Or App 233, __ P3d __ (Jan. 26, 2022), plaintiff was the beneficiary to her husband’s life insurance policy. She brought suit against the defendant insurer, alleging that the insurer unreasonably denied her claim for accidental loss of life benefits after her husband’s death. Plaintiff further alleged that she was entitled to damages for emotional distress resulting from the defendant insurer’s negligence in denying her claim. The trial court dismissed the negligence claim. The Oregon Court of Appeals, however, reversed and remanded, holding that a breach of an insurance policy may give rise to a negligence claim.

Plaintiff’s husband was accidentally shot and killed on a camping trip. The defendant insurer contracted to provide life insurance benefits to be paid on the death of plaintiff’s husband. In denying benefits, the defendant insurer pointed out that its policy excluded coverage for accidents caused by, or resulting from, the insured being under the influence. The defendant insurer asserted that the exclusion applied because the sheriff’s toxicology report stated that there was evidence that plaintiff’s husband had tested positive for marijuana. Plaintiff disputed that the policy exclusion applied because her husband died from the accidental shooting and not because he was under the influence of marijuana. After the defendant insurer denied
benefits, plaintiff filed this action. In addition to a breach-of-contract claim, plaintiff also asserted a negligence per se claim. In her negligence claim, plaintiff alleged that defendant failed to conduct a reasonable investigation and failed to pursue a good-faith settlement of her claim in violation of ORS 746.230(1), causing her to suffer emotional distress.

The defendant insurer moved to dismiss plaintiff’s negligence per se claim and to strike the allegation of damages for emotional distress on the ground that a negligence claim may not be predicated on a breach of the insurance policy. The trial court agreed and granted defendant’s motion. Defendant subsequently tendered the $3,000 benefits, and the trial court entered a judgment on the breach-of-contract claim.

On appeal, plaintiff argued the trial court erred in dismissing her negligence per se claim and striking her claim for emotional damages. In doing so, plaintiff acknowledged that the remedy for a violation of the terms of a contract—including an insurance policy—is a claim for breach of contract. Plaintiff argued, however, that Oregon recognizes an exception to that general rule when a breach of contract violates a standard of care independent of the terms of the contract. The Court of Appeals agreed with plaintiff’s argument and held that defendant’s breach of its insurance policy also supported a negligence claim based on the violation of the statutory standard of care listed in ORS 746.230(1).

In recognizing a negligence per se claim arising out of the alleged breach of insurance contract, the court analyzed the claim under the elements of negligence per se. Specifically, the court explained that such a claim requires: (1) defendant violated a statute; (2) plaintiff was injured as a result of that violation; (3) plaintiff was a member of the class of persons meant to be protected by the statute; and (4) the injury plaintiff suffered is of a type that the statute was enacted to prevent.

Looking at this case, the Court of Appeals reasoned that plaintiff alleged that defendant violated ORS 746.230(1). Plaintiff further alleged that she was injured as a result of the violation. In further analyzing the claim, the court found plaintiff’s negligence claim to be based on the violation of the terms of a contract—emotional damages the statute was intended to prevent. In determining that that statute was enacted to prevent emotional distress, the court determined that insurance policies do not “merely provide for the payment of funds in case of loss; they also provide the policy holder peace of mind.” Based on that holding, the court reversed the trial court’s dismissal of plaintiff’s negligence per se claim and remanded to the trial court.

Submitted by Christina Anh Ho
PK Schrieffer

UM/UIM

Failure to Stipulate at Trial May Result in Removal of Safe Harbor Protection

In Thoens v. Safeco Ins. Co., 317 Or App 727, ___ P3d ___, (Feb. 24, 2022), the Oregon Court of Appeals upheld an attorney fee award of $695,605.25 resulting from the underinsured motorist (UIM) insurer contesting a safe-harbor issue.

