Effective Motion Practice

Thursday, October 11, 2018
9 a.m.–4:30 p.m.

5.25 General CLE credits and 1 Ethics (Oregon specific) credit
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OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935
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8:00  Registration

9:00  Anti-SLAPP Motions: Challenging Claims Arising from Speech
  - When the statute applies
  - Evidence plaintiffs must present in order to survive
  - Potential defenses plaintiffs need to overcome
  - Attorney fees
  Clifford Davidson, Sussman Shank LLP, Portland

9:45  Motions Against Pleadings
  - Effective ORCP 21 and FRCP 12 motions
  - Tips, traps, and pitfalls
  - Perspectives from plaintiff, defense, and the bench
  The Honorable Youlee You, U.S. District Court for the District of Oregon, Portland
  Stephen Brischetto, Attorney at Law, Portland
  Xin Xu, Xin Xu Law Group, Portland

10:30 Break

10:45 Discovery Motions—Take the High Road and Keep Your Eyes on the Prize
  - Craft a discovery plan tailored to your case
  - Respond to discovery requests reasonably and thoroughly
  - Consider preemptive protective orders for overly broad requests
  - Seek sanctions only for clear discovery violations
  C. Marie Eckert, Miller Nash Graham & Dunn LLP, Portland
  Leslie Johnson, Samuels Yoelin Kantor LLP, Portland

11:45 Lunch

12:30 Ethical Considerations for Motion Practice
  - Ex parte communications
  - Conferring
  - Providing adverse legal authority
  - Privilege offense and defense
  Nena Cook, Ater Wynne LLP, Portland

1:30 Summary Judgment Motions Under FRCP 56 and ORCP 47
  - Differences between federal and state rules
  - Presenting your best written argument
  - Effectively arguing your motion or opposition before the court
  - Practical considerations in both state and federal courts
  Courtney Angeli, Buchanan Angeli Altschul & Sullivan LLP, Portland
  Julie Vacura, Larkins Vacura Kayser LLP, Portland
  Richard Vangelisti, Vangelisti LLP, Portland

2:30 Break
2:45 Trial Motions
  ♦ Motions in limine
  ♦ Pocket motions
  ♦ Motions for directed verdict and peremptory instructions
  ♦ Motions for mistrial
Travis Eiva, Zemper Eiva Law, Eugene
Angela Franco Lucero, Kranovich & Lucero LLC, Lake Oswego

3:45 Post-Trial Motions
  ♦ JNOV
  ♦ New trial
  ♦ Fee petitions and cost bills
  ♦ Remittitur
Jay Beattie, Lindsay Hart LLP, Portland
Shenooa Payne, Richardson Wright LLP, Portland

4:30 Adjourn
**FACULTY**

**Courtney Angeli,** *Buchanan Angeli Altschul & Sullivan LLP, Portland.* Ms. Angeli is one of the leading employment lawyers in Oregon. She has extensive experience litigating employment cases through trial, on behalf of both employers and individuals, in both state and federal courts. She is past president of the Federal Bar Association Oregon Chapter. Ms. Angeli and a recipient of the Judge Burns award for her contributions to federal practice.

**Jay Beattie,** *Lindsay Hart LLP, Portland.* Mr. Beattie is a product liability and insurance litigation lawyer who also specializes in employment-related litigation and civil appeals. He represents clients in federal and state trial courts and administrative forums. He has also handled numerous appeals in the Oregon, Washington, and federal courts of appeals. He is chair of the Oregon Association of Defense Counsel Insurance Coverage Practice Group, a past chair of the Oregon State Bar Products Liability Section, and a past member of the Oregon State Bar Uniform Civil Jury Instruction Committee. Mr. Beattie has written and lectured extensively on subjects including motion practice in Oregon, insurance law, products liability and punitive damages. He is admitted to practice in Oregon and Washington and before the U.S. Supreme Court.

**Stephen Brischetto,** *Attorney at Law, Portland.* Mr. Brischetto represents plaintiffs in complex employment and civil rights litigation in both state and federal court. He is admitted to practice in Oregon and Washington.

**Nena Cook,** *Ater Wynne LLP, Portland.* Ms. Cook is a trial attorney specializing in complex commercial litigation, appellate law, and professional ethics. She represents businesses in state and federal court on matters related to class actions, corporate disputes, estates and trusts, insurance coverage/defense, intellectual property, and real estate. She is a member of the American Constitution Society for Law and Policy, the Campaign for Equal Justice Advisory Board, the Federal Bar Association, the Oregon State Bar Litigation Section, Labor & Employment Section, and Business Litigation Section, the Oregon Women Lawyers Foundation Board, and the Washington State Bar Association Litigation Section and Labor and Employment Section. Ms. Cook is past president of the Oregon State Bar. She is a frequent speaker and writer on the topics of professionalism, ethics, and employment law. She is admitted to practice in Oregon and Washington and before the United States Supreme Court.

**Clifford Davidson,** *Sussman Shank LLP, Portland.* Mr. Davidson is a trial attorney with a focus on business litigation, noncompetition/nonsolicitation issues, class action defense, and First Amendment/anti-SLAPP matters. He has represented a wide range of business clients, from closely held family businesses to Fortune 50 companies. He also has represented businesses and individuals in defending against defamation, disparagement, racketeering, and business interference claims linked to speech conduct. He is active in the American Bar Association Section of Litigation and is a member of the ACLU of Oregon Lawyers Committee. He has been named “One of the Best LGBT Lawyers Under 40” by the National LGBT Bar Association. He is licensed to practice in Oregon, Washington, and California.

**C. Marie Eckert,** *Miller Nash Graham & Dunn LLP, Portland.* Ms. Eckert is an experienced business litigator with particular expertise in trusts and estates litigation, financial institutions litigation, and insurance coverage matters. She has handled a wide range of complex commercial litigation in state and federal courts, including contract and business valuation disputes, business torts, lender liability claims, employment, and environmental litigation. She is admitted to practice in Oregon, Washington, and California.
Travis Eiva, Zemper Eiva Law, Eugene. Mr. Eiva’s practice focuses on representing people financially or physically harmed by the wrongful conduct of others. Mr. Eiva is a member of the Oregon Council on Court Procedures, and he has been involved in legislative work groups to promulgate new laws in Oregon. He writes articles for law periodicals and presents CLE trainings to other lawyers on complex legal issues in personal injury law. He regularly writes amicus briefing to the Oregon Supreme Court on important issues affecting the rights of Oregon citizens.

Angela Franco Lucero, Kranovich & Lucero LLC, Lake Oswego. Ms Lucero focuses her practice defending civil litigation claims. She represents clients in bodily injury, property damage, and insurance coverage disputes. She has represented individual clients, insurance companies, and self-insured public bodies. Ms. Lucero is a member of Oregon Women Lawyers, a founding member and officer of Clackamas Women Lawyers, a member of the Oregon Minority Lawyers Association, a member of the Oregon Hispanic Bar Association, and a member of the Clackamas County Bar Association. She is an alumna of the Oregon State Bar Opportunities for Law in Oregon (OLIO) program, which is dedicated to helping women and ethnic minorities to increase their visibility and stature within Oregon’s judicial system. She regularly serves as a mentor for minority law students.

Leslie Johnson, Samuels Yoelin Kantor LLP, Portland. Ms. Johnson is of counsel to Samuels Yoelin Kantor LLP. Her practice focus is on business litigation and business law. She is a member of the Multnomah Bar Association, the Clark County (Washington) Bar Association, the American Bar Association, the Oregon State Bar House of Delegates, and the American Bar Association House of Delegates. Ms. Johnson is licensed to practice in Oregon and Washington. She is the 2005 recipient of Lewis & Clark Law School’s Joyce Ann Harpole Award.

Shenoa Payne, Richardson Wright LLP, Portland. Ms. Payne has a civil rights litigation and general civil appellate practice. She is an active member of the American Association for Justice and the Oregon Trial Lawyers Association. As well, she is a member of the Oregon Gay and Lesbian Law Association, the Multnomah Bar Association, the National Employment Lawyers Association, the Oregon Council on Court Procedures, and Oregon Women Lawyers. Ms. Payne was recognized as the 2014 Oregon Trial Lawyers Association Outstanding New Lawyer.

Julie Vacura, Larkins Vacura Kayser LLP, Portland. Ms. Vacura’s trial work focuses on commercial, real estate, banking, and insurance coverage litigation. She also acts as an arbitrator for the Arbitration Service of Portland and as an expert witness on attorney fees and attorney malpractice. She is a Fellow of the American College of Trial Lawyers and a member of the Multnomah Bar Association Solo and Small Firm Practice Committee, Oregon Women Lawyers, the Gus J. Solomon American Inn of Court, the American Bar Association, the American College of Trial Lawyers, and the International Society of Barristers. Ms. Vacura is a frequent CLE speaker on a broad range of litigation topics, and she has mentored attorneys through the Multnomah Bar Association Mentoring Program and Oregon Women Lawyers. She is admitted to practice in Oregon and Washington.

Richard Vangelisti, Vangelisti LLP, Portland. Mr. Vangelisti is a full-time mediator who focuses his practice on personal injury, employment, and business cases. He has mediation training from the National Judicial College and the United States District Court for the District of Oregon and negotiation training from the Harvard Law School Program on Negotiation. He has tried cases involving trade secrets, employment, wrongful death, landlord and retail premises liability, motor vehicle, and medical care. Mr. Vangelisti also serves as a judge pro tem for the Multnomah County Circuit Court.
Xin Xu, Xin Xu Law Group, Portland. Ms. Xu focuses on legal malpractice defense and commercial litigation. She is admitted to practice in state and federal courts in Oregon and Washington. She is treasurer of the Oregon State Bar Alternative Dispute Resolution and a member of the OSB Litigation and Solo and Small Firm sections, Professional Liability Fund Defense Panel, the Multnomah Bar Association, the Oregon Association of Defense Counsel, and the Oregon Asian Pacific American Bar Association. She is the 2000 recipient of the International Trial Lawyers Association Trial Advocacy Award. She is admitted to practice in Oregon and Washington.

The Honorable Youlee You, U.S. District Court for the District of Oregon, Portland. Judge You was appointed to serve as a U.S. Magistrate on March 1, 2016. Prior to her appointment, she was a Multnomah County Circuit Court judge for several years. Judge You is the first Asian-American to join the federal bench in the District of Oregon.
Chapter 1

Presentation Slides: Oh, Snap! Anti-SLAPP

CLIFFORD DAVIDSON
Sussman Shank LLP
Portland, Oregon
Oh, Snap! Anti-SLAPP.

Cliff Davidson  
SUSSMAN SHANK LLP  
cdavidson@sussmanshank.com  
(503) 243-1653

Why Do I Care about Anti-SLAPP Motions?

• Provides a summary procedure for early dismissal of claims based on speech-related conduct.

• Attorney fees and costs to successful movant.

• Immediate right to appeal if motion is denied.

• Discovery is stayed upon filing, unless good cause shown.

• Must be filed at outset of litigation.

• Creates the opportunity to undertake defense-side representation on contingency.
What is a SLAPP?

- **Strategic Lawsuit Against Public Participation**

- Concern is with chilling effect on conduct related to speech.
  
  - California was first (1992)
    “The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”


- Have your evidence ready!

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The Anti-SLAPP Statute Creates a **Procedure** (ORS 31.150(3))

- Prong I: Does the anti-SLAPP procedure apply?
  
  - Has movant shown that a civil claim “arises from” the speech-related conduct enumerated in ORS 31.150(2)?

- Prong II: Has the non-movant presented substantial evidence supporting a *prima facie* case?
  
  - Is there sufficient evidence?
  - Is there an affirmative defense that cannot be overcome?
Logistics
(ORS 31.152(1))

• Must file motion within 60 days after service of complaint, or later in court's discretion. Hearing supposed to be set within 30 days after filing “unless the docket conditions of the court require a later hearing” (that is, basically always).


• Treated like a Rule 21 A motion, at least in terms of timing, except Rule 21 F does not apply.

• Filing event is Motion – Strike; technically, an anti-SLAPP motion is a “special motion to strike.”

Prong I: What qualifies?
(ORS 31.150(2))

A special motion to strike may be made under this section against any claim in a civil action that arises out of:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;

(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or

(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.
Prong I: What does “arises out of” mean? (ORS 31.150(2))

- “Arises out of” is not the same as related to.

- The court’s job is to determine “more generally what sort of claim this is.” Deep Photonics Corp. v. LaChapelle, 282 Or App 533, 541 (Nov. 30, 2016), rev denied, 361 Or 524 (June 1, 2017).

- Focus is not on the form of the cause of action “but, rather, the defendant’s activity that gives rise to his or her asserted liability.” Navellier v. Sletten, 29 Cal 4th 82, 92 (Cal 2002) (construing identical language in CA statute).

- Examples: Mullen v. Meredith Corp., 271 Or App 698 (2015) (purported breach of agreement not to show plaintiffs’ faces or reveal identities on television news arose from conduct in furtherance of speech and therefore triggered prong II); Deep Photonics (attorney’s acts, though related to a legal proceeding was not conduct in furtherance of speech).

- Liberally construed. ORS 31.152(4).

Prong I: How does movant satisfy burden? (ORS 31.150(3))

- Movant must present prima facie evidence that case arises from the conduct listed in ORS 31.150(2).

- Evidence includes pleadings and affidavits. ORS 31.150(4).

- Could try to introduce extrinsic evidence to establish prima facie that the claim is more speech-y than alleged.

- Unclear what’s required. Carry burden of production, as in Prong II?
Prong I: Movant’s burden
(ORS 31.150(3))

• Movant must present *prima facie* evidence that case arises from the conduct listed in ORS 31.150(2).

• Evidence includes pleadings and affidavits. ORS 31.150(4).

• Could try to introduce extrinsic evidence to establish *prima facie* that the claim is more speech-y than alleged.

• Unclear what’s required. Carry burden of production, as in Prong II?

• Can look to California law (Cal Code Civ Proc § 425.16)—pre-2002 cases authoritative if wording identical; other authorities may be persuasive. *Deep Photonics*, 282 Or App 543 n5.

Prong II: Nonmovant’s burden
(ORS 31.150(3))

• “[B]urden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case.”

• Evidence must be admissible. *Young v. Davis*, 259 Or App 497, 508 (2013).


• No discovery unless ordered by the Court “on motion” for “good cause.” ORS 31.152(2).
  • “Good cause” requires a showing of specific elements requiring discovery.
  • Must actually file a motion before the motion hearing.
Prong II: Nonmovant’s burden (ORS 31.150(3))

- Present evidence on each element.
- Biggest issues in speech context:
  - Is the statement capable of defamatory meaning?
  - Evidence of falsity and knowledge of falsity.
  - Evidence of damages.

- No discovery unless ordered by the Court “on motion” for “good cause.” ORS 31.152(2).
  - “Good cause” requires a showing of specific elements requiring discovery.
  - Must actually file a motion before the motion hearing.

Prong II: Movant’s discussion of Prong II (ORS 31.150(3))

- Prong II is the time to raise defenses. Remember: the statute is a procedure; you have to get to Prong II in order to explain why claim fails as a matter of law.

  - Examples: Noerr-Pennington doctrine, absolute privilege, statute of limitations.

  - If something is an affirmative defense, consider putting on a prima facie case in support of that defense even if you’re the movant.

  - Tip: Give a preview of the issues the plaintiff/counterclaimant will need to address, if for no other reason than to appear reasonable (remember: fees).
Ruling, Judgment, Appeal, Fees

• Purpose of the anti-SLAPP statute is “to provide a defendant with the right not to proceed to trial in cases in which the plaintiff does not meet the burden [on Prong II.]” ORS 31.152(4)

• If the motion is granted, then the action is dismissed without prejudice.

• If the motion is denied, then the court enters a limited judgment from which there may be an appeal.
  
  • Interlocutory appeal in federal court because anti-SLAPP statute creates an immunity. See Schwern v. Plunkett, 845 F.3d 1241 (9th Cir. 2017).

• Court shall award costs/fees to successful movant. If court finds motion frivolous or is solely intended to cause unnecessary delay, then court shall award costs to nonmovant.

Examples of cases that have satisfied Prong 1

• Pre-suit demand letters.

• Online reviews of products or services.

• Reports by the Better Business Bureau.

• Business interference through speech acts.

• Purportedly false advertising.

• Accusations during political campaigns.

• Slander of title.

• Statements in community planning organizations.

• Advice given to former governor.

• News reports of shots fired in a neighborhood.
Thank you!

Cliff Davidson
SUSSMAN SHANK LLP
cdavidson@sussmanshank.com
(503) 243-1653
Chapter 2
FRCP 12 and ORCP 21 Motions

LAURIE R. HAGER
Sussman Shank LLP
Portland, Oregon

Updated by
XIN XU
Xin Xu Law Group
Portland, Oregon

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I. Benefits of FRCP 12 and ORCP 21 Motions

FRCP 12 and ORCP 21 motions can be used to request the court to dismiss a particular claim, party, or defense from an action. They can be used to strike certain allegations from a pleading, and they can be used to force a party to make allegations more definite and certain. The rules and cases following the rules detail the requirements and mechanics of these motions.

II. Motions to Dismiss

A. Grounds for Motions to Dismiss

A party may file a motion to dismiss on any of the grounds identified in FRCP 12 and ORCP 21. These grounds include:

1. Lack of subject-matter jurisdiction (in federal court, lacks legal standing is included in this defense; see Perez v. Nidek Co., 711 F.3d 1109, 1114 (9th Cir 2013) (recognizing Ninth Circuit precedent that “standing is a threshold matter central to our subject matter jurisdiction.”); Animal Protection Institute v. Hodel, 860 F.2d 920, 923 (9th Cir 1988) (standing is jurisdictional);

2. Lack of personal jurisdiction;

3. Improper venue (only under FRCP 12; in state court, move to change venue under ORS 14.110);

4. Insufficient process;

5. Insufficient service of process;

6. Failure to state a claim (in federal court, statute of limitations is included in this defense); and

7. Failure to join an indispensable party.

ORCP 21 also identifies the following additional grounds for a motion to dismiss:

8. Another action is pending for the same cause (in federal court, the second action will generally be stayed, not dismissed; see Alltrade, Inc. v. Uniweld Products, Inc., 946 F2d 622, 625, 628–629 (9th Cir 1991) (explaining the district court has discretion to transfer, stay or dismiss the subsequent action);

9. The plaintiff lacks legal standing to sue;

10. The plaintiff is not the real party in interest (in federal court, this can be raised under FRCP 17(a)); and
11. The pleading shows the action was not commenced within the statute of limitations.

B. Motions to Dismiss for Failure to State a Claim (FRCP 12(b)(6) and ORCP 21 A(8))

In the past, the primary difference in treatment of state and federal motions to dismiss arises from the distinction between federal “notice” pleading and state “fact” pleading. Federal courts rarely dismissed claims, except in cases of fraud (see FRCP 9(b)) or securities fraud (see Private Securities Litigation Reform Act of 1995, 15 USC §78u-4(b)).

Two significant Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 566 U.S. 662 (2009), have all but eliminated the distinctions between federal and state court pleading requirements and, therefore, the respective standards for motions to dismiss for failure to state a claim. These cases created two new requirements that make the federal pleading standard at least as strict as the state court standard. The *Twombly* and *Iqbal* decisions are based on the rule regarding pleading requirements under FRCP 8 and under ORCP 18.

First, “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements” will no longer survive an FRCP 12(b)(6) motion. *Iqbal*, 566 U.S. at 678. After *Twombly* and *Iqbal*, such conclusory allegations, unless supported by factual allegations, are not entitled to the assumption of truth on a motion to dismiss for failure to state a claim. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.” *Id.* at 679 (quoting FRCP 8(a)(2)).

In federal court, on a motion to dismiss for failure to state a claim, the federal court can, to a limited extent, look outside the pleadings in deciding the motion. “Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a [FRCP] 12(b)(6) motion to dismiss.” *Anderson v. Clow (In re Stac Elecs. Sec. Litig.),* 89 F3d 1399, 1405 n 4 (9th Cir 1996) (quoting *Fecht v. The Price Co.*, 70 F3d 1078, 1080 n 1 (9th Cir 1995)); *see Cooper v. Pickett*, 137 F3d 616, 622–623 (9th Cir 1998) (court may consider material submitted as part of a complaint when ruling on motion to dismiss).

Likewise, in state court, the judge may consider matters outside the pleadings, including affidavits, declarations, or other evidence, for motions to dismiss under ORCP 21 A(1) through (7) (which are (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, and (7) failure to join a party under Rule 29).
State courts, however, cannot consider matters that do not appear on the face of the pleadings on motions to dismiss under ORCP 21 A(8) and (9), for failure to state ultimate facts sufficient to constitute a claim and that the pleading shows that the action was not commenced within the statute of limitations. ORCP 21 A; Allen v. Lawrence, 137 Or App 181, 186 (1995) (restating the principle that a court may only consider matters outside of the pleadings when ruling on motions pursuant to ORCP 21 (A) (1)–(7)). But consider whether it is appropriate to file a request for judicial notice under OEC 201(f) (which permits judicial notice to be taken at any stage of the proceedings) of any matters that “appear” on the face of the pleading.

As with motions under ORCP 21 A(8) and (9), it is improper for the court to consider evidence outside the pleadings. In Ecumenical Ministries v. Oregon State Lottery Commission, 318 Or 551 (1994), however, the court considered legislative facts on a motion for judgment on the pleadings, suggesting such facts would also be appropriate under ORCP 21 A(8) and (9) motions. See OEC 202, regarding judicial notice of law.