The UIM claim arose from a 2007 rear-end auto collision. The insured settled with the tortfeasor for $50,000 and then made a claim under her UIM policy, which had limits of $500,000. At the time of the collision, the UIM statutes defined an “underinsured motorist” as a driver with liability limits that were less than the insured’s UIM limits. At trial on the UIM claim, the insured’s attorney described an “underinsured motorist” as a driver whose insurance policy was not sufficient to compensate the insured for her injuries. This description did not correctly reflect the law at the time of the incident. The insurer refused to stipulate that the tortfeasor was an “underinsured motorist” based on the insured’s attorney description of “underinsured motorist” because this would imply the insured was not fully compensated by her settlement with the tortfeasor.

The jury found in favor of the insurer on the UIM claim. In 2017, the Court of Appeals reversed and remanded, holding the jury instructions provided an incorrect impression that plaintiff was required to prove that the tortfeasor was an “underinsured motorist.” See Thoens v. Safeco, 272 Or App 512, 356 P3d 91 (2015). After remand, the case was heard in binding arbitration, and a panel awarded $350,000 in UIM benefits. The trial court agreed with a referee’s determination that the insured was entitled to an award of attorney fees.

The Court of Appeals acknowledged that the insurer had timely sent a valid safe-harbor letter pursuant to ORS 742.061 (3). A safe-harbor letter generally protects an insurer from a claim for attorney fees on a UIM claim if the insurer confirms in writing that there is coverage, it consents to binding arbitration, and the only issues are the liability of the underinsured motorist and the damages owed to the insured. During the jury trial, however, the insurer here disputed whether the tortfeasor was an “underinsured motorist” when it would not stipulate to the fact. Because this was
a dispute that did not involve liability or damages, the Court of Appeals held that the insurer had left the protection of the safe harbor. The fact that the insured’s attorney had incorrectly characterized an “underinsured motorist” at trial did not provide the insurer with any relief. The court rejected the insurer’s position that it had “re-entered” the safe harbor when it arbitrated the claim on remand. Finally, the court rejected the insurer’s arguments that the insured should not be entitled to recover attorney fees under a lodestar calculation on top of a contingency fee of $140,000 that the insured’s attorney had already received.

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

**Anti-SLAPP Statute**

Physician’s Wrongful Use of Civil Proceedings Claim Against Insurer to Be Dismissed

In *Mohabeer v. Farmers Ins. Exch.*, 318 Or App 313, ___ P3d ___ (March 16, 2022), plaintiff was a licensed medical doctor who practiced medicine in association with several chiropractic clinics. Plaintiff sued the defendant insurer and its attorneys in state court claiming wrongful use of civil proceedings. Plaintiff based his lawsuit on an action that the insurer filed in federal court against plaintiff and others that included allegations of insurance fraud. The court rejected the insurer’s arguments that the insurer filed in federal court against plaintiff and others that included allegations of insurance fraud. The federal court litigation settled, and it was stipulated that plaintiff would be considered the prevailing party. Plaintiff alleged that the federal court litigation was brought with malicious intent and without probable cause.

Defendants filed a special motion to strike plaintiff’s claim under ORS 31.150, Oregon’s Anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute. The trial court denied the motion to strike, but the Court of Appeals reversed and directed the trial court to enter judgment dismissing plaintiff’s claim without prejudice.

Oregon’s anti-SLAPP statute generally provides that a defendant may file a special motion to strike certain claims unless the plaintiff establishes a
probability that plaintiff will prevail on the claim. The types of claims that are subject to a special motion to strike include claims arising from statements made in connection with issues under consideration by a judicial body. ORS 31.150 (2)(b). If a defendant meets the burden of showing that plaintiff’s claim is subject to a special motion to strike, plaintiff has a burden of establishing a probability that plaintiff will prevail by presenting substantial evidence to support a prima facie case. The trial court denied defendants’ special motion to strike based on its determination that plaintiff presented substantial evidence of a prima facie case.

The Court of Appeals disagreed. In doing so, the court explained that plaintiff was required to present prima facie evidence of each element of his claim for wrongful use of civil proceedings. One of the elements required plaintiff to show defendants lacked probable cause to prosecute the underlying claim. Plaintiff argued that it was premature to require him to address the issue because it was a fact issue that required additional discovery. This argument was rejected, as the anti-SLAPP statute provides an expedited process for determining whether a prima facie case has been presented. It was also noted that in the federal court litigation, plaintiff’s motion for summary judgment was denied in part because the federal court found that the insurer presented evidence of conduct by plaintiff and others giving rise to genuine issues of material fact on its claims for fraud, RICO, and unjust enrichment. In light of this and other evidence—including affidavits of former clinic employees who described plaintiff’s participation in a scheme to overtreat patients and overbill insurance—the Court of Appeals held that defendants had ample evidence to name plaintiff in the federal court litigation. Even though plaintiff disputed the insurer’s evidence, plaintiff did not provide his own evidence to support his position. Accordingly, the anti-SLAPP statute required the dismissal of plaintiff’s claim.

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

Evidence

The Oregon Supreme Court Raises the Bar for Admissibility of Business Records Made by Third Parties

In Arrowood Indem. Co. v. Fasching, 369 Or 214, - P3d - (Feb. 10, 2022), the Oregon Supreme Court held that, in order for documents created by a third party to be admissible under the business-records exception to the hearsay rule under Oregon Evidence Code (OEC) 803(6), the offering party must present evidence of the third party’s record-making practices.

 Plaintiff was an insurance company that paid a claim to its insured bank for a defaulted loan and subsequently brought a subrogation action against the borrower for breach of contract. In support of a motion for summary judgment on the claim, plaintiff submitted the documents that it had received from its insured bank and other banks to whom its insured bank had transferred the loans. Plaintiff supported the admission of these documents with an affidavit of one of its own employees, attesting that plaintiff adopted and relied on the documents as part of its ordinary course of business. Because plaintiff relied on the documents in paying out the claim to its insured, and regularly does so as part of its business, it argued that the documents were admissible under OEC 803(6), the business-records exception to the hearsay rule.

In response, defendant argued that none of the submitted business records were admissible because the documents were not records made by the insurer, and the insurer did not submit an affidavit from somebody with knowledge of the third parties’ record-making practices. Defendant argued that plaintiff failed to make a prima facie case on summary judgment because all of the submitted evidence was inadmissible hearsay. The trial court rejected that argument, granting plaintiff’s cross-motion for summary judgment and entering judgment in favor of plaintiff. The Oregon Court of Appeals affirmed.

On review, the Oregon Supreme Court reversed, holding that to qualify for the business-records exception under OEC 803(6), the proponent of the evidence must submit evidence from a witness with personal knowledge of the business’s record-making practices to confirm that such records meet the requirements of the rule as to whether the records are kept in the ordinary course and are “made at or near the time” to the acts described.

The Supreme Court concluded that it was not enough that plaintiff relied on the third party’s records as part of the ordinary course of plaintiff’s own business. Instead, to admit records made by a third party under the business-records exception, plaintiff was required to provide evidence of that third party’s record-making practices. In practice, this new rule could make admission of routine business records into evidence more difficult, as laying the foundation for the hearsay exception now requires testimony from an individual familiar with the record-making practices of a non-party.

Submitted by Andrea Lang Clifford
Bullivant Houser
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.