In Thompson v. Telephone & Data Systems, Inc., 132 Or App 103 (1994), a party moved for judgment on the pleadings. The trial court considered evidence of the contents of an agreement related to the pleading, which was supposedly attached to pleadings filed in a different proceeding filed in Illinois, based on judicial notice of an adjudicative fact under OEC 201(b)(2). The Court of Appeals held that it was improper for the trial court to consider the contents of the agreement. In so holding, however, the court of appeals distinguished the contents of an agreement from judicial notice of a court record and judicial notice of law under OEC 202(2). Thompson, supra, at 106. Accordingly, Thompson also suggests that a court could consider judicial notice of certain matters, including law, on a motion for judgment on the pleadings, on a motion to dismiss for failure to state a claim, or on statute of limitations grounds.

III. Motions for a More Definite Statement (FRCP 12(E) and ORCP 21 D)

In federal court, the standard for a motion for a more definite statement is whether the pleading moved against is “so vague or ambiguous that the party cannot reasonably prepare a response.” FRCP 12(e). The motion must point out the defects in the pleading and the details desired. The moving party must make the motion before filing a responsive pleading. If the court grants the motion and the nonmoving party does not correct the defects within 14 days after notice of the order (or some other time frame set by the court), the court may strike the pleading “or issue any other appropriate order.” FRCP 12(e).

Under state practice, the standard used in ORCP 21 D is whether the pleading is “so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent.”

Motions for a more definite statement are often useful when asserted as an alternative to a motion to dismiss.
IV. Motions to Strike (FRCP 12(F) and ORCP 21 E)

A motion to strike serves two purposes. First, it can be used against any insufficient defense. FRCP 12(f). Used in this way, the motion to strike is the equivalent of a motion to dismiss. As with a majority of district courts across the country, in Gessele et al v. Jack in the Box, 2011 US Dist Lexis 99419 (D Or 2011), Judge Stewart held that the heightened pleading standard of Twombly, Iqbal, and their progeny apply to affirmative defenses.

For instance, Judge Stewart struck the affirmative defense alleging “[p]laintiffs’ claims are barred in whole, or in part, by applicable statutes of limitations,” on the grounds the defense was too conclusory to meet the Twombly standard of pleading. Additionally, Judge Stewart struck the affirmative defense of failure to state a claim (so often included among a laundry list of affirmative defenses), on grounds that “a defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense.” It is merely denying the allegations of the plaintiff’s complaint. “On the other hand, an affirmative defense admits the allegations in the complaint, but avoids liability with new allegations of excuse, justification, or other negating matters.”

Although FRCP 12(f) requires that a motion to strike be made before filing a responsive pleading or within 21 days after the service of the pleading against which the motion is based if no responsive pleading is permitted, courts may consider such motions even when untimely. See Oregon Laborers-Employers Trust Funds v. Pacific Fence & Wire Co., 726 F Supp 786, 788 (D Or 1989) (recognizing a party’s right to challenge legal sufficiency of a defense at any time).

ORCP 21 is broader than the federal rule. It allows the striking of “any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated,” in addition to “any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.” ORCP 21 E. Again, the differences between state and federal practice are more apparent than real. Inappropriate material will be stricken in either state or federal court. The main difference is that in state court, claims and defenses not separately pleaded can be stricken, whereas in federal court parties have more leeway in joining separate claims in a single count or defense. Compare ORCP 16 B with FRCP 10(b).

V. Waiving and Preserving Certain Defenses and Objections

In federal court, all defenses or objections available to a party must be consolidated into one FRCP 12 motion to avoid waiver of such defenses and objections. FRCP 12(g)(2) and (h)(1). There are a few exceptions to this rule. A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party required under FRCP 19(b), a legal defense to a claim, and a defense based on lack of subject matter jurisdiction are not waived, even if not asserted in the first FRCP 12 motion. These defenses may be later asserted in a motion for judgment on the pleadings under FRCP 12(c) or in the other manners allowed under FRCP 12(h)(2) and (3).

Likewise, in Oregon state court, all defenses or objections available to a party must be consolidated into one ORCP 21 motion to avoid waiver of such defenses and objections. ORCP 21
F. There are a few exceptions to this rule. For instance, if the first ORCP 21 motion is for lack of personal jurisdiction, insufficiency of summons or process, or insufficiency of service of summons or process, no other defenses will be waived if they are not consolidated with the motion. ORCP 21 F. Additionally, a defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under ORCP 29, and an objection of failure to state a legal defense or insufficiency of a new matter in a reply to avoid a defense are not waived, even if not asserted in the first ORCP 21 motion. ORCP 21 G. These defenses may be later asserted in a motion for judgment on the pleadings under ORCP 21 B.

Of course, if the motion is successful but the claimant is allowed to replead, an ORCP 21 or FRCP 12 motion may be made against any new or amended claim.

VI. Conferring Requirements

In Oregon, a moving party must make a good faith effort to confer on all FRCP 12 and most ORCP 21 motions. See LR 7-1; UTCR 5.010. In state court, no conferral is required for motions to dismiss for failure to state a claim or for lack of jurisdiction. UTCR 5.010 (1). Additionally, a motion made under either rule must contain a certificate of compliance with the conferral requirement. The court can deny the motion, no matter how substantively meritorious, on the grounds that the certification requirement is not met.

Under LR 7-1, the certificate need only state the parties “made a good faith effort through personal or telephone conferences to resolve the dispute and have been unable to do so.” LR 7-1(a)(1)(A). In contrast, Oregon rules require the movant state “either that the parties conferred or contains facts showing good cause for not conferring.” UTCR 5.010(3). Stating that the moving party made a “good faith effort to confer” is not sufficient to satisfy the UTCR 5.010(3) requirements.

In state court, it is good practice to refer to the Multnomah County Circuit Court Motion Panel’s Statement of Consensus for guidance. This statement explains what facts judges expect to show that the moving party made a good faith effort to confer (if the party ultimately was unable to confer). Judges often do not consider letters to opposing counsel, even with an invitation to confer, a good faith effort to confer unless the moving party also makes a follow up phone call leaving a message that specifically references the subject motion.
Chapter 2B

Presentation Slides: Motions Against Pleadings

THE HONORABLE YOULEE YOU
U.S. District Court for the District of Oregon
Portland, Oregon
Plaintiff, a 65-year old man, was suspected of shoplifting a watch at Walmart.

A Walmart security guard tried to detain Plaintiff, and a struggle ensued.

Security Guard handcuffed and detained Plaintiff until police arrived.

Officer X searched Plaintiff, but no watch was found.

Security Guard claimed that Plaintiff must have dropped or hidden the watch during their struggle.

Officer X arrested Plaintiff for assault, battery, and theft.
Plaintiff was charged with crimes in Multnomah County Circuit Court.

Security Guard and Officer X testified against him.

A jury found Plaintiff guilty of assault and battery, and not guilty of theft.

After trial, a video recording of the incident surfaced.

Security Guard says he told the prosecutor about the video, but she decided it wasn’t needed.

The prosecutor says she knew of the video, but there is no copy in the DA file.

The criminal defense lawyer says no one disclosed the existence of the video to him.
Plaintiff has filed a lawsuit against Walmart, Security Guard, Officer X, his criminal defense lawyer, and the DA alleging the same claims against all of them:

(1) false arrest;
(2) 42 U.S.C. § 1983 claim;
(3) elder abuse;
(4) malicious prosecution;
(5) assault and battery;
(6) collusion;
(7) negligence;
(8) malpractice; and
(9) perjury.

The case is filed in Multnomah County Circuit Court.

1) Assume Plaintiff is pro se

• If you are the defense attorney, what if any motions do you file?
• ORCP 21 A(8) for failure to state ultimate facts sufficient to support a claim?
  • Frivolous claims
  • Narrow claims as to each defendant
• ORCP 21 D and E to make more definite and certain or strike?
• Will the motion be dispositive?
  • Costs v. rewards
  • Risk of educating plaintiff
• Educate yourself on opposing counsel and the judge
2) Assume you are retained by Plaintiff

- Would you amend the complaint?
- Relevant rules: ORCP 23 A, FRCP 15(a)
- What do you do if a meritorious motion to dismiss is granted?
  - Ask to replead
  - Dismissal without prejudice
- Attorney’s fees and costs

3) Assume Plaintiff filed in federal court

- Different strategies?
  - Educating the judge
  - Researching the judge
- Would you offer affidavits in support of a Rule 12(b)(6) motion?
  - Converting Rule 12(b)(6) motion to motion for summary judgment
  - Judicial notice
  - Discovery
4) Motions against the Answer

- Affirmative defenses
  - Sufficient factual basis
  - Anticipatory affirmative defenses
  - More definite and certain
  - Interrogatories (in federal court)
  - FRCP 30(b)(6) authorized representative
  - Complexity of case
  - State court v. federal court
Chapter 3

Discovery Motions

C. Marie Eckert
Miller Nash Graham & Dunn LLP
Portland, Oregon

Leslie Johnson
Samuels Yoelin Kantor LLP
Portland, Oregon

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Chapter 3—Discovery Motions

I. DISCOVERY IS GENERALLY PERMITTED REGARDING ANY RELEVANT MATTER

The scope of discovery is broad under both the Oregon Rules of Civil Procedure ("ORCP") and the Federal Rules of Civil Procedure ("FRCP").

(a) Federal—FRCP 26(b)(1)—"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case* * *:"

(b) State—ORCP 36(B)(1)—Discovery allowed into "any matter, not privileged, which is relevant to the claim or defense" of any party.

The federal rules provide more explicit flexibility for trial courts. Under FRCP 26(b)(1) courts can, for "good cause," broaden permissible discovery "of any matter relevant to the subject matter involved in the action." Under FRCP 26 (b)(2)(C)(i)—(iii) the Court "must" limit discovery if it determines that:

- "The discovery sought is unreasonably cumulative, duplicative, or can be obtained from a more convenient or less expensive source;
- "the party seeking discovery had ample opportunity to get the info; or
- "the expense outweighs likely benefit."

The availability and predominance of electronically-stored information ("ESI") has increased the volume of material available for discovery, but the same rules regarding scope and limitations on disclosure still apply, subject to proportionality concerns. Judges who are not entirely familiar with the concepts welcome clear, straight-forward presentations where ESI is involved. See, e.g., Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information from the Conference of Chief Justices, https://ncsc.contentdm.oclc.org/digital/collection/civil/id/56/

II. STRATEGIC CONSIDERATIONS

A. Be Reasonable in Requesting and Responding to Discovery/Proportionality

Discovery motions are time-consuming, expensive, often acrimonious, and judges don't like them. While you will inevitably find yourself engaged either in prosecuting or defending a discovery motion, you should limit such motion practice to the extent possible. Many discovery disputes can be avoided altogether by simply being reasonable in the scope of discovery that you request, in ensuring that your responses to discovery requests are in fact responsive, that your objections have a reasonable basis, that you produce documents that are clearly relevant, and that you are willing to work with opposing counsel in reaching acceptable compromises on discovery disputes.
B. Do the Cost Benefit Analysis

While in some cases you will have no choice but to file a discovery motion, in others you will be debating whether to proceed with a motion or engage in further discussion with opposing counsel in an effort to get discovery without the aid of court intervention. In making this determination, bear in mind the time involved in fully briefing a motion to compel and having it heard by the court and the expense associated with such briefing, which in most cases will not be recoverable. Consider whether the information is available from another source that may not resist a formal request. Also be thoughtful about how much discovery you really need and whether pushing ahead with overly broad requests could put you in the be-careful-what-you-wish-for position of receiving voluminous documents that are not essential to your case. The court will expect you to make a cogent argument for the need for this information, from this source, at this moment.

C. Mind Your Manners

Before a discovery motion is filed, there are often contentious emails exchanged among counsel. No matter how high your blood pressure may have risen, make sure you are genuinely reasonable in all communications and polite and respectful in asserting your position. In addition to the fact that it is the right thing to do, your communications with opposing counsel will often become exhibits if a discovery battle ends up in court.

III. CONFERRAL IS REQUIRED PRIOR TO FILING A DISCOVERY MOTION

A. The "Good Faith" Requirement

1. Applicable State Court Rules

   (a) Uniform Trial Court Rules ("UTCR") Rule 5.010(2)—The Court will automatically deny a Rule 36 discovery motion unless the moving party, prior to filing, makes a good faith effort to confer with the other parties concerning the issues in dispute.

   (b) UTCR 5.010(3)—A party moving to compel discovery must file a certificate of compliance with the rule at the time motion is filed.

   In Anderson v. State Farm Mutual Auto Ins., the defendant filed a motion to dismiss and certified that it had made a good faith effort to confer with plaintiff. 21 Or App 592, 594, 177 P3d 31 (2008). Defendant later conceded that "a form certificate was inadvertently included" in its motion, despite the fact that no conferral had occurred, but argued that its failure to comply with the rule was not material, because conferral would have been futile. Anderson, 217 Or App at 595. The trial court granted the defendant's motion to dismiss, but the Court of Appeals reversed, ruling that "compliance with UTCR 5.010(3) was mandatory and that, pursuant to UTCR 5.010(1), the defendant's noncompliance precluded the allowance of its ORCP 21 A(3) motion to dismiss." Id. (emphasis added). Thus, futility does not excuse noncompliance with the rule.
UTCR 5.010(3) provides that a certificate of compliance is sufficient if it "states that the parties conferred or contains facts showing good cause for not conferring." It is not sufficient to simply state that you "made a good faith effort" to confer. Instead, you should either state that you have conferred with opposing counsel or explain the facts that show you made a good faith effort to confer. Multnomah County motion judges have held that a mere invitation to confer, without follow up, does not fulfill the conferral requirement. See Multnomah County Civil Motion Panel Statement of Consensus, section 4: https://www.courts.oregon.gov/courts/multnomah/go/CivilMotionPanel/CV_CivilMotionPanelStatementOfConsensus.pdf.

2. Applicable Federal Court Rules
   
   (a) Local Rule ("LR") 7-1 of the United States District Court for the District of Oregon requires the first paragraph to include a certification that the parties made a good faith effort to resolve the dispute. The moving party must certify that either:

   • The parties made a good faith effort to resolve the dispute through personal or telephone conferences; or
   
   • The opposing party willfully refused to confer.

   The best practice is to discuss the disputed issues with opposing counsel or exchange detailed emails. A "good faith" effort to confer requires an honest effort to resolve the dispute without court intervention.

3. Methods of Conferral
   
   (a) Call opposing counsel and talk to them about the issues.
   
   (b) Draft your Motion to Compel, send it to opposing counsel, and set a time to go over it. This method shows the other side you are serious about getting the discovery you need, and that you are not going to waste time. The disadvantage, of course, is that you incur the expense of preparing a motion to compel that you might be able to avoid through conferral.

   (c) Send a detailed email or letter.

   • "Hi Sue, here's a list of things I'd like to talk about;" and
   
   • Schedule a time to discuss the issues.

4. "You Never Write, You Never Call"—What to Do if Opposing Counsel Fails to Respond
   
   (a) Document your efforts to contact counsel. If you have called twice and opposing counsel has not called you back, send an email or letter in which you expressly refer to your voicemail messages.
(b) No hardline rule—do enough to support a brief declaration, if necessary, describing your earnest efforts to confer.

5. General Guidelines

(a) Be proactive. Call more than once (~3 calls).

(b) Be polite, call at reasonable hours. Don't call at 4:50 p.m. and threaten to file the next morning.

(c) Always give opposing counsel a reasonable time to respond to you.

(d) Try alternatives if opposing counsel is in trial or on vacation; sometimes another lawyer on the file may be able to assist.

(e) Give a final warning before filing the motion. "I've tried reaching you several times *** if you don't call back, I'm going to file the motion."

IV. MOTIONS TO COMPEL

A. Basis for Filing Motion to Compel and Enforcement

1. ORCP 46A and FRCP 37(a) authorize a motion for an order compelling discovery if a party fails to provide discovery materials upon request. While most commonly used to obtain documents, a party may also move to compel other discovery, such as answers to deposition questions. A party may also move under ORCP 45 and FRCP 36 to determine the sufficiency of answers or objections to requests for admissions.

2. If a party fails to obey an order compelling discovery, the court may order the imposition of sanctions. ORCP 46B; FRCP 37(b).

3. Courts tend to seek a balance between the positions of the moving and opposing parties. Before filing a motion, be sure your own discovery performance has been timely and complete.

B. Filing a Motion to Compel

A motion to compel should be filed reasonably quickly when documents are not produced and conferral with the opposing lawyer does not resolve the issue. See Oregon Civil Litigation Manual § 16.38 (2004 rev. with 2009 supp.).

1. The motion may be filed upon reasonable notice to the parties and "all persons affected thereby." ORCP 46A.

2. The motion "shall set out *** the items that the moving party seeks to discover." ORCP 46A(2).
3. In state court, the moving party generally has the burden of establishing that the information being sought falls within the scope of discovery. See, e.g., Kahn v. Pony Express Courier Corp., 173 Or App 127, 133, 20 P3d 837 (2001); Frease v. Glazer, 330 Or 364, 4 P3d 56 (2000). In federal court, the burden may be on the opposing party to show the request is beyond scope. Jane Doe 130 v. Archdiocese of Portland in Oregon, 717 F Supp 2d 1120 (2010).

4. Comply with UTCR 5.010 and LR 7-1 conferral requirements (see Section III, supra).

5. Comply with UTCR 5.050 regarding oral argument requests.

6. Accompany the motion with the appropriate affidavit or declaration. ORCP 1E.

V. MOTIONS FOR PROTECTIVE ORDER

A. Stipulated Protective Orders

The conventional practice for protecting proprietary or other confidential information is entry of a stipulated protective order.

Both federal and state courts in Oregon have raised the bar for keeping information out of the public record of a matter. See Foltz v. State Farm Mut. Auto. Ins. Co., 331 F3d 1122 (9th Cir 2003); Multnomah County Supplementary Local Rules 5.165. The District Court in Oregon has published a preferred form. See https://www.ord.uscourts.gov/index.php/filing-and-forms/forms/civil-forms. Proposed deviation from the form must be approved by the court, following meaningful conferral among counsel for the parties.

B. A Party Facing Burdensome Discovery May Seek a Protective Order

1. A party or any person from whom discovery is sought can move the court for an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." ORCP 36C; FRCP 26(c).

2. A nonparty can seek a protective order.

3. A party may not seek a protective order to protect rights of a nonparty (witness) unless the party believes that its own rights are jeopardized. Vaughan v. Taylor, 79 Or App 359, 364 n5, 718 P2d 1387 (1986).

C. Conferral Required

As with a motion to compel, you must confer with opposing counsel prior to seeking a protective order.
VI. MOTION FOR SANCTIONS

A. Failure to Comply With an Order Compelling Discovery

If a party fails to obey an order compelling discovery, a motion for sanctions may be filed. ORCP 46B. See Western Ridge Land Co. v. Zimmerlee, 127 Or App 705, 709, 873 P2d 1099 (1994) (attorney not sanctioned for failure to respond because he was only served with a proposed discovery order).

B. Motions for Fee Sanctions Allowed Without a Motion to Compel

1. Sanctions may be ordered when a party fails to appear for a deposition after being served with proper notice, or fails to comply with or object to a request for production. ORCP 46D;

2. Sanction may be ordered against any party or nonparty who disobeys a subpoena for testimony or production of records or refuses to be sworn or answer questions as a witness in response to a subpoena. ORCP 46B(1), 55G;

3. Personal Injury—Sanctions allowed when medical records or reports are withheld; parties must provide a "detailed report" after a compulsory medical examination. ORCP 44B.

4. Failure to answer requests for admissions completely and within time limits.

5. Spoliation of evidence – electronic or conventional – may be a basis for sanctions up to and including instructions on presumptions regarding lost evidence or a determination of the substantive issues of the case against the party.

C. Apply Sparingly

Courts do not like sanctions motions, as a general rule, and will order sanctions only for clear discovery violations and egregious conduct. Awards of expenses for motions to compel are infrequent, but outright dismissals or adverse judgment not unheard of in cases where the record reflects prolonged failure to participate in discovery. Given the cost of bringing a sanctions motion and the limited circumstances in which sanctions are appropriate or will be granted, it should be the rare case in which you seek sanctions.
On May 9, 2011, the Court granted plaintiffs’ motion to compel discovery, and directed defendants to submit complete discovery responses to plaintiffs within ten days. Minute Order, docket no. 228. The Court further directed plaintiffs to submit evidence of the reasonable attorneys’ fees they incurred in bringing the motion to compel.\(^1\) Id. Plaintiffs submitted their evidence of attorneys’ fees on May 12, 2011, and the matter is now ripe for consideration. See Goldman Decl., docket no. 231.

\(^1\) Defendants’ response to plaintiffs’ fee petition, if any, was due no later than May 23, 2011. Id. Defendants filed no opposition to the petition.
I. Plaintiffs' Attorneys' Fees Incurred in Bringing the Motion to Compel

Plaintiffs' fee petition seeks an award of $2,442.00, representing 7.4 attorney hours spent on the motion to compel, at the hourly rate of $330.00. Id. Based on the Court's review of plaintiffs' counsel's qualifications, and the Court's familiarity with the prevailing market rate for legal services in the Seattle community, the Court concludes that $2,442.00 represents a reasonable award of attorneys' fees for the time spent bringing the motion to compel. See Fed. R. Civ. P. 37(a)(5)(A).

II. Defendants' Motion for an Extension of Time

On May 18, 2011 (one day before the Court's deadline for providing complete discovery responses to plaintiffs' requests), defendants moved for an extension of the ten-day deadline. Mot., docket no. 232. Defendants were compelled to bring a formal motion because plaintiffs refused to agree to any extension of the deadline. See Silverstein Decl., Ex. B, docket no. 233. Consistent with the Court's local rules, defendants noted their motion for consideration on May 27, 2011. Id.; see also Local Rule CR 7(d)(2).

Although plaintiffs' response to defendants' motion was not due until May 25, 2011, see Local Rule CR 7(d)(2), plaintiffs prepared and filed a six-page response to the motion the very next day, May 19, 2011. Resp., docket no. 234. The entire issue became moot, however, because defendants successfully completed their production of documents on May 19, 2011. Not., docket no. 235.
Plaintiffs now request that the Court award them an additional $3,403.50 in attorneys' fees incurred in responding to defendants' motion. Plaintiffs' request is not well taken. The additional fees incurred are the direct result of plaintiffs' obstinacy in refusing to agree to the defendants' proposed reasonable extension of the production deadline. Accordingly, in light of the plaintiffs' failure to confer in good faith, the Court DENIES plaintiffs' request for an additional award of attorneys' fees. See Local Rule CR 37(a)(1)(A).

III. CONCLUSION

Although the Court has concluded that $2,442.00 represents a reasonable sum of attorneys' fees for the time spent by plaintiffs in bringing their motion to compel, the Court is troubled by plaintiffs' arbitrary denial of defendants' reasonable request for a brief extension of the deadline to produce documents. Pursuant to Local Rule CR 37(a)(1)(A), when a party fails to confer in good faith, the Court may take any action set forth in Local Rule GR 3, which provides as follows:

Moreover, plaintiffs were not "forced" to incur attorneys' fees in responding to defendants' motion, as they contend in their reply brief. Reply at 1, docket no. 236. Had plaintiffs simply waited until after the production deadline had passed (nearly a full week before the deadline for their response to defendants' motion), they would not have incurred any fees at all.

Defendants sought an extension so that a single witness could have additional time to search his files for a small subset of possible additional documents. Silverstein Decl. at ¶ 7, docket no. 233. The search ultimately revealed no additional responsive documents, and defendants completed their production on May 19, 2011. Supp. Silverstein Decl. at ¶ 4-7, docket no. 240.
Any attorney or party who . . . presents to the court unnecessary motions or unwarranted opposition to motions . . . or who otherwise so multiplies or obstructs the proceedings in a case as to increase the cost thereof unreasonably and vexatiously, may, in addition to, or in lieu of the sanction and penalties provided elsewhere in these rules . . . be subject to such other sanctions as the court deems appropriate.

Local Rule GR 3 (emphasis added). Exercising its discretion under GR 3, the Court concludes that a reduction in plaintiffs' fee award is appropriate in light of plaintiffs' borderline unprofessional conduct. Accordingly, pursuant to the Court's prior Minute Order granting plaintiff's motion to compel, docket no. 228, the Court AWARDS plaintiffs their reasonable attorneys' fees in the amount of $1.00.4 Defendants shall deliver full payment of the award to plaintiffs' counsel within ten (10) days of this Order.

IT IS SO ORDERED.

DATED this 27th day of May, 2011.

[Signature]

Thomas S. Zilly
United States District Judge

4 The Court intends that this Order act as a reminder to the parties of their joint obligation to meet and confer in good faith prior to seeking relief from the Court. See Local Rule CR 37(a)(1)(A).
ORDER

Before the Court in the above-entitled and styled cause of action is Defendant Wal-Mart Stores Texas, L.L.C.’s Opposed Motion for a Protective Order, filed May 29, 2008 (Doc. #26). Apparently, the parties are unable to agree if the deposition of Wal-Mart’s corporate representative should occur in San Antonio, Texas or in Bentonville, Arkansas.

The Court is sympathetic with Defendant’s argument. Surely Defendant’s corporate representative, a resident of Arkansas, would feel great humiliation by being forced to enter the home state of the University of Texas, where the legendary Texas Longhorns have wrought havoc on the Arkansas Razorbacks with an impressive 55-21 all-time series record.¹

On the other hand, the Court is sympathetic with Plaintiff’s position. Plaintiffs might enter Arkansas with a bit of trepidation as many residents of Arkansas are still seeking retribution for the “Game of the Century” in which James Street and Darrell Royal stunned the Razorbacks by winning

¹It is worth noting that the Razorbacks, who disgracefully retreated from the Southwest Conference to the gentler pastures of the Southeastern Conference, could have likely learned a lesson about stamina and perseverance in the face of battle by visiting the Alamo in San Antonio.
the 1969 National Championship.²

Because the Court is sympathetic to both parties' positions, it has found a neutral site, intended to avoid both humiliation and trepidation of retribution.

**ACCORDINGLY, IT IS ORDERED THAT** unless the parties agree otherwise, the deposition of Defendant’s corporate representative shall occur at 9 AM on June 11, 2008 on the steps of the Texarkana Federal Building, 500 State Line Avenue, TX/AR 71854.

**IT IS FURTHER ORDERED THAT** each party is to remain on his or her respective side of the state line.

SIGNED this 3rd day of May, 2008.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

²The Court takes judicial notice that the “Game of the Century” for the current century occurred on January 4, 2006 when Vince Young and Mack Brown led the Longhorns in a 41-38 win over the USC Trojans, thus securing the 2005 National Championship.
# Chapter 4

**Ethical Considerations for Motion Practice**

**Jessica Osborne**  
Ater Wynne LLP  
Portland, Oregon

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ETHICAL CONSIDERATIONS FOR MOTION PRACTICE

By: Jessica D. Osborne1

I. Ex Parte Communications

A. RPC 3.5, Impartiality and Decorum of the Tribunal: “A lawyer shall not *** (b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order[.]”

1. RPC 3.5 applies to communications in litigation, as well as contested case hearings, and arbitrations.

2. “The purpose [of DR 7-110(B), former rule on ex parte communications pre-adoption of RPCs] is to prevent the effect, or even the appearance, of granting undue advantage to one party to the litigation. A communication with the court becomes an impermissible ex parte contact when it is made to a judge “before whom the proceeding is pending” and when it concerns “the merits of the cause.”” In re Complaint of Thompson, 325 OR 467, 473 (1997).

3. Ex parte prohibitions are also intended to prevent the judge from being improperly influenced or inaccurately informed. See In re Burrows, 291 Or 135; See also RPC 3.3(d) (lawyer in an ex parte proceeding must inform the tribunal of all material facts that will enable the tribunal to make an informed decisions, whether or not facts are adverse).

B. Multnomah County SLR 5.025 lays out the requirements for allowed ex parte matters in civil proceedings.

1. SLR 5.025(2) states that “[c]ontested matters, unless otherwise allowed by these rules, shall not be presented at ex parte. ***” The rule only allows for application for TROs under ORCP 79(B)(1), and then only “when the adverse party appears and is permitted by the court to address the merits of the request.” SLR 5.025(2)(a).

2. The “party seeking ex parte relief must provide one judicial days’ notice to the opposing party of the date, time and court where the ex parte relief will be sought.”

1 Jessica (Jess) Osborne is an associate in Ater Wynne’s Litigation Department. Her practice focuses on commercial litigation, employment litigation, professional liability defense, and business disputes. The author acknowledges the contributions of Dayna Underhill and David Elkanich of Holland & Knight, LLP on a prior version of this material, parts of which are incorporated herein.
C. What does “merits of the cause” mean?

1. OSB Op. 2005-83 [Revised 2016] cites former DR 7-110(B), stating merits of the cause “include[s] any matter that might indirectly affect how a judge might ultimately rule. Even communication on a seemingly procedural matter might affect the merits of the cause if it would provide one party with a strategic or tactical advantage.” See also In re Fjelstad, 27 DB 68 (2013) (ex parte filing of motion to reinstate case, followed by ex parte motion to amend complaint, without notice to opposing counsel either of intent to go to ex parte, or more generally of either motion, violated RCP 3.5).

2. The ex parte contact must “affect any legal right or duty of the parties.” In re Merkel, 341 Or 142 (2006); citing In re Conduct of Smith, 295 Or 755, 760 (1983).

3. An attorney need only attempt to influence the outcome. The attempt does not need to be successful. See In re Thompson, 325 Or 467 (1997).

D. What must the attorney disclose at ex parte?

1. RPC 3.3, Candor toward the Tribunal, subpart (d), “In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable to make an informed decision, whether or not the facts are adverse.”

2. Multnomah County SLR 5.025(3): the party seeking ex parte relief must provide one judicial days’ notice to, or waiver or consent from, the opposing party, and the party seeking relief must inform the court whether the party made actual contact with the opposing party prior to the ex parte appearance. Further, the party seeking relief must provide the court with the opposing party’s position on the matter before the court.

E. When is a communication an ex parte contact?

1. In re Sandoval, 30 DB 272 (2016).


F. When is a communication not an ex parte contact?

In re Conduct of Merkel, 341 Or 142 (2006).

G. When is an ex parte contact authorized?

1. In certain emergency situations, including the following:

   a. ORS 107.718, temporary restraining order, imminent danger of further abuse;
b. ORS 107.097, temporary order providing child custody or parenting time; and

c. ORCP 70 temporary restraining orders under certain conditions.

2. Judicial Rules differ from RPCs.

JR 3.9 governs ex parte contact by a judge. Exceptions to no ex parte contact include when:

1. the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and

2. the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

H. Other considerations beyond ex parte communications.

1. Candor to the tribunal under RPC 3.3.

2. Misconduct under RPC 8.4.

II. Duty to Confer in Motions Practice, Ethics and/or Professionalism

A. USDC, District of Oregon, Statement of Professionalism and Notice of Rule 83-6, “Professionalism goes beyond observing the legal profession’s ethical rules by sensitively and fairly serving the best interest of clients and the public. Professionalism fosters respect and trust among lawyers and between lawyers and the public, promotes the efficient resolution of disputes, simplifies transactions, and makes the practice of law more enjoyable and satisfying.”

B. The Oregon State Bar Statement of Professionalism, effective December 12, 2011: “*** I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party. *** I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court. *** I will only pursue positions and litigation that have merit. ***”

C. USDC LR 7-1(a) requires that the first paragraph of a motion certify that the parties made a good faith effort through personal or telephone conferences to resolve the dispute. In conferring about dispositive motions, the parties must discuss each claim, defense, or issue that is the subject of the proposed motion. The court may deny any motion that fails to certify the information above.

D. UTCR 5.010, conferring on motions under ORCP 21, 23 and 36-46 requires a good faith effort to confer with the party(ies) concerning the issues in dispute.
III. Disclosing Adverse Authority

A. **RPC 3.3** states “[a] lawyer shall not knowingly:

1. make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

2. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

B. **See also, ABA Model Rules 3.3, comments:**

1. [3] “An advocate is responsible for pleadings and other documents prepared in litigation, but is not usually required to have personal knowledge of matters asserted therein, for litigation documents ordinary present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer.”

2. [4] “Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, *** an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.”

C. **Duty to disclose in evolution:**

1. In 1908, the ABA issued its first Canons of Professional Ethics, which did not set forth a duty to disclose adverse authority.

2. In 1935, the ABA issued Ethics Opinion 146, which stated “We are of the opinion that this Canon requires the lawyer to disclose such decisions [that are adverse to his client’s contentions] to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.” ABA Op. 146 (1935). Put another way, a lawyer must “advise the court of decisions adverse to his clients’ contentions that are known to [the lawyer] and unknown to his adversary.”

The moving party must **file a certificate of conferral** with the motion. The certificate must state that the parties conferred, or the certificate must show good cause facts for not conferring. An unopposed motion with supporting certificate may be provided *ex parte.*
3. In 1949, in Ethics Opinion 1949, the ABA stated the test to disclose as: “Is the decision which opposing counsel overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?”

4. Current 3.3: “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

D. Case considerations: Candor to the Tribunal and the Duty to Disclose

1. “Making misrepresentations to the fact finder is inherently obstructive because it frustrates the rational search for the truth. It may also delay the proceedings.” *U.S. v. Thoreen*, 653 F2d 1332, 1340-41 (9th Cir. 1981) (discussing contumacious misbehavior by attorneys and implication of ethical violations through misrepresentations to the court).

2. “The rule [3.3(a)(3) prohibiting an attorney from knowingly failing to disclose controlling authority directly adverse to the position advocated] is an important one, especially in the district courts, where its faithful observance by attorneys assures that judges are not the victims of lawyers hiding the legal ball.” *Transamerica Leasing, Inc. v. Compania Anonima Venezolana de Navegacion*, 93 F3d 675, 675-676 (9th Cir. 1996) (finding attorney did not violate the rule by failing to disclose an unpublished Ninth Circuit opinion, when the district court did not deny petition for writ of mandamus on the merits and the not cited case was a petition for writ on the merits).

3. Counsel has a “continuing duty to inform the Court of any development which may conceivably affect the outcome of the litigation. *Board of License Com’rs of Town of Tiverton v. Pastore*, 469 US 238 (1985) (discussing developments after certiorari is granted that effect jurisdiction of Court due to absence of continuing case or controversy); citing *Fusair v. Steinberg*, 419 US 379, 391 (1975).

4. *Southern Pacific Transp. Co. v. Public Utilities Com’n of State of California*, 716 F2d 1285, 1291 (1985). The court noted in its opinion that the counsel for Southern Pacific’s failure to mention an adverse case in its briefs was a breach of the duty to disclose adverse authority to the tribunal. The court went on to express its dismay that the opposing party did not mention the case in its briefs, but stated “we know of no rule of professional responsibility that requires a lawyer to cite to the court every case that supports the lawyer’s position. We shudder to think what problems such a rule would create, in light of the enormous increase in reported decision of this and other courts in recent years.”
IV. Privilege and the Challenges of Inadvertent Disclosure

A. RPC 4.4(b), Respect for the Rights of Third Persons; Inadvertently Sent Documents, states:

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and know or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”

B. RPC 4.4(b), by its terms, does not require the receiving party to return or destroy any documents inadvertently disclosed by the opposing party.

C. Protect your client’s interests!

1. The purpose of the rule is to provide the party who inadvertently disclosed privileged information to take protective steps to attempt to limit the damage of the disclosure, including asking the receiving party to return and/or destroy the documents, or otherwise seek a court order for the same.

2. Failure to react to the news that a document was inadvertently disclosed could lead to waiver of privilege. Whether disclosure has waived privilege is a question before the court hearing the matter. See Goldsborough v. Eagle Crest Partners, Ltd., 314 Or 336, 343 (1992) (“A court need not necessarily conclude that the lawyer-client privilege has been waived when a document has been produced during discovery. Factors to be considered by the court may be whether the disclosure was inadvertent, whether any attempt was made to remedy any error promptly, and whether preservation of the privilege will occasion unfairness to the opponent”).

3. Be careful in your electronic communications. The days of physically sending letters are disappearing. When communicating by email, be cognizant of your email system’s autofill (highly recommend disabling), and the dangers of Reply All and BCC functions.

D. Federal Rules and Inadvertent Disclosure

1. The Federal Rules of Evidence 502, an inadvertent disclosure does not operate as a waiver to attorney client privilege if:

   a. The waiver is inadvertent;

   b. The holder of the privilege or protection took reasonable steps to prevent disclosure; and

   c. The holder promptly took reasonable steps to rectify the error, including (if applicable) following FRCP 26(b)(5)(B) (Duty to
Disclose, Discovery Scope and Limits, Claiming Privilege or Protecting Trial-Preparation Materials).

2. “In the event of inadvertent production of protected materials in discovery that does not constitute waiver of the applicable protections, the inadvertent producing party is entitled to request [ ] destruction, return, or sequestration of the inadvertently produced materials ***. *Columbia Riverkeeper v. U.S. Army Corps of Engineers*, 2014 WL 12792545 (D. Or. 2014).

   a. Under FRCP 26(b)(5)(B), the party claiming a privilege of disclosed documents “may notify any party that received the information of the claim and the basis for it.”

   b. The party being notified must, after receiving notice, “promptly return, sequester, or destroy the specified information and any copies it has; it must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.

   c. The producing party must preserve the information until the claim is resolved.”
Chapter 5

Effective Motions for Summary Judgment

COURTNEY ANGELI
Buchanan Angeli Altschul & Sullivan LLP
Portland, Oregon

JULIE VACURA
Larkins Vacura Kayser LLP
Portland, Oregon

RICHARD VANGELISTI
Vangelisti LLP
Portland, Oregon

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Effective Motions for Summary Judgment
October 11, 2018

Courtney Angeli
Buchanan Angeli Altschul & Sullivan LLP

Julie Vacura
Larkins Vacura Kayser LLP

Richard Vangelisti
Vangelisti LLC

I. Should you file a MSJ at all?

• Some cases need to be tried.
• At the time you file or receive the complaint, decide what discovery you need to help you decide whether to file a motion for summary judgment.
• Waiting to start discovery in a case almost inevitably leads to a delayed decision on summary judgment and often greater expense.
• Client type
• Claim type – some claims are more appropriate for summary judgment than others.
  ▪ Declaratory judgment
  ▪ Insurance coverage
  ▪ Adverse possession
• Amount at stake – Usually it is not cost effective in a small dollar case to file a summary judgment motion because they are so expensive to prepare.
• Expense
• Chances of success
• If you use an associate or contract attorney, etc., it may make filing more feasible.
• If you address only key issues that will have a real impact on the case, will it be cost effective?
• How clear cut is your issue?
• Complexity of Case – It may narrow the issues but does it really shorten trial?
• Will it make a difference in how you can tell your story at trial?
• What do your declarations have to say – Help or hurt what would be left of your case.
Can your client be impeached somehow?

What will be the psychological effect – if any?
  - Have you already lost a number of motions?
  - Can affect, client, opposing counsel and the judge.

Do you have an assigned judge (federal court) that needs to be educated about the case before it goes to trial and how important is that?

How will it affect settlement negotiations – if at all?

Is the timing of the MSJ good or bad for settlement?

II. What Is The Standard?

“[A]t the summary judgment stage, the judge’s function is not [...] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial…the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving part is entitled to judgment as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505 (1986).

1. Federal Court

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FRCP 56(a).

2. State Court

“The court shall grant the motion if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.” ORCP 47 C.

Are there differences between the state and federal standards?

Oregon allows an attorney opposing summary judgment to provide “an affidavit or a declaration of the party’s attorney stating that an unnamed, qualified expert has been retained who is available and willing to testify to admissible facts or opinions” and, by doing so, create “a question of fact...sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion.” ORCP 47 E.
• The Federal Rules allows a court, denying summary judgment, to make an interlocutory judgment on undisputed facts. FRCP 56(g) provides that “if the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.”

• ORCP 47 A and B were amended effective January 1, 2018 to clarify that summary judgment could be granted on “all or any part of any claim or defense.”

• Otherwise, the courts officially say, “The Oregon rules are essentially identical to FRCP 15(b) and FRCP 56, respectively, and we therefore look to federal cases for guidance.” Hussey v. Huntsinger, 72 Or. App. 565, 569, 696 P.2d 580, 583 (1985).

• Unofficially, however, “In Oregon state courts, by contrast, judges are generally less inclined to weigh or evaluate the strength of conflicting evidence in ruling on summary judgment motions; hence, the denial rate tends to higher, practitioners know this, and most observers believe that the summary judgment device is therefore less frequently used these days in state court.” David Brewer, Former Associate Justice Oregon Supreme Court, Judges Corner, Oregon State Bar Litigation Journal (Summer 2015).1

• Statistical evidence, where available, supports Justice Brewer’s statement. A 2010 study by the University of Denver’s Institute for the Advancement of the American Legal System found that, in Multnomah County Circuit Court, litigants filed summary judgment motions in less than 20 percent of cases—and that the court granted, in whole or in part, less than 30 percent of such motions.2 By contrast, in the previous year, in the District of Oregon, parties filed a motion for summary judgment in 46% of cases, and the court granted such motions, in whole or part, over 50% of the time.3

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1 Available at http://www.osblitigation.com/judgescorner.php?articleid=16
3 Institute for the Advancement of the American Legal System, Civil Case Processing in the Federal District Courts (2009), available at http://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf
III. Historic Probability of Summary Judgment

1. Federal – District of Oregon
   - 43% of MSJ were **GRANTED** in whole in 2016-2017
   - 44% of MSJ were **GRANTED** in whole in 2015
   - 50% of MSJ were **GRANTED** in whole in 2002
   - 20% of MSJ were **GRANTED** in part and denied in part on average in 2002, 2015, 2016-2017

The 2002 and 2016-2017 statistics were provided by Hon. Anna J. Brown and Clerk of Court Mary L. Moran, respectively. The 2015 statistics are found in *Summary Judgment in the U.S. District Court*, Institute for the Advancement of the American Legal System.

2. State – Oregon
   - Data has not been recently collected on the GRANT/DENIAL rates in the Oregon trial courts.
   - 55% (approximately) is the probability of having a GRANT of summary judgment REVERSED in whole or part.

IV. Timing

   In all jurisdictions, the parties must, of course, be mindful of the judge’s particular scheduling orders and local rules of court.