In this appeal from the Workers’ Compensation Board, SAIF challenged an order of the board holding that SAIF was not authorized to terminate claimant’s temporary total disability (TTD) benefits under ORS 656.325(5)(b). That statute permits an insurer to cease payments to a claimant if the claimant was terminated for disciplinary reasons, and the claimant would have had the option of doing modified work if the claimant had not been terminated. On appeal, SAIF challenged the board’s determination that insufficient evidence showed that the claimant was terminated for violation of a work rule or other disciplinary reasons. SAIF also challenged the board’s assessment of a penalty and penalty-related attorney fees, arguing that ORS 656.262(11) does not permit the board to assess a penalty against an insurer on an imputed knowledge theory. The Oregon Court of Appeals affirmed the board’s order on the TTD benefits, but reversed the penalty and penalty-related attorney fees. On review, the issues are: “(1) Whether an insurer is unreasonable under ORS 656.262(11) when it ceases paying temporary disability benefits under ORS 656.325(5)(b) based on insufficient evidence from the employer; and (2) Whether employer misconduct is a prerequisite to the determination under unreasonable claims processing by the insurer under ORS 656.262(11)(a) when the insurer erroneously ceases payment of temporary disability benefits based upon erroneous information from the employer.”


In this tort action, plaintiffs brought negligence claims after being injured in a relatively low-speed automobile accident with defendant. At trial, plaintiffs asked the trial court to deliver two uniform jury instructions about causation—the “but for” instruction and the “substantial factor” instruction—even though there was no evidence of any other cause of the plaintiff’s harm. According to plaintiffs, the “substantial factor” instruction should be given to a jury in any case where there is evidence that the plaintiff has underlying conditions that made the plaintiff more susceptible to injury. On review, the question presented is: “Where there is evidence, and argument by the defendant, that a plaintiff’s pre-existing condition caused plaintiff’s harm, rather than the negligence of the defendant, is the plaintiff entitled to an instruction on multiple causes and the substantial factor test?”
The May 17 Oregon primary has come and gone, and political insiders are watching closely as campaigns quickly move into the general phase of a historic election season. Most eyes are primarily focused on a competitive three-way race for governor featuring former House Speaker Tina Kotek, who secured the Democratic nomination, and former House Republican Leader Christine Drazan on the Republican ticket. The two former legislators have a contentious relationship, going back to the legislative walk-out in 2020 and a failed deal in 2021 over seats on the legislative redistricting committee. Kotek and Drazan will be joined by former longtime Democratic lawmaker Betsy Johnson, who is running unaffiliated and will need to gather 23,743 valid voter signatures in order to make the ballot. Senator Johnson has a long history of working with Oregon’s rural natural resource community and the Portland area business community.

The Kotek vs. Drazan vs. Johnson match will mark the first election for governor in Oregon history with only women atop the ticket—all of whom have significant legislative leadership experience and a legitimate path toward the governor’s mansion. Kotek and Drazan will be closely watching during interim legislative days for potential issues of interest to our membership, including bills related to liability and bills impacting employment practices. Given the historically high turnover expected in the legislature, identifying specific legislative concepts to track will likely be difficult until much later into the summer and fall. However, we do expect to see activity in 2023 regarding Oregon’s public defense system crisis, and we will be tracking that activity as a significant access-to-justice issue and a matter of concern for the entire legal ecosystem in our state. The state is also experiencing another influx of revenue, with May’s revenue forecast showing an additional $427 million for state lawmakers to spend in the 2023-2025 budget. Against this backdrop, OADC will likely seek to join others in the legal community to again pursue increased funding for our courts and our bench.
Honorable Steffan Alexander
Multnomah County Circuit Court

When he was 12 years old, Judge Steffan Alexander moved from his home in Trinidad to Florida with his mother and younger siblings. He grew up in South Florida and, after high school, moved to Gainesville, where he earned both his bachelor’s degree and juris doctor from the University of Florida. He began his legal career in Florida at the State Attorney’s Office for the Eight Judicial Circuit.

While Judge Alexander was always drawn to public service, as reflected in his position with the State Attorney’s Office, serving on the bench did not immediately cross his mind. Over time, his career evolved, first in an in-house position at a Florida energy company and, later, as a civil litigator at Markowitz Herbold, where he become partner. In his capacity as a litigator in Oregon, he heard a presentation from Multnomah County Circuit Court Judge Benjamin Souede describing the need for civil litigation attorneys willing to serve on the bench. With his interest in public service and love of trial, this call to serve on the bench motivated Judge Alexander to re-engage in public service, this time in a judicial capacity, and culminated in his appointment to the Multnomah County Circuit Court in 2019.

Judge Alexander brings to the bench his varied perspective as a criminal prosecutor, in-house counsel, and civil trial attorney, and continues to enjoy complex civil litigation and trials. It took serving on the bench for him to fully appreciate the court’s busy docket and how the court manages its cases. Because of the court’s high volume of cases and central docketing assignments, trial court judges often prepare for hearings on civil motions after the briefing is complete and beyond the court’s normal business hours. With this in mind, Judge Alexander finds it especially valuable when attorneys understand the court’s limited time and take care and effort to present their motion and case with focus and clarity.

To that end, Judge Alexander articulated a few practice tips for civil litigation attorneys:

1. If the case, portions of the case, or portions of motions are resolved, he always appreciates when parties immediately reach out to the court to inform the court of that fact in a transmittal e-mail copying all parties. See UTCR 7.040.

2. It is a matter of the rules, professionalism, and courtesy to alert the court to any settlements before trial, even during the weekend. See UTCR 6.020.

3. During trial, it’s more persuasive to present complex or document-intensive evidence to witnesses slowly and understandably than to employ examination techniques to control witnesses and their responses.

4. During trial, it is helpful to use visuals to enhance the jury’s understanding of key documents. To that end, he wants to make sure lawyers and litigants are aware of the new technology available at the Multnomah County Circuit Court.

When Judge Alexander is not on the bench or volunteering with the Classroom Law Project, he cheers on his two kids at soccer and basketball matches, and tends to his pet dog, cat, and two chickens.
I met with Magistrate Judge John V. Acosta via Zoom to discuss his journey to the bench, the practice of law generally, and contemporary issues faced by lawyers in Oregon. Judge Acosta obtained his Bachelor of Arts degree in history from San Diego State University and remains, to this day, an avid reader and enthusiast of 20th century American history, a passion shared by this author. After much discussion on precision bombing in World War II, the iconic flag-raising events on Iwo Jima, and the critically acclaimed HBO miniseries “Band of Brothers,” I learned that Judge Acosta was the first lawyer in his family and obtained his juris doctor from the University of Oregon in 1982. His experience in Eugene left a lasting impression, so much so that Judge Acosta later served on the Dean’s Advisory Council at UO, taught as an adjunct professor, and became a devotee of Ducks football.

Judge Acosta initially worked as a civil litigator at Hughes, Thorsness, Gantz, Powell & Brundin, and Stoel Rives in Alaska and Oregon, respectively, focusing on labor and employment, products liability, and general commercial matters. Preceding his appointment to the United States District Court, Judge Acosta transitioned to the public sector and served as Senior Deputy General Counsel for the Tri-County Metropolitan Transportation District of Oregon, which he described as “one of the best professional experiences of my career.” At TriMet, Judge Acosta worked in the operations division, performed a broad array of legal work, and played an active role in the direction of the business. In many ways, TriMet prepared Judge Acosta for his eventual role on the bench, given his work with a broad base of constituents and clients with different interests and needs, and his resolution of disputes between and among a wide variety of people.

Judge Acosta was appointed Magistrate Judge for the District of Oregon in 2008. He had contemplated a judgeship since his youth, consistently valuing the traits of fairness, impartiality, reasonableness, and professionalism. Judge Acosta recognizes that it is a “great privilege to serve in this role” and views “judicial office as the highest form of public service that we can perform as lawyers.”

Judge Acosta’s service to the legal community and the public has been acknowledged by several organizations. In 2013, he was the inaugural recipient of the annual Honorable John V. Acosta Professionalism Award, given by the Oregon State Bar New Lawyers Division to a lawyer or judge in recognition of their commitment to promoting the highest ethical and professional standards among new lawyers. He is a recipient of the Oregon State Bar’s Edwin J. Peterson Professionalism Award, the Oregon Hispanic Bar Association’s Paul J. De Muniz Professionalism Award, the Oregon State Bar President’s Diversity & Inclusion Award, the University of Oregon School of Law’s Frohmayer Award for Public Service, and the University of Oregon School of Law’s Meritorious Service Award.