1. Federal Court
   - Based on order of court. Any time until 30 days after the close of all discovery. FRCP 56(b).

2. Oregon State Court
   - Must be served and filed at least 60 days before the date set for trial, though the court can modify this timing. ORCP 47 C.

If you are going to file a motion for summary judgment, do not wait until the last possible day.

This does not save your client any money because you will be having to get ready for trial while drafting the brief and make the oral argument.

You may not get a decision from the court at all.
V. Materials Needed

1. **The Motion Itself**
   - Briefly states basis for motion, references accompanying memorandum in support and evidence filed in support

2. **Memorandum in Support of Motion**
   - Describes factual, evidentiary support, sets forth legal arguments (see below)

3. **Evidentiary Support**
   - Affidavits
   - Deposition testimony
   - Responses to Request for Admission and Interrogatories
   - Exhibits

4. Consult your local lawyer and/or local rules when practicing in another state for scheduling, practice requirements, proposed orders, etc. Do not assume procedures are the same even from one county to another.
   - Check the Court’s web site
   - For federal district court in Oregon, check the Federal Bar Association Handbook regarding judicial preferences for important guidance on summary judgment filings.

VI. Summary Judgment Begins With Discovery

1. You should focus on summary judgment in undertaking your discovery. Plaintiffs should file summary judgment motions too. Have your motion thought through and researched before taking the opposing party’s deposition.
   - Determine what admissions you need to obtain.
   - Consider specific wording that parallels case law

2. Base your memoranda as much as possible on the opposing party’s deposition to avoid creating a question of fact. (Remember, if the opposing party said it and you agree, it is an undisputed fact.)
   - Get the opposition to sign off on as much of your side of the story as possible in deposition, or at least to acknowledge that he or she has no facts to dispute your version.
Use affidavits of your own witnesses and their deposition testimony sparingly (they increase the appearance of disputed facts).

In employment discrimination cases, Reeves v. Sanderson Plumbing Products, Inc., 530 US 133 (2000) has magnified the importance for defense counsel of fully understanding the rationale for the challenged decision as soon as possible in the litigation. This case rejected the “pretext-plus” doctrine and concluded that evidence of pretext alone (without other evidence of discrimination) may be enough to overcome summary judgment. The Oregon Court of Appeals, meanwhile, has suggested that, in discrimination cases, the burden for a plaintiff to survive summary judgment “is so minimal that it is virtually impervious based on evidentiary sufficiency.” Medina v. State, 278 Or. App. 579, 587 (2016). As a result, defense counsel in such cases should do significant preparation before even considering a motion for summary judgment:

- All participants in the challenged decision should be immediately interviewed such that counsel is able to very accurately state the reasons for the challenged decision. Contradictions between defense witnesses in depositions can be fatal to the defendant’s summary judgment prospects.

- Likewise, even before formal litigation begins, statements made in connection with the employer’s application for unemployment benefits and statements made in EEOC, BOLI or other agency response must be very well thought through or they will be used to attempt to show pretext.

3. In some cases, the effective use of requests for admission and interrogatories may also be useful. However, in many cases the responses obtained in deposition will be more candid and more useful.

VII. The Memorandum in Support of Motion

1. The Introduction

The introduction should make it clear in a snappy, compelling, to-the-point fashion why your client should win. It generally also should state what the claims are that have been asserted.

- Get the judge on your side before he or she even reads the fact section.
- Tell the story. Get the moral high ground.
- It’s not a jury trial but judges are people too. Particularly in discrimination cases or other cases where you are on the side of the “Big Bad Company,” judges understandably need to be made confident that
they are doing the right thing, or at least, not the wrong thing by granting your motion not only from a legal perspective but from the standpoint of basic fairness.

2. The Fact Section

Don’t be afraid to narrate a complete factual story so long as you base it on undisputed facts. Make sure it is supported by the record. In the District of Oregon, “a party’s factual positions must be supported by citations, by page and line as appropriate, to the particular parts of materials in the record.” LR 56-1(a).

- Don’t lose the reader. If it’s a long story, use head notes to separate out various sections of the narrative.
- Be persuasive but not argumentative. The tone should be relatively neutral but the story should be told in manner that leads inexorably to the conclusion that the plaintiff’s claims or defendant’s defenses are without merit.
- Read it over multiple times and edit to make sure it flows. As you read it over, try to place yourself in the mind of someone who knows nothing about the case.
- Use plaintiff’s or defendant’s admissions (either from deposition or discovery requests) as much as possible for your source.
- Keep in mind that this may be your only shot to tell the facts. In the District of Oregon, “[u]nless otherwise ordered by the Court, a party is not required to file a separate Concise Statement of Material Facts.” LR 56-1(a).

3. The Law Section

While some redundancy may be required, avoid a rehash of the fact section.

- Focus on making affirmative arguments without breaking your stride by responding to arguments that you think the opposing party is likely to make, e.g., don’t have an argument with yourself in your brief. If a defendant, hold these responses to plaintiff’s arguments back for the reply, otherwise you weaken the strength of your affirmative presentation. Sometimes, you may be pleasantly surprised as plaintiff may not make the anticipated argument after all.
- Make it tight. Revise, revise, revise.
- Have someone give it a cold eye.
- Do not have pride in authorship.
4.  **The Conclusion**

If you have not convinced the reader by this point, it’s too late. Use a simple: “For all of the foregoing reasons, and for all the reasons set forth in the papers filed in support of this motion, defendant respectfully requests the Court to grant summary judgment for defendant on each one of plaintiff's claims.”

**VIII. The Concise Statement of Material Facts**

Oregon’s District Court local rules provide:

“The court may order “a Concise Statement of Material Facts. If ordered, a Concise Statement of Material Facts may not exceed 1,500 words, or in the alternative, five pages.” LR 56.1(a).

If ordered to file a statement, heed this rule. Pare it down to those facts that the Court must decide in your client’s favor in order to rule your way. Nothing that is mere background should be included in the Concise Statement. The Concise Statement should be substantially shorter than the fact section of the memorandum.

- The Concise Statement should list the undisputed facts that you actually make use of in the argument section.
- Be sure there really is no dispute on any of the essential relevant facts in the concise statement. (Of course, a citation to the plaintiff's deposition helps underscore the absence of a dispute.)
- The judge should be able to essentially decide the Motion by reading only the introduction to the Memorandum and the Concise Statement of Material Facts.

**IX. Opposition Requirements**

When opposing a motion for summary judgment, a party should raise disputed facts, as well as disputes of law.

Evidentiary objections are fair game. But be aware that “If an evidentiary objection is raised in the non-moving party’s response memorandum, the moving party may address the objection in its reply memorandum; the non-moving party may not file further briefing on its evidentiary objection.” LR 56-1(b).

**X. The Reply**

- The Reply should be extremely focused and should be just that, a reply-not a rehash of the Memorandum in Support.
- Don’t feel compelled to respond to every point made by the opposition. Focus on those points raised in the opposition that might actually have confused or concerned the Court.
The Reply should re-focus the Court on how simple your Motion really is.

Don’t be constrained by the order of the arguments set out in the opposition brief. Make your arguments in the format that is the most compelling for your case.

Once again, use the introduction in the Reply to give a very brief but snappy and compelling summary of why the Opposition fails to create an issue of material fact.

Don’t forget to consider evidentiary objections. Remember, issues of authentication, hearsay, etc., are just as relevant at the summary judgment phase as at trial and if you don’t make the objection it will likely be waived.

**XI. Tips for Written Advocacy for Summary Judgment**

- Know your audience (i.e., judge) in terms of experience with the substantive law.
- If you know, what judge will hear the motion?
- Investigate your judge – even if he or she is only assigned after you file.
- Read his or her profile – what kind of work done prior to getting on the bench, what firm or employer.
- Read preference results.
- Ask around, but consider the source as well.
- Help the judge help you by submitting “user friendly” briefing and evidentiary support.
- If possible, keep it short. The fastest way to a denial in state court with a sitting judge is to file a huge pile of paper.
  - Include only the material and important facts.
  - Simplify the legal arguments.
- Provide tools (roadmap, summary, index, highlighting, etc.) to help the judge review briefing and evidentiary support.
- Ensure that the briefing is self-contained such that the judge does not have to pull cases or documents found elsewhere in the case file.
- Withholding issues until the reply brief or oral argument diminishes credibility and can be fatal to the motion (ORCP 47 C (“adverse party has the burden of producing evidence on any issue raised in the motion”).)
- Ensure that the evidence submitted is competent and capable of admission, including authenticity in the case of a document.
- Assume that the judge may read the reply first.
- Gold standard: Could the judge cut and paste portions of my brief into a written opinion for publication?
XII. The Oral Argument

- Keep the argument simple.
- Be prepared for the possibility that the Court may have read nothing that you have written or provided, but know that more likely you will be responding to specific issues raised by the Court.
- Focus on the justice of your case as well the law.
- Be prepared to quote from the plaintiff’s deposition or other telling sources of evidence. Know the citations in the record.

XIII. Tips for Oral Advocacy

- “Scout” your judge to have some idea as to how to prepare for oral argument.
- Be prepared. Practice oral argument with a colleague.
- Prepare for a variety of approaches:
  - Judge read everything, nothing, or something in between
  - Judge asks many questions, no questions or something in between
- Listen to the opposing counsel and the judge to guide or re-focus your presentation.
- Answer the judge’s questions directly and then explain your answer.
- If you must concede an issue as weak or uncertain, then do it as it will build credibility.
- The ultimate goal is to have a “conversation” to engage the judge in the pivotal issues.
- Adjust your speed to that of the judge’s notetaking.
- Consider using handouts or visual aids especially for complex information.
- Direct your comments to the judge—not opposing counsel.
- Do not interrupt opposing counsel or the judge.
- Be professional and respectful to everyone regardless of the other’s behavior—it’s the smartest approach.
- If you win a point or are winning, stop arguing.
ORDER AND AMENDED OPINION

ORDER

SNEED, Circuit Judge.

The mandate, issued on March 27, 2002, is hereby recalled.
The opinion filed March 5, 2002, is amended. The Hearsay section of the opinion is substantially amended.

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The panel directs the Clerk to reenter judgment. The parties may seek panel rehearing or rehearing en banc thereafter within the time limits provided by Federal Rule of Appellate Procedure 40.

**OPINION**

Robin Orr (“Orr”) appeals the district court’s grant of summary judgment in favor of Bank of America (“BOA”). The district court found that most of the evidence submitted by Orr in support of her opposition to BOA’s motion for summary judgment was inadmissible due to inadequate authentication and hearsay. It held Orr had failed to present any admissible evidence to raise a triable issue of material fact and thus entered summary judgment in favor of BOA on Orr’s First Amended Complaint (“Complaint”). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

**BACKGROUND**

Orr was a service manager for BOA’s Incline Village branch in 1992. Joe Bourdeau (“Bourdeau”) was its sales manager. In July 1992, the branch suffered a night-time deposit loss of $12,000. As part of its investigation, the FBI took a polygraph test from Orr. BOA claims it did not receive the results of Orr’s polygraph test. Its position is corroborated by Orr’s deposition testimony and the affidavit of an FBI agent who administered the test. Orr was never charged with any criminal wrongdoing.

In January 1993, George Burns, BOA’s District Officer, and Vicki Haven, BOA’s auditor, conducted an operational review of BOA’s Incline Village branch. They reported forty-seven deficiencies. This led Julie Castle (“Castle”), BOA’s Incline Village branch manager, to terminate Bourdeau and Orr for failure to implement proper control procedures.

Bourdeau and Orr subsequently raised $3.5 million to start the Bank of Lake Tahoe (“Tahoe Bank”). An application for deposit insurance was submitted to the Federal Deposit Insurance Corporation (“FDIC”), listing Orr as Tahoe Bank’s proposed Vice President of Operations and Bourdeau as its President and CEO.

The FDIC interviewed BOA’s Incline Village branch managers Castle and Robert Underwood (“Underwood”) as part of its investigation of Tahoe Bank. Castle and Underwood insist they did not disclose any information about Orr to the FDIC. Orr, however, claims they submitted disparaging information about her to the FDIC. She points to Exhibit B, Bourdeau’s deposition testimony in which he states that he saw negative documents about Orr at the FDIC and was told they were submitted by BOA. She also points to Exhibit C, a memo sent from Bob Geerhart to Scott Walshaw, both agents of the Nevada Department of Financial Institutions, concerning the investigation of Tahoe Bank in which Geerhart paints a suspicious portrait of Orr based on an FBI report. That report purportedly identified her as a suspect in an $18,000 theft of a deposit at BOA. At the close of its investigation, the FDIC denied Tahoe Bank’s application.

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In February 1995, Bourdeau filed an action against BOA alleging slander, fraudulent misrepresentation and intentional interference with business relations. The jury dismissed all but one count in which it found BOA liable for intentional interference with prospective business relations and awarded Bourdeau $1.2 million in compensatory damages. On appeal, the Nevada Supreme Court reversed and remanded for a new trial.
Following the FDIC’s denial of Tahoe Bank’s application, the Nevada Banking Company purchased Tahoe Bank and opened a branch in Incline Village. It hired Bourdeau and Orr and became highly successful. Orr has been working there since January 1996 and is currently its Operations Officer.

Orr brought the present action against BOA on August 24, 1998. Her Complaint contains counts for intentional interference with existing contractual relations, intentional interference with prospective business relations, business disparagement, slander, intentional infliction of emotional distress, and violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), the Sherman Act, and the Employee Polygraph Protection Act. Orr alleges that the FDIC’s rejection of Tahoe Bank’s application injured her, costing her equity in Tahoe Bank and depriving her of valuable career opportunities.

BOA moved for summary judgment on Orr’s Complaint. The district court found that twenty-two of the twenty-five exhibits submitted by Orr were inadmissible as hearsay or for lack of proper authentication. As the three admissible exhibits failed to raise a triable issue of material fact, the district court granted summary judgment in favor of BOA. Orr appeals.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. See Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1257 (9th Cir.2001). We must determine, viewing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in its favor, whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. Compare Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), with Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir.1987).

CHOICE OF LAW

This is a diversity action. The Federal Rules of Evidence govern. See Trammel v. United States, 445 U.S. 40, 47 n. 8, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980); Wray v. Gregory, 61 F.3d 1414, 1417 (9th Cir.1995) (per curiam) (“the Federal Rules of Evidence ordinarily govern in diversity cases”). Nevada law, including its statute of limitations, governs Orr’s tort claims because the alleged torts occurred in the state of Nevada.4

DISCUSSION

I. Many of Orr’s Exhibits Are Inadmissible Because of Inadequate Authentication and Hearsay.

In opposing BOA’s motion for summary judgment, Orr submitted Exhibits A through Y, various documents attached as exhibits to the declaration of her counsel Kevin Mirch (“Mirch”). The district court admitted Exhibits A, U, and V. It excluded the remaining exhibits for inadequate authentication and hearsay. We confront the issue whether any of the excluded exhibits should have been admitted and whether such admission alters the outcome of the summary judgment motion.5 We conclude that with the exception of Exhibits A, U, and V, Orr’s exhibits are inadmissible due to inadequate authentication or hearsay. Because Exhibits A, U, and V do not present a triable issue of material fact, we affirm the district court’s grant of summary judgment.

A. Standard of Review of Evidentiary Rulings

The district court’s exclusion of evidence in a summary judgment motion is reviewed for an abuse of discretion. See Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). It follows that we must affirm the district court unless its evidentiary ruling was manifestly erroneous and prejudicial. See id. at 142, 118 S.Ct. 512; Maffei v. N. Ins. Co., 12 F.3d 892, 897 (9th Cir.1993).
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B. Authentication

A trial court can only consider admissible evidence in ruling on a motion for summary judgment. See Fed.R.Civ.P. 56(e); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir.1988). Authentication is a “condition precedent to admissibility,” and this condition is satisfied by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed.R.Evid. 901(a). We have repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment. See Cristobal v. Siegel, 26 F.3d 1488, 1494 (9th Cir.1994); Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550-51 (9th Cir.1989); Beyene, 854 F.2d at 1182; Canada v. Blain’s Helicopters, Inc., 831 F.2d 920, 925 (9th Cir.1987); Hamilton v. Keystone Tankship Corp., 539 F.2d 684, 686(9th Cir.1976).

In a summary judgment motion, documents authenticated through personal knowledge must be “attached to an affidavit that meets the requirements of [Fed.R.Civ.P.] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.” Canada, 831 F.2d at 925 (citation omitted). However, a proper foundation need not be established through personal knowledge but can rest on any manner permitted by Federal Rule of Evidence 901(b) or 902. See Fed.R.Evid. 901(b)(providing ten approaches to authentication); Fed.R.Evid. 902 (self-authenticating documents need no extrinsic foundation).

C. Most of Orr’s Exhibits Are Inadmissible Because of Improper Authentication.

(a) Deposition Extracts

(i) Exhibit Y: Deposition of Castle

Exhibit Y purports to be an extract from the deposition of Castle in which she states that BOA’s security officer Rick Parsons told her he knew the results of Orr’s polygraph test.

This exhibit is not properly authenticated. The reporter’s certification and the names of the deponent and the action are missing. The statement in Mirch’s affidavit that Exhibit Y is a “true and correct copy” does not provide authentication because Mirch lacks personal knowledge of Castle’s deposition. See Fed.R.Evid. 901(b)(1); Beyene, 854 F.2d at 1182. Nor can it be authenticated by reviewing its contents because Castle’s name is not mentioned once in the deposition extract. See Fed.R.Evid. 901(b)(4). It is thus inadmissible.

A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter’s certification that the deposition is a true record of the testimony of the deponent. See Fed.R.Evid. 901(b); Fed.R.Civ.P. 56(e) & 30(f)(1); Beyene, 854 F.2d at 1182; Pavone v. Citicorp Credit Servs., Inc., 60 F.Supp.2d 1040, 1045(S.D.Cal.1997) (excluding a deposition for failure to submit a signed certification from the reporter). Ordinarily, this would have to be accomplished by attaching the cover page of the deposition and the reporter’s certification to every deposition extract submitted. It is insufficient for a party to submit, without more, an affidavit from her counsel identifying the names of the deponent, the reporter, and the action and stating that the deposition is a “true and correct copy.” See Beyene, 854 F.2d at 1182. Such an affidavit lacks foundation even if the affiantcounsel were present at the deposition. See id.; Pavone, 60 F.Supp.2d at 1045.

(ii) Deficient References to Exhibit D in Orr’s Statement of Undisputed Facts

Orr’s Statement of Undisputed Facts fails to cite the page and line numbers when referring to the deposition contained...
in Exhibit D.\textsuperscript{12} This defect alone warrants exclusion of the evidence.\textsuperscript{13} See Huey v. UPS, Inc., 165 F.3d 1084, 1085 (7th Cir. 1999) (“[J]udges need not paw over the files without assistance from the parties.”); Nissho-Iwai Am. Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988) (parties must designate specific facts and their location in the record when relying on deposition testimony). The efficient management of judicial business mandates that parties submit evidence responsibly. We hold that when a party relies on deposition testimony in a summary judgment motion without citing to page and line numbers, the trial court may in its discretion exclude the evidence.\textsuperscript{14}

(iii) Exhibit S: Deposition of Orr

Exhibit S purports to be extracts from Orr’s deposition in which she states that Bourdeau saw negative documents about her at the FDIC in connection with BOA. It lacks a reporter’s certification and does not identify the names of the deponent and the action. It is therefore not authenticated. Ordinarily, it would have to be excluded.

However, a more complex problem arises when a district court admits into evidence, as it did here, a document that has been authenticated by a party but excludes the same document on the ground of inadequate authentication when submitted by another party.\textsuperscript{15} Orr submitted Exhibit S in support of her opposition to BOA’s motion for summary judgment. The district court found that the extracts of Orr’s deposition contained in Exhibit S were not authenticated. It excluded Exhibit S from evidence despite the fact that BOA had authenticated Orr’s deposition and relied upon it in the summary judgment motion. We must determine whether under these circumstances, the district court abused its discretion in excluding Exhibit S because of inadequate authentication.

The Third Circuit examined this issue in In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 285-86 (3d Cir. 1983), rev’d on other grounds by Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). It held that the trial court erred in finding that two diaries were authenticated as to some defendants but not others. See id. It explained:

The evidence which suffices to establish authenticity should be evidence that is relevant on the limited question of genuineness: that is, evidence admissible against the party having such a relationship to the proffered materials that it is likely to know the facts as to genuineness. Once a prima facie case of genuineness against that party is established, the court should regard the materials as sufficiently authenticated against all parties, subject, of course, to the right of any party to offer evidence to the ultimate fact-finder disputing authenticity. The other parties are adequately protected, with respect to trustworthiness, by the requirement that the court must still rule on admissibility.