Judge Acosta imparted to me several words of advice for lawyers appearing before District of Oregon. Principal among them is to always be prepared, candid, and concise when advocating on behalf of your client, whether it be during motions practice, at hearings, or during trial—“Credibility is the currency of the courtroom: You should spend it wisely and avoid doing anything that would cause that credibility to evaporate.” Although the pandemic has made the use of technology a key component of our daily working routine, Judge Acosta cautioned against becoming overly reliant on the same, observing that, “There is a lot about the practice of law that is relationship driven,” and the remote environment detracts from that. He observed that the ability to do video calls and meetings “is not a substitute for in-person interaction.”

Effective March 2022, Judge Acosta will have assumed senior status but will continue to conduct settlement conferences, fill in for colleagues, and preside over the soon-to-be-implemented deferred sentencing program.

Sean O’Connor
Bullivant Houser
Dismissal Of $5.4 Million In Lost Profit Claim For Cannabis


Plaintiff’s claims related to the purchase and construction of a commercial greenhouse that contained alleged defects, rendering the building incapable of supporting a legal marijuana grow operation and resulting in $5.4 million in lost profits. Clearspan moved against the lost profit claim arguing that the damages were waived under the parties’ contract and that the damages were too speculative. The court agreed on both grounds.

At oral argument, the court requested supplemental briefing on whether lost profits derived from the cultivation and sale of cannabis are recoverable under federal law. The court agreed with Clearspan that allowing the recovery of such damages would violate the Controlled Substances Act (21 U.S.C. § 801) because they are derived from an illegal activity under federal law. The court also granted summary judgment on that additional basis.

■ Peder Rigsby
Bullivant Houser

Barry Snyder
Mediation and Arbitration Services

Mr. Snyder is a Diplomate of ABOTA, having tried over 175 jury trials to verdict, for plaintiff and defendant, in state and federal court. He is available for mediation and arbitration in all types of civil matters throughout Oregon, Washington and California.

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- Stan Jacobs | Preeminent Plaintiff Trial Lawyer

“I’ve known Barry for over 35 years. He has a wealth of experience and I recommend him without hesitation.”

- Darrell Forgey | Mediator with Judicate West

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Contact Laura Gosnell at 541.357.6650 for scheduling and other information. No charge for travel time in any matter.
The Amicus Committee has survived the pandemic and is looking forward to a productive summer and fall. A collegial meeting in May has the members agog, remembering the good old days of regular gatherings. Fortunately, in the coming months we will again be enjoying the convivial discussion of thorny legal issues that personal attendance allows.

Many thanks to our colleague, Dan Lindahl, who has retired from the committee. His contributions and keen insight and knowledge will be missed.

Members remaining are Michael Estok, Janet Schroer, Tom Christ, Michael Stone, and Lindsey Hughes, who is retiring as chairperson at the end of the year. The OADC Board will be recruiting new members in the fall, to begin terms starting in January. Watch for announcements in a few months as the existing team readies to make room for new members and fresh perspectives. In the meantime, do not hesitate to let one of our members know if you have an interest in participating on the committee. We can answer any questions you may have about participation and will make sure the Board is aware of your interest.

The Amicus Committee usually convenes several times a year. Most often, we meet when we are asked to consider appearing in matters before the appellate courts. The process for requesting amicus support is detailed on the OADC website. We are always interested in matters of interest to the defense bar. In addition to the written materials requested, we ask for a summary of the issues and arguments on appeal or review. Identifying those issues for which you are seeking amicus support is important. Also, please give your thoughts on what an amicus brief can lend to your position, where you would like us to focus, and how you believe an amicus appearance might make a difference.