We have previously held that a district court’s admission of unauthenticated evidence in a summary judgment motion is harmless error when the same item of evidence has been authenticated by an opposing party. See Cristobal, 26 F.3d at 1494; Hal Roach Studios, 896 F.2d at 1551. We now hold that when a document has been authenticated by a party, the requirement of authenticity is satisfied as to that document with regards to all parties, subject to the right of any party to present evidence to the ultimate fact-finder disputing its authenticity.\textsuperscript{16} See In re Japanese, 723 F.2d at 285. Thus, we recognize that an inquiry into authenticity concerns the genuineness of an item of evidence, not its admissibility. See 31 Wright & Gold, Federal Practice & Procedure: Evidence § 7104 at 30-31 (2000) (“Once evidence offered against one party is deemed authentic, its authenticity is established as against all other parties as well.”).
Exhibit S, which contains four pages of Orr’s deposition testimony, was not properly authenticated by Orr. However, because these pages were included in portions of Orr’s deposition authenticated by BOA, the district court manifestly erred in its decision to exclude Exhibit S for inadequate authentication.17

(iv) Exhibit B: Deposition of Bourdeau

Orr also failed to authenticate Exhibit B, which contains an extract from Bourdeau’s deposition in which he states that BOA submitted disparaging documents about Orr to the FDIC.18 However, because Bourdeau’s deposition was authenticated by BOA, the district court manifestly erred in excluding Exhibit B for inadequate authentication. See In Re Japanese, 723 F.2d at 285-86.

(b) Trial Transcripts

Exhibits H, J, P, W, and X purport to be transcripts of testimony from the Bourdeau trial. They do not identify the names of the witness, the trial, and the judge and are not certified copies of the reporter’s transcript. Accordingly, they are not authenticated. See Fed.R.Civ.P. 80(c)(requiring that testimony stenographically reported and offered into evidence at a later trial be “proved by the transcript thereof duly certified by the person who reported the testimony”); Beyene, 854 F.2d at 1182; Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 161 (7th Cir.1963) (“an uncertified copy of testimony is inadmissible in a summary judgment proceeding”).

Mirch cannot authenticate these exhibits by stating in his affidavit that they are “true and correct copies.” His statement lacks foundation even if he were present when the witnesses testified at the Bourdeau trial. See Beyene, 854 F.2d at 1182; Pavone, 60 F.Supp.2d at 1045.

(c) Documents Obtained in Discovery

(i) Exhibit C: Memo Discussing FBI Report on Orr

Exhibit C purports to be a memo, dated and written on Nevada Department of Financial Institutions (“NDFI”) letterhead, from Bob Geerhart (“Geerhart”) to Scott Walshaw (“Walshaw”), both agents of the NDFI. In this memo, Geerhart discusses an FBI report identifying Orr as a suspect in a deposit theft at BOA. The memo identifies both the author and recipient and contains a signature next to their names. However, it lacks foundation because Orr has failed to submit an affidavit from Geerhart stating that he wrote the memo.19 Mirch’s affidavit does not lay a foundation for Exhibit C. Mirch neither wrote the memo nor witnessed Geerhart do so, and he is not familiar with Geerhart’s signature. See Hal Roach Studios, 896 F.2d at 1550-51; Canada, 831 F.2d at 925.

Moreover, Exhibit C is not authenticated by having been produced in discovery in the Bourdeau action. Orr has not identified who produced it, and neither Geerhart nor the NDFI have admitted to producing the memo.20 Further, neither Geerhart nor the NDFI is a party in Orr’s action against BOA. Exhibit C is therefore inadmissible.21 It matters not whether Exhibit C is hearsay.

(ii) Exhibit M: Letter from the NDFI to Bourdeau

Exhibit M purports to be a letter from Walshaw to Bourdeau, permitting Tahoe Bank to “transact business preliminary to its organization.” It is not authenticated because Orr has failed to submit an affidavit or deposition testimony from Walshaw stating that he wrote the letter. Because Orr attempted to introduce Exhibit M by attaching it to Mirch’s affidavit, Federal Rule of Civil Procedure 56(e) requires that Mirch have personal knowledge of the letter. Had Orr submitted the letter by attaching it to an exhibit list (rather than to
Mirch’s affidavit), the alternative means to authentication permitted by Federal Rule of Evidence 901(b)\textsuperscript{22} and 902\textsuperscript{23} would have to be considered.\textsuperscript{24}

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Orr did not do so. The district court’s exclusion of Exhibit M was therefore proper.

(iii) Exhibit Q: Letter from FDIC to Bourdeau

Exhibit Q purports to be a letter from the Regional Director of the FDIC to Bourdeau denying Tahoe Bank’s application. It provides: “[Y]our departure from... Bank of America under unfavorable circumstances reflect[s] poorly on your stability for positions as a director or senior officer.”

The district court properly found that Exhibit Q was not authenticated because Orr introduced the letter by attaching it to Mirch’s affidavit. Mirch lacks personal knowledge of the letter.\textsuperscript{25} The district court’s exclusion of Exhibit Q was therefore proper.

D. Hearsay.

As discussed above, the district court’s finding that Exhibits B and S were not authenticated was erroneous. Our next inquiry is whether the exhibits are inadmissible hearsay. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed.R.Evid. 801(c). In the absence of a procedural rule or statute, hearsay is inadmissible unless it is defined as non-hearsay under Federal Rule of Evidence 801(d) or falls within a hearsay exception under Rules 803, 804 or 807. See Fed.R.Evid. 802; 30B Federal Practice & Procedure: Evidence § 7031 at 279.

We review the district court’s construction of the hearsay rule de novo and its decision to exclude evidence under the hearsay rule for an abuse of discretion. See United States v. Bao, 189 F.3d 860, 863-64 (9th Cir.1999). We find that Exhibits B and S are both inadmissible hearsay.

(a) Exhibit B

Exhibit B consists of an extract from Bourdeau’s deposition. In that extract, he states that when he visited the FDIC, an employee gave him an FBI report which stated that Orr had failed her polygraph and was a suspect in a deposit loss at BOA. Bourdeau also states that the same employee told him that BOA had submitted negative documents about Orr to the FDIC. Exhibit B was offered by Orr to establish that BOA had submitted these documents to the FDIC. It was offered to prove the truth of the matter asserted and is thus hearsay. See Fed.R.Evid. 801(c). There being no exceptions, Exhibit B is inadmissible.

(b) Exhibit S

Exhibit S is an excerpt from Orr’s deposition in which she states that Bourdeau told her that he saw disparaging documents about her at the FDIC. It was offered by Orr as circumstantial evidence to show that BOA submitted these documents to the FDIC. Although it was not offered to prove the truth of the matter asserted, it is nonetheless hearsay. Orr seeks to draw the inference from it that BOA submitted the documents to the FDIC. This inference depends on the truth of Bourdeau’s statement that he actually saw the documents. See Fed.R.Evid. 801(c); United States v. Cowley, 720 F.2d 1037, 1044-45 (9th Cir.1983) (holding that the postmark on a letter is hearsay when offered to prove that the letter was mailed from a particular location); United States v. Jefferson, 925 F.2d 1242, 1252-53 (10th Cir.1991) (“Whether evidence is offered as circumstantial evidence as opposed to direct evidence has nothing to do with whether it constitutes inadmissible hearsay”).\textsuperscript{26} In other
words, the inference that BOA submitted disparaging documents about Orr to the FDIC depends on whether Bourdeau actually saw the documents at the FDIC. Bourdeau’s statement to Orr is therefore hearsay. There being no applicable exceptions, it is inadmissible.27

II. Certain Tort Claims by Orr Are Barred by Nevada’s Statute of Limitations.

Orr contends the district court erred in finding that the statute of limitations governing her tort claims began to run in September 1995 when she was told by Bourdeau that BOA had submitted negative information about her to the FDIC.

Whether a claim is barred by the applicable statute of limitations is reviewed de novo. See Santa Maria v. Pac. Bell,

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202 F.3d 1170, 1175 (9th Cir.2000). When the statute of limitations begins to run is a question of law also reviewed de novo. See Harvey v. Waldron, 210 F.3d 1008, 1013 (9th Cir.2000); In re DeLaurentis Entm’t Group, Inc., 87 F.3d 1061, 1062 (9th Cir.1996).

A. Orr Discovered or Should Have Discovered the Necessary Facts Supporting Her Tort Claims by September 1995.

Under Nevada law, which governs Orr’s tort claims, the statute of limitations begins to run “when the wrong occurs and a party sustains injuries for which relief could be sought.” Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18 (1990). However, when a plaintiff has not discovered her injury or cause of injury at the time of its occurrence, the statute of limitations is tolled “until the injured party discovers or reasonably should have discovered facts supporting a cause of action.” Id.; see Siragusa v. Brown, 114 Nev. 1384, 1393, 971 P.2d 801 (1998); Sorenson v. Pavlikowski, 94 Nev. 440, 443-44, 581 P.2d 851 (1978).

Whether a plaintiff has discovered or should have discovered the cause of her injury is ordinarily a question of fact. See Siragusa, 114 Nev. at 1400, 971 P.2d 801. However, when “uncontroverted evidence proves that the plaintiff discovered or should have discovered the facts giving rise to the claim,” such a determination can be made as a matter of law. Id. at 1401, 971 P.2d 801.

Orr contends she did not discover the cause of her injury until 1997 when she came across documentary evidence (Exhibit C) in Bourdeau’s trial indicating that the FDIC had received an FBI report suspecting her of criminal conduct at BOA. Orr, however, testified in her deposition that by September 1995, Bourdeau told her that BOA had made negative comments about her to the FDIC and that she “didn’t have any reason to doubt that.”28 Despite her absence of doubt, she failed to investigate this matter. This is evident from her deposition testimony: “I wanted it to go away. I was just wanting to move on with my life.” Orr failed to exercise reasonable diligence in attempting to discover the cause of her injury. This bars her from asserting a “discovery rule” tolling defense to Nevada’s statute of limitations. See Siragusa, 114 Nev. at 1394, 971 P.2d 801. Thus, we conclude that Orr discovered or should have reasonably discovered the necessary facts supporting her tort claims by September 1995 and that the statute of limitations for these claims began to run at that time.

B. Nevada’s Limitations Period Bars Some of Orr’s Tort Claims.

Orr’s Complaint contains tort claims for (1) intentional interference with existing contractual relations, (2) intentional interference with prospective business relations, (3) business disparagement, (4) slander, and (5) intentional infliction of emotional distress. Under Nevada’s applicable statute of limitations, Orr had two years from September 1995 to file her third, fourth and fifth tort claims. See Nev.Rev.Stat. § 11.190(4)(c) (2001)
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(providing a two-year limitations period for “[a]n action for libel, slander, assault, battery, false imprisonment or seduction”);

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Nev.Rev.Stat. § 11.190(4)(e) (2001) (providing a two-year limitations period for “an action to recover damages for injuries to a person ... caused by the wrongful act or neglect of another”).29

Orr filed her Complaint against BOA on August 24, 1998. The two-year statute of limitations on her claims for business disparagement, slander and intentional infliction of emotional distress began to run in September 1995 and expired in September 1997. Accordingly, these tort claims are time-barred.

However, Orr’s claims for (1) intentional interference with existing contractual relations and (2) intentional interference with prospective business relations are subject to Nevada’s four-year limitations period and are thus not time-barred.30 See Nev.Rev.Stat. § 11.190(2)(c); Sorenson, 94 Nev. at 444, 581 P.2d 851. The district court’s contrary finding was erroneous.

III. Orr’s Tort Claims Are Unsupported by Evidence.

The error, however, was not prejudicial. Orr’s surviving tort claims fail for lack of evidence. These claims are based on BOA’s alleged submission of disparaging information about Orr to the FDIC. However, there is no admissible evidence to support this claim. Orr’s reliance on Bourdeau’s deposition testimony in Exhibit B is unavailing because it is inadmissible hearsay.

Moreover, the record supports BOA’s position. Orr admits in her deposition that she does not know with certainty whether BOA submitted disparaging documents about her to the FDIC. Castle and Underwood assert in their affidavits that they disclosed nothing about Orr to the FDIC. Further, the FBI agent who administered Orr’s polygraph test said he did not disclose its results to BOA or anyone outside the FBI.

Orr’s contention is further undermined by the Nevada Supreme Court’s holding in Bourdeau, which suggests that information disclosed by BOA employees to the FDIC in its investigation of Orr’s fitness to serve as an officer of Tahoe Bank would be subject to conditional privilege. BOA would not be liable unless it made the statements with actual malice, knowledge of their falsity, or reckless disregard for their truth. See Bourdeau, 115 Nev. at 266, 982 P.2d 474.

Orr has failed to establish that BOA made any statements about her to the FDIC. Nor can she establish that the alleged statements were made with actual malice, knowledge of their falsity, or reckless disregard for their truth. Orr’s tort claims thus fail for lack of evidence. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (the moving party’s burden to show the absence of a genuine issue of material fact can be met simply by showing an absence of evidence “sufficient to establish the existence of an element essential to[the nonmoving] Party’s case, and on which that party will bear the burden of proof at trial.”); Beyene, 854 F.2d at 1181-82.

IV. There Is No Triable Issue of Material Fact as To Orr’s Claims for Violation of RICO, the Sherman Act, and the Employee Polygraph Protection Act.

A. RICO: Mail & Wire Fraud

To maintain a viable private RICO action, Orr must establish that BOA engaged in “a pattern of racketeering activity.” 18 U.S.C. § 1962(a)-(c); Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393,
1398-99 (9th Cir.1986). “Racketeering activity” is defined by 18 U.S.C. § 1961(1)(B) as any act “indictable” under enumerated criminal statutes, including 18 U.S.C. § 1341, which criminalizes mail fraud, and 18 U.S.C. § 1343, which criminalizes wire fraud. See 18 U.S.C. § 1961(1)(B). The elements of mail and wire fraud consist of (1) a scheme or artifice devised with (2) the specific intent to defraud and (3) use of the United States mail or interstate telephone wires in furtherance thereof. See Franciscan Ceramics, Inc., 818 F.2d at 1469.

Orr contends BOA engaged in a scheme to defraud the organizers of Tahoe Bank by submitting negative information about her to the FDIC in an attempt to prevent the formation of Tahoe Bank. However, Orr has presented no admissible evidence to substantiate this claim. Indeed, Orr cannot establish that BOA was ever in possession of her polygraph test results or the corresponding FBI memo that allegedly suspected her of criminal conduct.

Nor can Orr establish that BOA submitted negative information about her to the FDIC. The only evidence supporting this accusation is contained in Exhibits B and S, which are inadmissible hearsay. In the absence of evidence of a scheme to defraud, Orr cannot establish a pattern of racketeering activity. Thus, Orr’s RICO claim fails. See Rothman v. Vedder Park Mgmt., 912 F.2d 315, 316 (9th Cir.1990); Franciscan Ceramics, Inc., 818 F.2d at 1469.

B. Sherman Act, 15 U.S.C. § 1

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1. To prevail under § 1 of the Sherman Act, Orr must establish that (1) BOA entered into a contract, combination, or conspiracy, (2) which unreasonably restrained trade, (3) affected interstate commerce, and (4) caused her injury.31 Compare Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 854 (9th Cir.1995), with Kaiser Cement Corp. v. Fischbach and Moore, Inc., 793 F.2d 1100, 1104(9th Cir.1986) (“[W]ithout a showing of injury, plaintiff cannot recover.”).

In her antitrust claim, Orr contends that BOA entered into an agreement with other banks in Incline Village to restrain competition by preventing the formation of Tahoe Bank, and that it accomplished this by submitting disparaging information about Orr to the FDIC. However, there is no evidence of an agreement among BOA and other banks in Incline Village to prevent the formation of Tahoe Bank. Indeed, Orr admits in her deposition that she is not aware of any such agreement. Moreover, Orr’s reliance on Bourdeau’s deposition testimony in this regard is unavailing because it is inadmissible hearsay. Nor can Orr establish a restraint of trade because the Nevada Banking Company purchased Tahoe Bank and opened a branch in Incline Village that became successful “beyond [Orr’s] wildest dreams.”

Orr has failed to present any admissible evidence in support of her antitrust claim. To defeat summary judgment, she “must respond with more than mere hearsay and legal conclusions.” Kaiser Cement Corp., 793 F.2d at 1104. She “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co., 475 U.S. at 586, 106 S.Ct. 1348 (antitrust case). The district court’s grant of summary judgment on this claim was therefore proper.32 See Sicor Ltd., 51 F.3d at 853.

C. Employee Polygraph Protection Act (“EPPA”)

The EPPA, 29 U.S.C. §§ 2001-09, restricts employers from using, taking adverse employment action on the basis of, or disclosing information obtained from an employee’s polygraph test. See 29 U.S.C. §§ 2002, 2008; Saari v. Smith Barney, Harris Upham & Co., Inc., 968 F.2d 877, 880(9th Cir.1992); Veazey v. Communications & Cable, 194 F.3d 850, 858 (7th Cir.1999). Section 2008 of the EPPA prohibits an employer from disclosing
information about an employee’s polygraph test to anyone other than the following: (1) the employee or a person designated in writing by him, (2) the employer that requested the test, (3) “any court[or] governmental agency ... pursuant to an order from a court of competent jurisdiction,” and (4) “a governmental agency, but only insofar as the disclosed information is an admission of criminal conduct.” 29 U.S.C. § 2008.33

Orr contends BOA disclosed her polygraph test results to the FDIC in violation of the EPPA. In support of her position, she relies on Exhibits B, X, and Y. However, none of these exhibits are admissible. Exhibit B is inadmissible hearsay. Exhibits X and Y are not authenticated. Orr’s EPPA claim thus fails for lack of evidence establishing that BOA disclosed the results of her polygraph test.

V. The District Court Did Not Abuse Its Discretion in Denying Orr’s Request for a Continuance.

Orr contends the district court abused its discretion in denying her request to continue the June 6, 2000 summary judgment hearing because her counsel was in trial at the time and the FDIC had not produced certain subpoenaed documents.

We review the district court’s denial of Orr’s request for a continuance for an abuse of discretion. See Weinberg v. Whatcom County, 241 F.3d 746, 750-51 (9th Cir.2001); United States v. Shirley, 884 F.2d 1130, 1134 (9th Cir.1989). There was no such abuse.

The district court had continued pretrial dates on two prior occasions. The final pretrial order set discovery cut-off for April 18, 2000 and the last day for hearing dispositive motions for June 6, 2000. It stated: “No further continuances will be permitted.” Given the discovery cut-off of April 18, 2000, Orr’s request for a continuance to obtain additional discovery from the FDIC was groundless. Orr should have filed a motion to compel production of documents prior to the discovery cut-off.

Orr’s request for a continuance due to scheduling conflicts was likewise devoid of merit because two previous continuances to pretrial dates had been granted. Moreover, Orr had notice from December 7, 1999 that the final day for filing dispositive motions was June 6, 2000 and that no further continuances would be granted. That Orr’s counsel was in the midst of another trial on the day of the summary judgment hearing does not as a matter of right entitle her to a continuance. Orr lacked diligence as she waited for two weeks after being served with the summary judgment papers before seeking a continuance. Despite this, the district court gave Orr five days to cure the evidentiary defects in her opposition papers following the hearing. She failed to do so. Under these circumstances, we cannot say that the district court abused its discretion in denying Orr’s request for a continuance. See Canada, 831 F.2d at 925-26.

VI. BOA’s Motion for Sanctions for Filing a Frivolous Appeal.

BOA moves for sanctions against Orr for filing a frivolous appeal pursuant to Federal Rule of Appellate Procedure 38. We deny BOA’s motion because some of Orr’s evidentiary arguments are meritorious, and the result of the appeal is not obvious.34 See Goss Golden W. Sheet Metal, Inc. v. Sheet Metal Workers Int’l. Union, 933 F.2d 759, 765(9th Cir.1991); Gayle Mfg. Co., Inc. v. Fed. Sav. & Loan Ins. Corp., 910 F.2d 574, 584 (9th Cir.1990).

CONCLUSION

Orr’s exhibits are mostly inadmissible due to lack of authentication or hearsay. As a consequence, she cannot raise a triable issue of material fact as to any of the counts in her Complaint. Further, even if meritorious, some of her tort claims are barred by Nevada’s statute of limitations. We thus affirm the district court’s grant of summary judgment.
AFFIRMED.

Notes:

1. There is no admissible evidence indicating whether Orr passed or failed her polygraph.

2. Therein, Geerhart states:

I read the FBI report and it did reflect a “high degree of suspicion” [on the part of Orr], however, she was never charged, nor were her accounts ever investigated by the FBI, because they did not have enough evidence to proceed. It is the FDIC’s position that they cannot use the FBI report because it was given in confidence, with no legal action taken against Robin Orr, however, it does present a problem of security to the new bank. Chris Collella [of the FDIC] informed me that he intends only to advise examiners to be watchful of her activities, if FDIC issue insurance, and the bank is opened with her as Operations Officer.

3. The Court held that statements made by BOA employees to the FDIC in its investigation of Bourdeau’s fitness to serve as an officer of Tahoe Bank were subject to conditional privilege. The privilege could be overcome by showing that the statements were made with malice, knowledge of their falsity, or reckless disregard for their truth. See Bank of Am. Nev. v. Bourdeau, 115 Nev. 263, 266, 982 P.2d 474 (1999) (per curiam).

4. Because this is a diversity action filed in the Northern District of California, California’s choice of law rules govern. See Cleary v. News Corp., 30 F.3d 1255, 1265 (9th Cir.1994) (“A district court in diversity jurisdiction must apply the law of the forum state to determine the choice of law.”). Applying California’s governmental interest test, we conclude that Nevada law, including its statute of limitations, is applicable to Orr’s tort claims. See Am. Bank of Commerce v. Corondoni, 169 Cal.App.3d 368, 372, 215 Cal.Rptr. 331 (1985). The alleged torts occurred in Nevada; Orr is a resident of Nevada; and BOA’s branch is located in Nevada. Under the circumstances of this case, we believe that California has little interest in having its law applied here.