The committee is currently considering lending support to the defense in Haas v. The Estate of Mark Steven Carter, 316 Or App 75 (2021), in which the Oregon Supreme Court has granted review. The issues involve uniform instructions and whether the trial court erred when it refused to give the substantial factor instruction on causation along with the but-for instruction. Plaintiff requested both instructions, and on appeal argued that the substantial factor instruction is always required in cases involving preexisting condition.

The committee welcomes your submissions. If you have questions, don’t hesitate to let us know.
My last column made the case for the sparing use of “upper case.” Carrying the everything-in-moderation theme forward, this article is about the overuse of parentheticals to introduce abbreviated references to people, places, and things. Abbreviated references are commonplace in writing. Legal writing is no exception. The abbreviations reduce repetition, and parentheticals that introduce them help the readers understand what the abbreviated references mean. But the introductions tend to be overused in legal writing out of, I suspect, a misplaced sense that they make legal writing more formal. When overused, however, the introductions actually can make legal writing harder to understand.

Consider these illustrations:

This lawsuit arises out of a dispute between plaintiff Jennifer Smith (plaintiff) and defendant Widget Manufacturer, Inc. (defendant) relating to a contract to purchase 100 widgets (the contract). The trial court granted defendant’s motion to dismiss plaintiff’s Second Amended Complaint (the complaint) on the ground that her claim for breach of contract (the claim) was barred by the statute of limitation and entered a general judgment of dismissal (the general judgment) in defendant’s favor on the claim. Plaintiff appeals from the judgment, assigning error to the trial court’s decision to dismiss the contract claim without granting her leave to amend the complaint.

vs.

This lawsuit arises out of a dispute between plaintiff Jennifer Smith and defendant Widget Manufacturer, Inc. relating to a contract to purchase 100 widgets. The trial court granted defendant’s motion to dismiss plaintiff’s Second Amended Complaint on the ground that her claim for breach of contract was barred by the statute of limitation and entered a general judgment of dismissal in defendant’s favor on the contract claim. Plaintiff appeals from the judgment, assigning error to the trial court’s decision to dismiss the contract claim without granting her leave to amend the complaint.

As it turns out, none of the parenthetical introductions to the abbreviated references in the first example do anything to aid the reader’s understanding. Once “plaintiff Jennifer Smith” and “defendant Widget Manufacturer, Inc.” have been introduced, the reader will understand that any references to the abbreviated references to “plaintiff” and “defendant” that follow refer, respectively, to Jennifer Smith and Widget Manufacturer, Inc.

The paragraph (and presumably the brief itself) only talks about one contract, one complaint, one claim, and one judgment. So the reader should understand, without being told, that any subsequent references to “the contract,” “the complaint,” “the claim,” or “the judgment” are to the ones described in the first paragraph.

Of course, some short-hand references should be introduced. Most acronyms (which should also be used sparingly) do require an introduction. But acronyms and other short-hand references need an introduction only if they might be misunderstood by the reader without one.
New and Returning Members

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

**Joseph M. Winsby**  
Lorber Greenfield & Polito

**Nick A. Rhoten**  
Davis Rothwell Earle & Xóchihua

**Jared A. Anderson**  
Davis Rothwell

**Max H. Goins**  
DKM Law Group

**Nicholas P. Seymour**  
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**Abby Michels**  
Bodyfelt Mount

**Ryan J. Roberts**  
Bullivant Houser

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OADC PAC Terminated

The Oregon Association of Defense Counsel State Political Action Committee (PAC) has been terminated upon a vote of the OADC Board of Directors, and in compliance with the PAC Operating Guidelines. The PAC was originally formed in 2008 and since 2015, the PAC has received less than a handful of contributions. Given the lack of interest in and funding for the PAC, the decision was made to terminate the PAC. Per state guidelines, the balance of funds remaining in the PAC account were donated to two non-profits that OADC supports - The Campaign for Equal Justice and the Multnomah County CourtCares program. Please contact the Board of Directors with any questions.

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