5. Orr did not object to and has thus waived any challenge to the district court’s evidentiary rulings with respect to the evidence submitted by BOA. See In re Pac. Enters. Sec. Litig., 47 F.3d 373, 379 n. 6 (9th Cir.1995); Townsend v. Columbia Operations, 667 F.2d 844, 849 (9th Cir.1982).

6. Once the trial judge determines that there is prima facie evidence of genuineness, the evidence is admitted, and the trier of fact makes its own determination of the evidence’s authenticity and weight. See Alexander Dawson, Inc. v. NLRB, 586 F.2d 1300, 1302 (9th Cir. 1978) (per curiam).

7. Authentication is a special aspect of relevancy concerned with establishing the genuineness of evidence. See Fed.R.Evid. 901(a) advisory committee’s note.

8. “A document can be authenticated [under Rule 901(b)(1)] by a witness who wrote it, signed it, used it, or saw others do so.” 31 Wright & Gold, Federal Practice & Procedure: Evidence § 7106, 43 (2000).

9. Federal Rule of Civil Procedure 56(e) requires that affidavits be made on personal knowledge, that the affiant be competent to testify to the matters stated therein, and that sworn or certified copies of all papers referred to in an affidavit be attached thereto. See Fed.R.Civ.P. 56(e).

10. The deposition extracts in Exhibits K, R, and T suffer from similar defects. They are unauthenticated and thus inadmissible.

12. Exhibit D purports to be Bourdeau’s “affidavit.” However, it contains fifteen pages of deposition testimony. It is not properly authenticated.

13. For this reason, BOA’s authentication of Bourdeau’s deposition does not render Exhibit D admissible.

14. The same holds true for references to an affidavit without citing to paragraph numbers.

15. This presents a conflict between the authentication requirement of Federal Rule of Evidence 901 and the “rule of completeness” of Federal Rule of Evidence 106, whose purpose is to avoid the “misleading impression created by taking matters out of context.” See Fed.R.Evid. 106 advisory committee’s note.

16. However, when unauthenticated extracts of a document are submitted that do not readily indicate that they are parts of the same document authenticated by another party, the trial court is not required to deem them authentic. This qualification takes into account situations in which different pages of a document (such as a multi-volume deposition) are submitted by opposing parties, and only one party authenticates the pages it submits. In such instances, the trial court may not be able to determine if the unauthenticated extracts are part of the same document as the authenticated extracts. It can then exclude the unauthenticated extracts.

17. BOA, in fact, relied on the same pages of Orr’s deposition in the summary judgment motion.

18. It contains no cover page to identify the names of the deponent and the action. The reporter’s certification is also missing.

19. Likewise, Exhibits L, N, and O, purporting to be letters sent to Walshaw from Larry Hickman, a CPA who reviewed Tahoe Bank’s application, are not authenticated because Orr has failed to submit an affidavit from Hickman stating that he wrote the letters. They are thus inadmissible.

20. See Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 889 n. 12 (9th Cir.1996) (documents produced by a party in discovery were deemed authentic when offered by the party-opponent); Snyder v. Whittaker Corp., 839 F.2d 1085, 1089 (5th Cir.1988) (same); 31 Federal Practice & Procedure: Evidence § 7105, at 39 (“Authentication can also be accomplished through judicial admissions such as ... production of items in response to ... [a] discovery request.”).

21. Exhibits F, G, and I suffer from a similar defect. They cannot be authenticated by way of production in discovery because Mirch has not identified who produced them, and BOA has not admitted to having produced them.

22. Federal Rule of Evidence 901(b) provides: “By way of illustration only, and not by way of limitation, the following are examples of authentication ... conforming with the requirements of this rule.” Fed.R.Evid. 901(b). This rule provides ten non-exclusive methods of authentication, one of which is personal knowledge.


24. Federal Rule of Civil Procedure 56(e) does not require that all documents be authenticated through personal knowledge when submitted in a summary judgment motion. Such a requirement is limited to situations where exhibits are introduced by being attached to an affidavit. Compare Fed.R.Civ.P. 56(e) (bearing the heading “Form of Affidavits”), with Fed.R.Evid. 901(b) (providing ten methods to authenticate evidence). For instance, documents attached to an exhibit list in a summary judgment motion could be authenticated by review of their contents if they appear to be sufficiently genuine. See Fed.R.Evid. 901(b)(4) (authenticity may be satisfied by the “[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.”); United States v. Whitworth, 856 F.2d 1268, 1283 (9th Cir.1988) (authenticating letters by the linkage between the dates of postmarks and defendant’s location on the days letters mailed); United States
v. One 56-Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1284-85 (9th Cir.1983) (authenticating a diary under Rule 901(b)(4) by reviewing its contents); Alexander Dawson, Inc., 586 F.2d at 1302 (“[t]he content of a document, when considered with the circumstances surrounding its discovery, is an adequate basis for [its authentication]”).

25. Moreover, Exhibit Q does not present a triable issue. It only suggests that Tahoe Bank’s application was denied by the FDIC because of concerns with Bourdeau. At best, it is circumstantial evidence that BOA submitted negative information about Bourdeau to the FDIC. Orr’s contention that a trier of fact could infer from this that BOA submitted disparaging documents to the FDIC about her is unpersuasive.

26. See also Edward J. Imwinkelried, Evidentiary Foundations 312 (4th ed. 1998). Professor Imwinkelried explains:

[A] statement is deemed hearsay only when the immediate inference the proponent wants to draw is the truth of the assertion on the statement’s face.... When the proponent offers the statement for a nonhearsay purpose, we are primarily interested simply in the fact that the statement was made. The fact of the statement is relevant; the truth of the facts in the statement is irrelevant.

Id.

27. In ruling on the admissibility of Exhibits B and S, the district court held that deposition testimony, regardless of its contents, is hearsay when submitted in a summary judgment motion. Its holding was erroneous. Deposition testimony, irrespective of its contents, is ordinarily hearsay when submitted at trial or a motion hearing involving live witness testimony but not in a summary judgment motion. See Fed.R.Civ.P. 56(c) & (e) (allowing the use of deposition testimony in a summary judgment motion); Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 962 (10th Cir.1993) (holding that deposition testimony is normally inadmissible hearsay when submitted at trial); 8A Wright, Miller & Marcus, Federal Practice & Procedure: Civil § 2142, 164 (2d ed. 1994) (“A deposition is at least as good as an affidavit and should be usable whenever an affidavit would be permissible, even though the conditions of [Fed.R.Civ.P. 32(a)] on use of a deposition at trial are not satisfied.”) However, the district court’s error was not prejudicial because the contents of both depositions contained in Exhibits B and S are inadmissible hearsay.

28. Orr states in her affidavit that she did not discover the cause of her injury until 1997. We find her affidavit to be a sham submitted in an attempt to create a triable issue. Because Orr’s deposition testimony contradicts her affidavit, Orr has not raised a triable issue of fact on the statute of limitations issue. See Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir.1991).

29. Orr’s claim for intentional infliction of emotional distress comes under the two-year limitations period of Nevada Revised Statutes § 11.190(4)(e) as it involves “injur[y]” to her “person” by the “wrongful act” of another. See Perez v. Seevers, 869 F.2d 425, 426 (9th Cir.1989) (Nevada’s residual statute of limitations applies to all personal injuries whether caused by negligent or intentional conduct).

30. Nevada’s statute does not provide a specific limitations period for intentional interference with existing and prospective business relations. However, given that these counts “sound[ ] in tort for interference with intangible property interests,” the four-year limitations period of Nevada Revised Statutes § 11.190(2)(c) is applicable. See Sorenson, 94 Nev. at 444, 581 P.2d 851.

31. Unreasonable restraint of trade in violation of § 1 of the Sherman Act can be established “under either a per se rule of illegality or a rule of reason analysis.” Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir.1991). To maintain a claim under a rule of reason analysis, Orr must show (1) an agreement or conspiracy among BOA and one or more persons or banks (2) by which they intend to harm or restrain competition; and (3) “which actually injures competition.” See Oltz v. St. Peter’s Cmty. Hosp., 861 F.2d 1440, 1445 (9th Cir.1988).
32. Orr did not argue in her Opening Brief that BOA violated § 2 of the Sherman Act. She has thus waived her right to appeal this issue. See In re Pac. Enters. Sec. Litig., 47 F.3d at 378-79 n. 6.

33. For an examination of the meaning of the term “disclosure” under the EPPA, see Long v. Mango’s Tropical Cafe, Inc., 972 F.Supp. 655, 658-59 (S.D.Fla.1997).

34. Federal Rule of Appellate Procedure 38 provides: “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” Fed.R.App.P. 38. An appeal is frivolous “if the result is obvious or the appellant’s arguments are wholly without merit.” Adriana Int’l Corp. v. Thoeren, 913 F.2d 1406, 1417 (9th Cir.1990). The decision whether to impose Rule 38 sanctions lies within the discretion of the court of appeals. See Urban v. C.I.R., 964 F.2d 888, 890 (9th Cir.1992).
Chapter 6

Trial Motions

TRAVIS EIVA
Zemper Eiva Law
Eugene, Oregon

ANGELA FRANCO LUCERO
Kranovich & Lucero LLC
Lake Oswego, Oregon

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Chapter 6—Trial Motions

I. PRE-TRIAL MOTIONS:

• **Motion to Limit Evidence (Motions in Limine):**
  Pre-trial motion to limit evidence, commonly called a ‘motion in limine,’ provide a legal procedure to flush out problems to be encountered during the trial, before a jury is contaminated with the evidence.” *State v. Foster*, 296 Or 174, 182, 674 P2d 587 (1983), *rev’d on other grounds*, 303 Or 518 (1987) (footnote omitted).

• **Jury/Voir Dire Motions:**
  - **Challenges for Cause:** A lawyer may make an unlimited number of challenges for cause on the grounds list in ORCP 57 D(1).
  - **Juror/Panel Rehabilitation:** A lawyer who objects to the court’s granting a challenge for cause should attempt to rehabilitate the juror to establish on the record ground for which an appellate court could determine that the trial court abused its discretion. *State v. Nefstad*, 309 Or 523, 532, 789 P2d 1326 (1990).

II. 104 HEARINGS/ EXPERT FOUNDATION:

“Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court.” OEC 104(1) (ORS 40.030(1)). On motion, the court holds a hearing and allows the parties to present evidence on the question at issue. *State v. Carlson*, 311 Or 201, 208, 808 P2d 1002 (1991).

Typical OEC 104 motions include motions to determine the validity of proffered scientific evidence and motions to determine the qualification of a person to provide expert testimony. *See, e.g., Jennings v. Baxter Healthcare Corp.*, 331 Or 285, 289 n 4, 14 P3d 596 (2000).

III. POCKET MOTIONS:

When to anticipate, research and prepare “pocket motions” for anticipated evidentiary issues that may arise during trial. You need to be prepared with at least one citation that supports your position.

IV. MOTIONS FOR DIRECTED VERDICT AND PEREMPTORY INSTRUCTIONS:

• **Motions for Directed Verdict:**
  A motion for a directed verdict brings before the court an issue of law: whether the evidence is sufficient to prove a claim or defense. If the court determines that the evidence is insufficient to sustain a claim or defense, there is no question for the jury, and the moving party is entitled to judgment on the claim or defense as a matter of law. *See, e.g., McDonald v. United States Nat’l Bank*, 113 Or App 113, 830 P2d 618 (1992).
**ORCP 60:** “A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdict. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict.”

- **Peremptory Instructions:**
  A specific instruction charging a jury that if they agree to the stated facts and evidence used to substantiate the facts, then the jury should find in favor of a particular party.

**V. JURY INSTRUCTIONS/VERDICT FORM:**

- **Jury Instructions:**
  Jury instructions are the special province of the judge, who is the sole authority concerning matters of law during the course of trial, just as jurors are the exclusive judges of the factual issues in the case.

  Pleadings and the evidence at trial frame the right of a party to request jury instructions. A litigant is entitled to, and the trial court has the duty to, instruct the jury on all legal theories of the case as long as the instructions: correctly state the law; are based on the current pleadings; and are supported by evidence.

- **Requesting Jury Instructions:**
  UTCR 6.060: All requested instructions must be (1) submitted in writing and (2) delivered to the court and to opposing parties.

  See ORCP 59 A
Chapter 7A
Post-Trial Motion Practice

JAY BEATTIE
Lindsay Hart LLP
Portland, Oregon

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POLLING THE JURY

1. The Rule: ORCP 59 G provides:

   **G(1) Declaration of verdict.** When the jurors have agreed upon their verdict, they shall be conducted into court by the officer having them in charge. The court shall inquire whether they have agreed upon their verdict. If the foreperson answers in the affirmative, it shall be read.

   **G(2) Number of jurors concurring.** In civil cases three-fourths of the jury may render a verdict.

   **G(3) Polling the jury.** When the verdict is given and before it is filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether the verdict is the juror’s verdict. If fewer jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations.

   **G(4) Informal or insufficient verdict.** If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.

   **G(5) Completion of verdict; form and entry.** When a verdict is given and is such as the court may receive, the clerk shall file the verdict. Then the jury shall be discharged from the case.

2. Procedural Considerations

   a. The “Same Nine” Rule

      As a general rule, the same nine jurors must agree on all issues determined by the verdict, and if the lesser number agrees, the court may not receive the verdict and must send the jury back for further deliberation. *Schultz v. Monterey*, 232 Or 421, 375 P2d 829 (1962). In *Davis v. Dumont*, 52 Or App 73, 627 P2d 907 (1981) *rev den* 291 Or 309 (1981), the Court of Appeals held that where the questions presented in a special verdict form are not dependent on each other and involved two separate and independent defendants, the same nine jurors need not agree on each question. See also *Eulrich v. Snap-On Tools Corp.*, 121 Or App 25, 853 P2d 1350, *rev den* 317 Or 583 (1993) vacated on other grounds 512 U.S. 1231 (1994) (the same nine rule applies to each claim but does not require agreement by the same nine jurors on separate and independent claims). See also *Kennedy v. Wheeler*, 356 Or. 518, 541, 341 P.3d 728, 741 (2014) (The same nine out of twelve jurors do not have to agree on the specific amounts of economic and noneconomic damages awarded.)

   b. Polling the Jury

      Upon receipt of the verdict, the jury may be polled. If an insufficient number of jurors agree to the verdict, the court shall send the jury out for further deliberations. ORCP 59 G(3).
The court is required to poll the jury upon a request of a party and in a manner that will ensure that the same nine jurors agreed on all issues necessary to the verdict. Refusing to poll the jury in this manner is grounds for reversal and a new trial. *Sandford v. Chevrolet Division of General Motors*, 292 Or 590, 642 P2d 624 (1982).

c. Inconsistency or Informality

An insufficient or informal verdict may be corrected by the jury on advice of the court, or the jury may be required to deliberate further. ORCP 59 G(4).

A party who fails to take advantage of the provisions of ORCP 59 G(4), and fails to make an objection to the verdict at the time it is received, waives any objections as to the informality or insufficiency of the verdict. *Building Structures, Inc. v. Young*, 131 Or App 88, 94, 883 P2d 1308 (1994) aff’d 328 Or 100, 968 P2d 1287 (1998) (an objection to a legally defective verdict is deemed waived if it is not made before the jury is dismissed); *Howmar Materials, Inc.*, supra. Such an error cannot be reclaimed or reviewed by a motion for a new trial. *Id.; compare State ex rel. Sam’s Texaco & Towing, Inc. V. Gallagher*, 314 Or 652, 842 P2d 383 (1992) (court erred in ordering jury to deliberate further where it had determined issue of liability but could not reach agreement on other questions in special verdict). See also *Croghan v. Don's Dugout, LLC*, 262 Or App 130, 131, 325 P.3d 38 (2014) (Jury returned a verdict in which it found for plaintiff on the discrimination/retaliation and battery claims but found for defendants on the wrongful discharge claim. Defendants waived challenge that verdict was “inconsistent” because they failed to employ the procedure set forth in ORCP 59 G(4)).

**PRACTICE TIPS:**

It is sometimes difficult to determine whether a verdict is “inconsistent or informal.” Examples of “inconsistent or informal” verdicts include:

1. An award of economic damages only, although this rule is subject to exceptions. *Wheeler v. Huston*, 288 Or 467, 605 P2d 1339 (1980) (“[T]he jury may conclude that the plaintiff suffered no general damages . . . . Such verdicts are valid and include cases in which (a) the plaintiff's evidence of injury is subjective, (b) there is evidence that the plaintiff's injuries for which general damages are claimed were not caused by the accident, and (c) the objective evidence of a substantial injury sustained by plaintiff is controverted by other competent evidence, or could be disbelieved by the trier of fact.”) *Kriner v. Weaver*, 276 Or 741, 744-45, 556 P2d 652 (1976); *Estate of Ibarra v. Lilly*, 2011 Or App LEXIS 1210 (2011).


3. An award of punitive damages only. *Building Structures, Inc. v. Young*, supra, 328 Or at 100.
d. Multiple Damage Awards as Inconsistent Verdict

Where the jury returns separate verdicts on two independent claims seeking the same damages, the plaintiff ordinarily is entitled to judgment on only one claim. *Hampton Tree Farms, Inc. v. Jewett*, 158 Or App 376, 974 P2d 738 rev den 329 Or 61 (1999). Where there is any question as to whether damages for the two claims are the same, or whether the jury intended separate awards for each, the defendant should ask for an appropriate instruction and should request clarification from the jury if appropriate. *See Howmar Materials, Inc. v. Peterson*, 174 Or App 55, 23 P3d 409 (2001) (where two claims are not necessarily duplicative as a matter of law, and there is any question as to whether the two damage awards should be added together or treated as duplicative, defendant’s remedy was to ask for clarification from the jury); *see also Schmitz v. U.S. Bakery*, 41 Or App 749, 599 P2d 471(1979) (court may not inquire as to understanding of jury where verdict is proper on its face).

**OBJECTION TO THE FORM OF JUDGMENT**

UTCR 5.100(1)(a) requires service of a proposed judgment on opposing counsel not less than three days before submission to the court subject to certain exceptions. If there are errors in the proposed form of judgment, those errors should be brought to the attention of the court prior to the entry of judgment. *See McDougal v. Griffith*, 156 Or App 83, 87-88, 964 P2d 1135 (1998), rev den, 328 Or 330 (1999) (where trial court's letter opinion, which appellant received a month before entry of judgment, indicated that court intended to award damages in excess of the prayer, in violation of ORCP 67 C(2), and appellant raised no objection before entry of judgment, error was not preserved.)

Make sure that the judgment is correctly captioned as a “general judgment” or a “limited” judgment. The designation affects more than the appealability of the judgment. By designating a judgment as “general,” any claim that is not expressly adjudicated by the judgment is deemed dismissed with prejudice. ORS 18.082(3). A “limited” judgment mistakenly designated as a “general” judgment may be corrected under ORS 18.112:

ORS 18.112 Correction of designation of judgment as general judgment.

(1) Upon motion of any party, the court may enter a corrected judgment under ORS 18.107 that changes the designation of a judgment from a general judgment to a limited judgment if the moving party establishes that:

(a) Except by operation of ORS 18.082 (3), the judgment does not decide all requests for relief in the action other than requests for relief previously decided by a limited judgment or requests for relief that could be decided by a supplemental judgment; and

(b) The judgment was inadvertently designated as a general judgment under circumstances that indicate that the moving party did not reasonably understand that the requests for relief that were not expressly decided by the judgment would be dismissed.
(2) A motion under subsection (1) of this section must be filed within the time provided by ORCP 71 B.

(3) Upon motion of any party, the court shall enter a corrected judgment under ORS 18.107 that changes to a limited judgment any document that has the effect of a general judgment under the provisions of ORS 18.082 (6) unless all requests for relief in the action are decided by the terms of the document, by previous limited judgments entered in the action or by written decisions of the court that are incorporated in a general judgment under the provisions of ORS 18.082 (2).

(4) Notwithstanding ORS 18.107, the time for appeal of the judgment corrected under this section commences from the entry of the corrected judgment. A motion may be filed under this section while an appeal is pending as provided in ORCP 71 B(2).

(5) This section does not apply to justice courts, municipal courts or county courts performing judicial functions.

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Rule 62. Findings of Fact

   A. Necessity. Whenever any party appearing in a civil action tried by the court so demands prior to the commencement of the trial, the court shall make special findings of fact, and shall state separately its conclusions of law thereon. In the absence of such a demand for special findings, the court may make either general or special findings. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact or conclusions of law appear therein.

   B. Proposed Findings; Objections. Within 10 days after the court has made its decision, any special findings requested by any party, or proposed by the court, shall be served upon all parties who have appeared in the case and shall be filed with the clerk; and any party may, within 10 days after such service, object to such proposed findings or any part thereof, and request other, different, or additional special findings, whether or not such party has previously requested special findings. Any such objections or requests for other, different, or additional special findings shall be heard and determined by the court within 30 days after the date of the filing thereof; and, if not so heard and determined, any such objections and requests for such other, different, or additional special findings shall conclusively be deemed denied.

   C. Entry of Judgment. Upon (1) the determination of any objections to proposed special findings and of any requests for other,
different, or additional special findings, or (2) the expiration of the
time for filing such objections and requests if none is filed, or (3) the
expiration of the time at which such objections or requests are
deemed denied, the court shall enter the appropriate order or
judgment. Any such judgment or order filed prior to the expiration of
the periods above set forth shall be deemed not entered until the
expiration of said periods.

D. Extending or Lessening Time. Prior to the expiration of the
times provided in sections B. and C. of this rule, the time for serving
and filing special findings, or for objecting to and requesting other,
different, or additional special findings, may be extended or lessened
by the trial court upon the stipulation of the parties or for good cause
shown; but in no event shall the time be extended more than 30 days.

E. Necessity. Requests for findings of fact or objections to
findings are not necessary for purposes of appellate review.

F. Effect of Findings of Fact. In an action tried without a jury,
except as provided in ORS 19.415(3), the findings of the court upon
the facts shall have the same force and effect, and be equally
conclusive, as the verdict of a jury.

It is common for trial judges to issue a “letter opinion” even if the parties do not request
findings of fact and conclusions of law. Samuels v. Key Title Co., 63 Or App 627, 665 P2d 362 cert.
denied 295 Or 773 (1983). (A letter from the court to counsel can constitute findings if the court
indicates that was its intention). The failure to alert the trial court to a purported error in a letter
opinion may precludes appellate review of that error. See, e.g., McDougal v. Griffith. 156 Or App at
86-87. But Cf. ORCP 62 E; Peiffer v. Hoyt, 339 Or 649, 656, 125 P3d 734 (2005) (a party may
challenge sufficiency of evidence to support judgment in bench trial even where the party failed
to object to findings of fact). However, the courts have never imposed such a requirement where the
appealing party had previously raised the error at trial. State v. Wilson, 240 Or App 475, 486 , 248
P3d 10 (2011) (where criminal defendant identified asserted error in closing argument, there was no
need to object to subsequent letter opinion to preserve error).

Findings of fact are accorded the same deference and weight on appeal as a jury’s findings
and will be upheld in a legal action so long as they are supported by any evidence. McCormick v.
City of Portland, 191 Or App 383, 398, 92 P3d 1043 rev den 337 Or 616 (2004). Considering the
weight given to findings of fact, it makes strategic sense to request or contest special findings and
conclusions.

**OBJECTION TO ATTORNEY FEE PETITIONS**

Objections must be filed within 14 days after submission of a fee petition. If objections are
filed, the trial court must hold a hearing unless the hearing is waived. ORCP 68 C(4)(b). See, e.g.,
to hold a hearing to consider plaintiffs' objections to the court's award of attorney fees, as required by ORCP 68 C, the plaintiffs invited any error by asking the court to contact them 'should a hearing be necessary,' thereby indicating that the court could act on their objections without conducting a hearing. The court must make findings of fact and conclusions of law if requested by a party. ORCP 68 C(4)(c), and even if no request is made, the court must state the facts and legal criteria relevant to its decision when awarding fees under a statute. *McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 96, 957 P2d (1200) clarified 327 Or 185 (1998). *See also Ornduff v. Hobbs*, 273 Or App. 169, 171, 359 P.3d 33 (2015) (ORCP 15 D does not apply to statements for attorney fees.).

**MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)**

1. **The Rule: ORCP 63**

   **A. Grounds.** When a motion for a directed verdict, made at the close of all the evidence, which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

   **B. Reserve ruling on directed verdict motion.** In any case where, in the opinion of the court, a motion for a directed verdict ought to be granted, it may nevertheless, at the request of the adverse party, submit the case to the jury with leave to the moving party to move for judgment in such party’s favor if the verdict is otherwise than as would have been directed or if the jury cannot agree on a verdict.

   **C. Alternative motion for new trial.** A motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the verdict, and unless so joined shall, in the event that a motion for judgment notwithstanding the verdict is filed, be deemed waived. When both motions are filed, the motion for judgment notwithstanding the verdict shall have precedence over the motion for a new trial, and if granted the court shall, nevertheless, rule on the motion for a new trial and assign such reasons therefore as would apply had the motion for judgment notwithstanding the verdict been denied, and shall make and file an order in accordance with said ruling.

   **D. Time for motion and ruling.** A motion for judgment notwithstanding the verdict shall be filed not later than 10 days after the entry of the judgment sought to be set aside, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days of the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.
E. Duties of the clerk. The clerk shall, on the date an order made pursuant to this rule is entered or on the date a motion is deemed denied pursuant to section D of this rule, whichever is earlier, mail a notice of the date of entry of the order or denial of the motion to the attorney of record, if any, of each party who is not in default for failure to appear. If a party who is not in default for failure to appear does not have an attorney of record, such notice shall be mailed to the party. The clerk also shall make a note in the register of the mailing.

F. Motion for new trial after judgment notwithstanding the verdict. The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 64 not later than 10 days after filing of the judgment notwithstanding the verdict.

2. Procedural Considerations

a. Timing of the Motion

The 10-day period for filing a motion for JNOV is “jurisdictional.” A motion for JNOV (or a motion for extension in which to file a motion for JNOV) must be filed within ten days after the entry of judgment. Leaving the motion with a judge or judicial assistant does not constitute filing. See Averill v. Red Lion, 118 Or App 298, 846 P2d 1203 modified 120 Or App 232, 850 P2d 1173 rev'd 317 Or 271 (1993). Cf. ORCP 15.

b. Purpose of Motion

A motion for JNOV is made to challenge the evidence in support of a claim or defense. A court may grant JNOV based on the insufficiency of the evidence where there is no admissible evidence to support a claim or defense. Or Const. Art. VII (amended) § 3; Holien v. Sears Roebuck & Co., 66 Or App 911, 677 P2d 704 aff'd 298 Or 78, 689 P2d 1292 (1984). The court may grant JNOV establishing a claim or defense where no “reasonable juror” could not conclude that a claim or defense had not been proved. Cook v. Southern Pac. Transp. Co., 50 Or App 547, 623 P2d 1125 (1981).

In determining whether there is any evidence in the record to support a claim or defense, the court must draw all reasonable inferences in favor of the party for whom the jury returned a verdict. Parrott v. Carr Chevrolet, Inc., 331 Or 537, 17 P3d 473 (2001).

c. Relationship to Motion for Directed Verdict

ORCP 63 A provides that a JNOV is proper only “when a motion for a directed verdict, made at the close of all the evidence, which should have been granted has been refused and a verdict is rendered against the applicant.” (Emphasis added). A motion made at the end of plaintiff's case but not renewed at the close of all of the evidence does not preserve a motion for JNOV. Building Structures, Inc. v. Young, 328 Or 100, 968 P2d 1287 (1998). Note that the defendant’s failure to move for directed verdict at the close of all evidence does not preclude a later appeal based on the insufficiency of evidence so long as defendant moved for directed verdict at the close of plaintiff’s
A motion for JNOV based on lack of subject matter jurisdiction may be brought after the entry of judgment and without a prior motion for directed verdict. *Gaussoin v. Port of Portland*, 144 Or App 247, 927 P2d 601 (1996).

d. **Preservation of Error**


e. **Relationship to Motion for New Trial**

The state standard for granting a new trial based on the insufficiency of the evidence is identical to the standard for granting JNOV. *Hall v. Corning*, 247 Or 33, 427 P2d 105 (1967). That is, a court may not grant a new trial where there is any admissible evidence in the record to support the verdict. *Id.*

Under federal law, however, even when there is sufficient evidence to support the jury verdict, the court may grant a new trial if “the verdict is against the ‘great weight’ of the evidence or ‘it is quite clear that the jury has reached a seriously erroneous result.’” *Venegas v. Wagner*, 831 F2d 1514, 1519 (9th Cir 1987) (citation omitted). In exercising its discretion, the court may weigh the evidence and assess the credibility of witnesses and “need not view the evidence from the perspective most favorable to the prevailing party.” *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir.1987) (citations omitted). If the court “ ‘on the entire evidence is left with the definite and firm conviction that a mistake has been committed,’ ” a new trial may be granted. *Id.* (citing 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 at 48-49 (1973)).

It is arguable that in state court there is no reason for filing an alternative motion for new trial based on the insufficiency of the evidence because it would give the court the option of ordering a new trial rather than entering judgment in favor of the moving party. ORCP 63, however, provides that the motion for JNOV takes precedence over the new trial motion. More importantly, the failure to make an alternative motion for new trial precludes the grant of a new trial after appeal on the same grounds raised in the motion for JNOV. *See Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc.*, 325 Or 46, 932 P2d 1141 (1997) (discussing “raise it or waive it” rule under ORCP 63 and holding that failure to join motion for new trial with motion for JNOV prevented appellate court from remanding for new trial where court “could not tell” whether verdict was based on claim supported by the evidence or one which was not); *but see Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 61 P3d 928 (2003) (rejecting so-called “we can’t tell” rule and holding that a new trial was not appropriate where one allegation of negligence not supported by evidence, and moving party cannot prove that jury based its verdict on unsupported allegation).
f. **Ruling on Motion for JNOV**

A motion for JNOV is deemed denied if it is not “determined” upon within 55 days after the entry of judgment. A motion is determined when the order is entered in the court register. *Ryerce v. Haddock*, 337 Or 273, 95 P3d 1120 (2004).

**NEW TRIAL**

1. **The Rule: ORCP 64 provides:**

   A. **New trial defined.** A new trial is a re-examination of an issue of fact in the same court after judgment.

   B. **Jury trial; grounds for new trial.** A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

      B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

      B.(2) Misconduct of the jury or prevailing party.

      B.(3) Accident or surprise which ordinary prudence could not have guarded against.

      B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

      B.(5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

      B.(6) Error in law occurring at the trial and objected to or excepted to by the party making the application.

   C. **New trial in case tried without a jury.** In an action tried without a jury, a former judgment may be set aside and a new trial granted on motion of the party aggrieved on any grounds set forth in section B. of this rule where applicable. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
D. Specification of grounds of motion; when motion must be on affidavits or declarations. In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated shall be considered or regarded by the court. When the motion is made for a cause mentioned in subsections (1) through (4) of section B. of this rule, it shall be upon affidavit or declaration setting forth the facts upon which the motion is based. If the cause is newly discovered evidence, the affidavits or declarations of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction.

E. When counteraffidavits or counterdeclarations are allowed; former proceedings considered. If the motion is supported by affidavits or declarations, counteraffidavits or counterdeclarations may be offered by the adverse party. In the consideration of any motion for a new trial, reference may be had to any proceedings in the case prior to the verdict or other decision sought to be set aside.

F(1) Time of motion; counteraffidavits or counterdeclarations; hearing and determination. A motion to set aside a judgment and for a new trial, with the affidavits or declarations, if any, in support thereof, shall be filed not later than 10 days after the entry of the judgment sought to be set aside, or such further time as the court may allow. When the adverse party is entitled to oppose the motion by counteraffidavits or counterdeclarations, such party shall file the same within 10 days after the filing of the motion, or such further time as the court may allow. The motion shall be heard and determined by the court within 55 days from the time of the entry of the judgment, and not thereafter, and if not so heard and determined within said time, the motion shall conclusively be deemed denied.

F.(2) Effect of notice of appeal. A motion for new trial filed within the time limit prescribed in subsection (1) of this section may be filed notwithstanding that another party has filed notice of appeal in the case and the trial court may decide the motion notwithstanding that notice of appeal has been filed. If a party files a motion for new trial after notice of appeal has been filed, the moving party shall serve a copy of the motion on the appellate court. If the trial court decides the motion by order, the moving party shall file a copy of the order in the appellate court within seven days of the date of entry of the order. Any necessary modification of the appeal required by the order shall be pursuant to rule of the appellate court.

G. New trial on court's own initiative. If a new trial is granted by the court on its own initiative, the order shall so state and shall be
made within 30 days after the entry of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case.

2. Procedural Considerations

   a. Timing of the Motion

      A motion for new trial is subject to the same requirements and time limitations as a motion for JNOV, viz., it must be filed within ten days after entry of judgment. The motion is deemed denied if not ruled upon within 55 days.

   b. Relation to JNOV

      If a party moves for JNOV but does not move for a new trial in the alternative, that party may not seek a new trial on appeal with respect to the issue raised in the JNOV. See, e.g., Goodyear Tire & Rubber Tire & Rubber Co. v. Tualatin Tire & Auto, 325 Or at 53 (failure to move in alternative for new trial operated as waiver of remedy of new trial with respect to error at issue in motion for JNOV); Shoup v. Wal-Mart Stores, Inc., 335 Or at 177. This is a peculiar rule and one that rarely applies, but a prudent practitioner should evaluate whether it is appropriate to make an alternative motion for new trial when filing a motion for JNOV.

   c. Prior Objection in Trial Court: Punitive Damages

      Generally speaking, a motion for new trial can only be made based on an error occurring at trial that was brought to the attention of the trial court. See Schacher v. Dunne, 109 Or App 607, 820 P2d 865 (1991) cert denied 313 Or 74 (1992) (error that is not preserved cannot properly form basis for motion for new trial.) Similarly, a motion for new trial does not preserve error for appeal that has not been raised during trial.

      However, any error occurring post-trial, including an award of constitutionally excessive punitive damages, must be raised and preserved with a motion for new trial. See Parrott v. Carr Chevrolet, Inc., 331 Or 537, 558 n 14, 17 P3d 473 (2001). But see Strawn v. Farmers Ins. Co., 350 Or 521, 256 P3d 100 (2011) (suggesting without deciding that additional measures must be taken to preserve argument that punitive damages award is constitutionally excessive). See also Barrett v. Warrington, 60 Or App 406, 653 P2d 1020 (1982) (a defendant's motion for a new trial, based on the grounds that there was insufficient evidence to support the verdict for punitive damages, could not be granted because the defendant had not raised the issue during the trial.)

   d. Relationship to Summary Judgment

      A summary judgment is not a judgment from which a new trial may be granted. Ass'n of Unit Owners of Timbercrest Condos. v. Warren, 352 Or 583, 585, 288 P.3d 958 (2012) (overruling Carter v. United States National Bank of Oregon, 304 Or 538, 747 P2d 980 (1987)).
TACTICAL CONSIDERATIONS AND ARGUMENT STRATEGIES:  
JNOV AND NEW TRIAL

1. Should You File a Motion for JNOV/New Trial

   In determining whether to file a motion, consideration should be given to the cost of the motion, the likelihood of success and the possibility that it might give the court or the opposing party an opportunity to cure an error. See, e.g., Lutz v. State by and through Carey, 130 Or App 278, 881 P2d 171 (1994) (court must indicate basis of OEC 403 ruling). Again, a motion for JNOV or new trial is not necessary to preserve any issue for appeal that arose during trial, and the motion should be filed only if there is some chance of success or other tactical advantage which may be gained by filing the motion. See also ORS 19.255(2) (extension of appeal deadlines by filing of motion for JNOV). Except in the context of an award of punitive damages or an error occurring after the verdict, a motion for new trial is similarly “elective.”

2. Motion Practice

   A motion for JNOV/new trial must be in writing and otherwise satisfy the requirements of ORCP 14 and the applicable local rules. If the motion is based on the inadequacy or conclusiveness of the evidence as opposed to the failure to state a claim or defense, then the motion should be supported with portions of the transcript.

3. Argument

   a. Who Should Argue the Motion

      It is often the case that appellate counsel is brought in to argue post-trial motions. In determining who should argue the motion, consideration should be given to various factors including the complexity of the motion, the availability of a transcript and the need for a “fresh face.”

   b. What Can be Argued

      A motion for JNOV is, in effect, a re-asserted motion for directed verdict, and counsel may not move after trial for a JNOV on a basis that was not raised in its motion for directed verdict. Garner, supra; Vancil v. Poulson, 236 Or 314, 388 P2d 444 (1964). This does not mean that a prior motion for directed verdict cannot be made better or more complete on motion for JNOV.

   c. Why Bother

      Because a court may be willing to revisit a hastily made motion for directed verdict when it has additional argument or a black-and-white copy of the transcript. For example, a court may be willing to revisit a ruling allowing the admission of evidence where it is clear after trial that the offering party failed to establish a foundation for the evidence or failed to prove the existence of an exception to a rule of exclusion. See, e.g., Holmes v. Morgan, 135 Or App 617, 899 P2d 738 (1995) (absent inadmissible hearsay evidence, there was no evidence to support claim and court erred in denying directed verdict); Siegner v. Interstate Production Credit Assn., 109 Or App 417, 820 P2d

d. How Should It Be Argued

1. Tell ‘Em What You’re Going to Tell ‘Em

Argument generally should follow the format of expository prose: a topic sentence, an explanation and a conclusion – or tell them what you are going to tell them; tell them; tell them what you told them.

2. Only the Facts

The trial court is familiar with the facts of the case and is only interested in the hearing why certain facts do not support a claim or defense in the case. Counsel should be intimately familiar with the record and should have transcript cites for the judge. It is also important to be familiar with the “inference standard” – what inferences permissibly may be drawn from the evidence and what inferences may not. See, e.g., Ostrander v. Alliance Corporation, 181 Or App 283, 45 P3d 1031 (2002) (explaining permissible inferences to be drawn from the evidence).

3. Know the Cases

Know the standard for granting JNOV; be candid about the standard and know all of the cases that bear on the issue that gives you a right to judgment in favor of your client. Do not misstate or overstate the holdings of cases, and always make sure they have not been overruled. This seems like an obvious point, but it is one that is often overlooked.

4. Quit Talking

The purpose of a motion for a JNOV is to clarify and emphasize issues already made in a motion for directed verdict. This is déjà vu for the trial court, and prolonged argument is not necessary and usually annoys the court.

5. Listen to the Questions

Answer the question asked by the court - - and not a reformulation of that question. Do not dodge or evade questions.

6. Be Polite and Keep a Straight Face

Never show your annoyance when questioned by the court, and always treat the judge with respect.

7. Argue to the Court and Not with Your Opponent

All arguments should be made to the court. Ask for permission to respond to your opponent’s argument or wait for a cue from the court. Rebuttal should be rebuttal and not new arguments. Never make personal attacks on the opposing lawyer.
8. **Do Not Make Jury Arguments**
   
   This is not “queen for a day.” The court is not determining which party is more deserving but is rather determining if there is sufficient evidence in the record to support a claim or defense.

9. **Relax and Don’t Feel Defeated**
   
   A ruling on a motion for directed verdict is reviewed for errors of law. *See Buckner v. Home Depot USA, Inc.*, 188 Or App 307, 71 P3d 150 (2003). So even if you “boot” the motion, the Court of Appeals will look at the record and determine for itself whether there is sufficient evidence to support a claim or defense. Losing a motion for JNOV will not affect your appeal, except that it will affect the cost of your appeal, *vis.* you will have to pay for the supersedeas bond.

10. **Do Not Accidentally Waive Bases for Appeal**
    
    It is also technically possible that a poorly argued motion for JNOV may waive a basis for reversal properly raised at trial – or at a minimum, an argument on appeal that an issue had been waived in the trial court. If there is any fear of waiver, do not raise the weaker bases for reversal. Keep them alive and weed them out before appeal rather than being forced to abandon them by the trial judge. The failure to argue a potential basis for reversal which was properly raised in a motion for directed verdict does not amount to a waiver. *State v. Hitz*, 307 Or 183, 766 P2d 373 (1988) (failing to press issue in oral argument does not amount to a waiver).
UTCR 5.100 SUBMISSION OF PROPOSED ORDERS OR JUDGMENTS

(1) Any proposed judgment or proposed order submitted in response to a ruling of the court must be:
   (a) served on opposing counsel not less than 3 days prior to submission to the court, or
   (b) accompanied by a stipulation by opposing counsel that no objection exists as to the form of the judgment or order, or
   (c) mailed to an unrepresented party at the party's last known address not less than 7 days prior to submission to the court, or
   (d) presented in open court with the parties present.
**ORCP 68 C (4)(a)**

A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment, file a statement for attorney fees.

**UTCR 5.080 STATEMENT FOR ATTORNEY FEES, COSTS, AND DISBURSEMENTS**

In civil cases, the statement for attorney fees, costs, and disbursements must be filed in substantially the form set forth in Form 5.080 in the UTCR Appendix of Forms.
FORM 5.080

UTCR 3.150 NO REACTION TO JURY VERDICT

After the jury returns a verdict, all persons present in the courtroom must remain seated until the jury has left the room and must refrain from visibly or audibly reacting to the verdict in a manner which disrupts the dignity of the courtroom.
ORCP 59 G (3) Polling the jury.

When the verdict is given, and before it is filed, the jury may be polled on the request of a party, for which purpose each juror shall be asked whether the verdict is the juror’s verdict. If fewer jurors answer in the affirmative than the number required to render a verdict, the jury shall be sent out for further deliberations.

SAME NINE RULE:

“The minimum number of jurors required for a valid verdict must be the same jurors voting on each separate issue demanding resolution.”

ORCP 59 G (4) Informal or insufficient verdict.

If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.

Ch 7A—Post-Trial Motion Practice

**Effective Motion Practice**

**ORCP 59 G (4) Informal or insufficient verdict.**

If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further.


**ORCP 59 G (5) Completion of verdict; form and entry.**

When a verdict is given and is such as the court may receive, the clerk shall file the verdict. Then the jury shall be discharged from the case.
ORCP 61 Verdicts, general and special.

A General verdict.

A(2) When a general verdict is found in favor of a party asserting a claim for the recovery of money, the jury shall also assess the amount of recovery. A specific designation by a jury that no amount of recovery shall be had complies with this subsection.

Robin v. Knuth, 108 Or App 207, 815 P2d 704 (1991) (Jury may return a verdict for the plaintiff and at the same time award the plaintiff no damages under subdivision (A)(2)).

ORCP 61 Verdicts, general and special.

B Special verdict.

The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires such party demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
ORCP 61 Verdicts, general and special.

C General verdict accompanied by answer to interrogatories.

* * * * *

When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and the answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

OBJECTIONS TO THE FORM OF JUDGMENT

- Limited Judgment Mislabeled as General Judgment
Chapter 7A—Post-Trial Motion Practice

OBJECTIONS TO THE FORM OF JUDGMENT

ORS 18.112 Correction of designation of judgment as general judgment

(1) Upon motion of any party, the court may enter a corrected judgment under ORS 18.107 that changes the designation of a judgment from a general judgment to a limited judgment if the moving party establishes that:

(a) Except by operation of ORS 18.082 (3), the judgment does not decide all requests for relief in the action other than requests for relief previously decided by a limited judgment or requests for relief that could be decided by a supplemental judgment; and

(b) The judgment was inadvertently designated as a general judgment under circumstances that indicate that the moving party did not reasonably understand that the requests for relief that were not expressly decided by the judgment would be dismissed.

OBJECTIONS TO THE FORM OF JUDGMENT

Damage Exceeds Tort Cap or Prayer


- Propose a form of judgment capped by the prayer. ORCP 67 C(2): “Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.” *Laursen v. Morris*, 103 Or App 538, 547, 799 P2d 648 (1990), rev den, 311 Or 150, 806 P2d 128 (1991).
ORCP 62 B: Proposed Findings; Objections.

Within 10 days after the court has made its decision, any special findings requested by any party, or proposed by the court, shall be served upon all parties who have appeared in the case and shall be filed with the clerk; and any party may, within 10 days after such service, object to such proposed findings or any part thereof, and request other, different, or additional special findings, whether or not such party has previously requested special findings.

Any such objections or requests for other, different, or additional special findings shall be heard and determined by the court within 30 days after the date of the filing thereof; and, if not so heard and determined, any such objections and requests for such other, different, or additional special findings shall conclusively be deemed denied.

OBJECTIONS TO FINDINGS OF FACT

- Findings are not supported by evidence;
- Findings are unresponsive to or outside the issues framed in the pleadings, or
- Findings do not support conclusions of law on which the judgment is based. *Ierulli v. Lutz Development Co.*, 73 Or App 311, 315, 698 P2d 504 (1985).
ORCP 62 E: Necessity.

Requests for findings of fact or objections to findings are not necessary for purposes of appellate review.

*McDougal v. Griffith*, 156 Or App 83, 87-88, 964 P2d 1135 (1998), *rev den*, 328 Or 330 (1999) (where trial court's letter opinion, which appellant received a month before entry of judgment, indicated that court intended to award damages in excess of the prayer, in violation of ORCP 67 C(2), and appellant raised no objection before entry of judgment, error was not preserved.)

*Peiffer v. Hoyt*, 339 Or 649, 656, 125 P3d 734 (2005) (a party may challenge sufficiency of evidence to support judgment in bench trial even where the party failed to object to findings of fact.)

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**Notice of Entry of Judgment**

May 8, 2007

Received May 8, 2007

RECEIVED
May 8, 2007
RECEIVED
THE COURT

NOTICE OF ENTRY OF JUDGMENT

A Judgment was entered in the register of the Court in the above-noted case on May 4, 2007.

Judgment Dismissal Limited

was NOT docketed in the Circuit Court Judgment docket.

This notice is sent in accordance with ORCP 70B.

Note: Docketing a judgment in the circuit court judgment docket is necessary for purposes of creating a lien on real property when there is a judgment for the payment of money.

Client(s) of Attorney: MARVIN VINDOOS INC

CC:
PETER J VITALENIK
BRUCE E GILBERT
LAWRENCE PAUL BLICK
RICHARD J SHREEDON
DAVID B WILES
MICHAEL KENNEDY
**ORCP 68 C(4)(b) Objections.**

A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be served within 14 days after service on the objecting party of a copy of the statement. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

If objections are filed, the trial court must hold a hearing unless the hearing is waived. ORCP 68 C(4)(b).

*See, e.g., Werbowski v. Red Shield Ins. Co.*, 221 Or App 271, 190 P3d 406 (2008). (Although the court failed to hold a hearing to consider plaintiffs' objections to the court's award of attorney fees, as required by ORCP 68 C, the plaintiffs invited any error by asking the court to contact them ‘should a hearing be necessary,’ thereby indicating that the court could act on their objections without conducting a hearing).
JNOV and New Trial: General Considerations

Must be filed within ten days after entry of judgment


Generally must be based on errors raised at trial.
Generally do not preserve issues for appeal.
Generally just unnecessary whining.
ORCP 64: New Trial.

B. Jury trial; grounds for new trial. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B.(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having fair trial.

B.(2) Misconduct of the jury or prevailing party.

B.(3) Accident or surprise which ordinary prudence could not have guarded against.

B.(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B.(5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B.(6) Error in law occurring at the trial and objected to or excepted to by the party making the application.

Newly Discovered Evidence and Jury Misconduct

Thomas v. Dad’s Root Beer, 225 Or 166, 356 P2d 418, adhered to 225 Or 172 (1960):
"The rule that the assignment of error of a denial of a motion for a new trial will not be reviewed on appeal has a well-recognized exception. Where the motion for a new trial is based upon misconduct of a juror, which did not come to the knowledge of the party making the motion for a new trial until after the verdict is returned, or where there has been newly discovered evidence which was not known at the time of trial, the denial of a motion for a new trial will be considered on appeal." 225 Or at 169-70 (citing State v. Evans, supra; Benson v. Birch, supra; Sullivan v. Carpenter, 184 Or 485, 199 P2d 655 (1948); and Klemguard v. Wade Seed Co., supra.)
Punitive Damages

Error in awarding constitutionally excessive punitive damages does not arise until after verdict, and the error must be raised and preserved with a motion for new trial.

*See Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 558 n 14, 17 P3d 473 (2001). *But see Strawn v. Farmers Ins. Co.*, 350 Or 521, 256 P3d 100 (2011) (suggesting without deciding that additional measures must be taken to preserve argument that punitive damages award is constitutionally excessive).

Summary Judgment

JNOV

The Rule: ORCP 63

A. Grounds. When a motion for a directed verdict, made at the close of all the evidence, which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

B. Reserve ruling on directed verdict motion. In any case where, in the opinion of the court, a motion for a directed verdict ought to be granted, it may nevertheless, at the request of the adverse party, submit the case to the jury with leave to the moving party to move for judgment in such party’s favor if the verdict is otherwise than as would have been directed or if the jury cannot agree on a verdict.
The Rule: ORCP 63

C. Alternative motion for new trial. A motion in the alternative for a new trial may be joined with a motion for judgment notwithstanding the verdict, and unless so joined shall, in the event that a motion for judgment notwithstanding the verdict is filed, be deemed waived. When both motions are filed, the motion for judgment notwithstanding the verdict shall have precedence over the motion for a new trial, and if granted the court shall, nevertheless, rule on the motion for a new trial and assign such reasons therefore as would apply had the motion for judgment notwithstanding the verdict been denied, and shall make and file an order in accordance with said ruling.

If you do not join your JNOV with a motion for new trial, the motion for new trial is deemed waived as to those claims raised in the JNOV.

Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc., 325 Or 46, 932 P2d 1141 (1997) (discussing “raise it or waive it” rule under ORCP 63 and holding that failure to join motion for new trial with motion for JNOV prevented appellate court from remanding for new trial where court “could not tell” whether verdict was based on claim supported by the evidence or one which was not.)
JNOV and New Trial: Tactical Considerations and Argument Strategies

- Who should argue the motion
- What can be argued
- Why bother?
- How should it be argued?
  - Tell 'em what you're going to tell 'em.
  - Only the facts.
  - Know the cases.
  - Quit talking.
  - Listen to the questions.
  - Be polite, and keep a straight face.
  - Argue to the Court and not with your opponent.
  - Do not make jury arguments.
- Relax, and don’t feel defeated.

Dude, you lost!

Post Trial Motion Practice

Jay W. Beattie
Lindsay Hart, LLP
T 503.226.7677
jbeattie@lindsayhart.com
Chapter 7B

Post-Trial Motions

Shenoa Payne
Richardson Wright LLP
Portland, Oregon

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Chapter 7B—Post-Trial Motions

Attorney Fee Petitions

I. ORCP 68

C(4) Procedure for seeking attorney fees or costs and disbursements. The procedure for seeking attorney fees or costs and disbursements shall be as specified in this subsection.

C(4)(a) Filing and serving statement of attorney fees and costs and disbursements. A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of a judgment:

C(4)(a)(i) file with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements that explains the application of any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and

C(4)(a)(ii) serve, in accordance with Rule 9 B, a copy of the statement on all parties who are not in default for failure to appear.

II. Right to Seek Attorney Fees

A party is not entitled to seek attorney fees in the absence of a statute or contractual provisions that authorizes such an award. DeYoung v. Board of Parole and Post Prison Supervision, 332 Or 266, 27 P3d 110 (2001). A party must have alleged the facts, statute, or rule that provides the basis for the award of fees in a pleading filed by the party. ORCP 68 C(2)(a). The purpose of this rule is to provide the opposing party with notice that they may be held liable for attorney fees and to provide such party the opportunity to contest availability of fees before proceeding to a trial on the merits. McNeely v. Hiatt, 138 Or App 434, 909 P2d 191, on recons, 142 Or App 522, rev den, 324 Or 394.

III. The Statement for Attorney Fees, Costs and Disbursements

A. Timeline: Not later than 14 days after entry of judgment. ORCP 68 C(4)(b).

The court may, in its discretion and upon any terms that may be just, allow a statement for attorney fees to be filed and served after the 14-day deadline. ORCP 68 C(4)(d)(ii).

B. Format: See UTCR Form 5.080

PRACTICE TIP: Specifically request special findings of fact and conclusions of law in the caption of the pleading pursuant to ORCP 68(4)(c)(e).
C. Petition Must Include the Source that Entitles You to Attorney Fees:

Your petition must cite the source that entitles you to seek attorney fees – statute, contract, or other legal source.

D. Exhibits:

- Exhibit 1: Detailed billing statement
- Exhibit 2: Memorandum of law
- Exhibit 3: Litigation expenses
- Exhibit 4: ORCP 68 Cost bill
- Exhibit 5: Anticipated "fees for seeking fees"

1. Detailed Billing Statement (Exhibit 1).

   a) Avoid Block Billing

   Block billing is the practice of failing to allocate time between work devoted to particular clients or particular tasks. Block billing may lead to the inability of the court to determine which time was spent on recoverable claims versus unrecoverable claims. See Makarios-Oregon v. Ross Dress-for-Less, Inc., 293 Or App 732, --- P3d --- (2018) ("the practice of block billing is disfavored in Oregon and is difficult to reconcile with the obligation to provide detailed statements in support of fee requests").

   PRACTICE TIP: A prevailing party may recover attorney fees even for claims in which the party did not prevail, if there are "common issues among the claims." Freedland v. Trebes, 986 P2d 630, 632 (1999). In such cases, it is not necessary to apportion the fees. However, it is still wise to avoid block billing.

   b) Strategizing with Co-Counsel is Recoverable

   In Oregon, when multiple attorneys in an office work on a matter, if it no per se unreasonable when it is a "team approach," – that is, the attorneys are engaging strategy sessions and working together to develop key strategies and make final decisions for the client. See State ex rel. English v. Multnomah County, 231 Or App 286, 300 (2009).

2. Memorandum of Law (Exhibit 2)

   a) The Lodestar Method

   Oregon courts determine an attorney fee based on the lodestar calculation. Under the "lodestar" method, the attorney is awarded a fee based on a reasonable hourly rate, multiplied by a reasonable number of hours devoted to work on the case, with certain adjustments potentially made such as the risk of loss and the quality of the attorney's work. Strawn v. Farmers Ins. Co. of Oregon, 353 Or 210, 217 (2013).
b) Statutory Factors in Determining Reasonableness of Requested Fees

ORS 20.075 provides the "factors" for considering the reasonableness of the amount of attorney fees. In cases where fees are mandatory by statute or other source, courts consider the factors under subsection (1) and (2) in determining the amount of fees. In cases where the court has discretion to award fees, the court first considers the factors under subsection (1) to determine whether to award fees, and then considers the factors under both subsections (1) and (2) in determining the amount of fees.

ORS 20.075. Factors for awarding of attorney fees.

(1) A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:

(a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

(b) The objective reasonableness of the claims and defenses asserted by the parties.

(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.

(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.

(f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.

(g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.

(h) Such other factors as the court may consider appropriate under the circumstances of the case.

(2) A court shall consider the factors specified in subsection (1) of this section in determining the amount of an award of attorney fees in any case in which an award of attorney fees is authorized or required by statute. In addition,
the court shall consider the following factors in determining the amount of an award of attorney fees in those cases:

(a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.

(b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.

(c) The fee customarily charged in the locality for similar legal services.

(d) The amount involved in the controversy and the results obtained.

(e) The time limitations imposed by the client or the circumstances of the case.

(f) The nature and length of the attorney's professional relationship with the client.

(g) The experience, reputation and ability of the attorney performing the services.

(h) Whether the fee of the attorney is fixed or contingent.

3. **Litigation Expenses – as Part of the Attorney fee Award (Exhibit 3)**

   a) **Litigation Expenses are part of the attorney fee award and are distinct from ORCP 68 Costs and Disbursements**

   Litigation expenses are expenses awarded as part of the attorney fee award when specially billed to the client, properly document, and reasonable. *Willamette Production Credit Assoc., 75 Or App. at 159; see also Strawn v. Farmers Ins. Co. of Oregon, 233 Or App 401, 416 (2010).*

   b) **Excludes expenses expressly not allowed under ORCP 68**

   Although litigation expenses are distinct from costs and disbursements under ORCP 68, costs expressly prohibited under ORCP 68, such as deposition expenses, are not recoverable as litigation expenses. *Robinowitz v. Pozzi, 127 Or App 464, 470 (1994).*

4. **Cost Bill – Detailed Statement of Costs and Disbursements (Exhibit 4)**

   ORCP 68 B entitles the prevailing party to costs and disbursements. The award of costs and disbursements is discretionary. *See ORCP 68 B ("costs and disbursements shall be allowed*
to the prevailing party, unless these rules or other rule or statute direct that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs ").

PRACTICE TIP: Many other statutes could affect a party's entitlement to, or the amount of, recoverable costs. For example, ORS Chapter 20 contains examples of provisions dealing with costs. See ORS 20.190(1)(b) (providing for prevailing party fee).

a) Reasonable and necessary expenses

ORCP 68 A(2) defines costs and disbursements as "reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services."

b) Allowed costs and disbursements

- Prevailing party fee — ORS 20.190(1)(b)
- Trial Witness Fees – ORCP 68 A(2); see ORS 44.415 (outlining witness fees)
- Other witness fees – Stoll v. Curl, 275 Or 487, 491 (1976); Spencer v. Peterson, 41 Or 257, 262 (1902); Luckey v. Lincoln County, 42 Or 331 (1902).
- Expert witnesses (only if permitted by statute). See, e.g., ORS 20.098
- Trial and jury fee. ORS 21.270
- Transcript fee. ORS 21.470
- Circuit court filing fee. ORS 21.110
- Service of summons. ORCP 68 A(2); ORCP 7 E.
- Trial exhibits. ORCP 68 A(2).

c) Costs Not Allowed

- Deposition expenses not expressly allowed by statute. ORCP 68 A(2).

5. Anticipated Fees for Seeking Attorney Fees (Exhibit 5)


IV. Declarations in Support of the Petition for Attorney Fees

A. Declaration by Lead Litigation Counsel

- Explains why fees are reasonable under statutory factors
- Explains where cut fees and billing practices to show reasonableness
- Explains any other potentially relevant factors as to why your fees might be unusually high, such as refusal to engage in settlement by the other side, scorched-earth litigation tactics, unusual needs of client, etc.
B. Declaration by Each Counsel that billed time on the case:

- Educational experience
- Legal experience relevant to the case (trial experience, motions experience, etc)
- Successful experience in litigation
- Previous awards of attorney fees
- States involvement in the bar, speaking experience, etc. (speaks to reputation and respect among the bar)
- Publications, awards, recognition
- Explanation of hourly rate and why it is reasonable in light of experience and OSB Economic Bar Survey

PRACTICE TIP: The OSB Economic Bar Survey has its limitations. It may not accurately cover your practice area or may be outdated. If your rate is above the average or median in the OSB Economic Survey, make sure you justify your rate by explaining why your experience, education, and reputation justifies a departure, or that your practice area is unique and not accurately covered by the survey. If the Survey is outdated, you can use the consumer price index (CPI) from the United States Department of Labor, Bureau of Labor and Statistics, to demonstrate rates of inflation that should apply to your hourly rate.

C. Expert Declaration(s): other attorneys in the community that practice in your field that can speak to the reasonableness of your rates and the time billed

- Establishes reasonableness of attorney hours spent on case and fees charged based on the attorneys reputation, experience, and level of expertise.
- Establishes reputation of the attorneys in community
- May be able to establish any unique nature of case, skill required, or risk involved

PRACTICE TIP: If you are permitted to recover expert witness fees, you should be able to recover your expert fees in support of your petition for attorney fees. See Emerald People’s Utility Dist., 104 Or App at 507.

V. Attorney Fee Enhancements (Multipliers)

An attorney fee enhancement may be justified to account for the risk of nonpayment in a contingency fee case. Strawn v. Farmers Ins. Co., 353 Or 210, 226 (2013). Fee multipliers may also be justified to account for "exceptional success" of the litigation." Strunk v. Pub. Employees Ret. Bd., 343 Or 226, 246 (2007). Factors such as "the difficulty and complexity of the issues involved in the case, the values of the interests at stake, as well as the skill and professional standing of the lawyers involved" support an enhancement of fees. Id.
OBJECTIONS TO ATTORNEY FEE PETITIONS

I. ORCP 68

ORCP 68 C(4)(b) Filing and serving objections. A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by a written objection to the statement. The objection and supporting documents, if any, shall be filed and served within 14 days after service on the objecting party of a copy of the statement. The objection shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. The objecting party may present affidavits, declarations, and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

II. Procedural Requirements

A. Timeline: The objections must be filed and served within 14 days after service.

B. Format: The objections should include affidavits, declarations, and other evidence, and address the factors in ORS 20.075, ORCP 68, and any other statutory factors.

III. Substantive Requirements

A. Specificity.

Objections shall be "specific." Oregon courts have emphasized that parties objecting to the reasonableness of a fee should make particularized objections to fee petitions. See Computer Concepts, Inc. v. Brandt, 141 Or App 275, 280 (1996) (Haselton, J., concurring) ("Just as trial courts are enlightened by particularized objections to fee petitions, so are we.").

Unless the objecting party specifically identifies each problematic or unreasonable billing entry, a court will not comb the entire billing statement to determine whether and how the proposed fees are unreasonable. See State ex rel. English v. Multnomah Cty., 231 Or App 286, 297 (2009) (when county did not explain why or how specific entries evinced systematic overbilling at unreasonable rates, court denied its objections).

B. Objections Supported by Disinterested Expert:

Oregon courts have emphasized that parties objecting to the reasonableness of a fee should support their overall objections with an opinion by a disinterested expert. See Computer Concepts, Inc. v. Brandt, 141 Or App 275, 280 (1996) (Haselton, J., concurring) ("Just as trial courts benefit from expert opinions as to the reasonableness of fees, so do we."); State ex rel. English v. Multnomah Cty., 231 Or App 286, 297 (2009) (when county failed to submit an affidavit from a disinterested expert corroborating its generic assertion, court denied its objections).
REMITTITUR

I. Remittitur:

A motion for remittitur is the proper procedural mechanism for seeking to reduce a jury's verdict. The motion must be made after the jury's verdict, and the jury cannot be made aware of the existence of any statutory cap on damages. See ORS 31.710(4); Multnomah County Motion Judges Consensus Statement, 5 (Aug 2018).

II. "Excessive" Verdicts

Reexamination Clause: The "No Evidence" Standard

Article VII (Amended), section 3, of the Oregon Constitution provides, in part:

"In action at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

The purpose of that constitutional clause is "to eliminate, as an incident of a jury trial in this state, the common law power of a trial court to re-examine the evidence and set aside a verdict because it was excessive or in any other respect opposed to the weight of the evidence." Van Lom v. Schneiderman, 187 Or 89, 99 (1949). It prohibits a trial court from granting a new trial because the court concluded that the verdict was contrary to the weight of the evidence.

III. Statutory Caps on Damages

The legislature has decided to place statutory limits of liability on certain causes of action, including tort actions against public bodies, see ORS 30.285, and noneconomic damages in certain cases. See ORS 31.710(1). A jury verdict may be reduced to the statutory cap on damages so long as the reduction in damages does not violate any constitutional rights of the plaintiff.

A. Re-examination Clause:

Although the "no evidence" standard applies to the trial courts, the legislature is permitted to define the nature and extent of damages generally available in certain classes of cases. Horton v. OHSU, 359 Or 168, 244 (2016). Applying a statutory limit on damages is not "reexamining" a fact found by the jury under the reexamination clause. Horton, 359 Or at 253.

B. Right to Jury Trial -- Article I, Section 17

Article I, Section 17 of the Oregon Constitution provides:

"In all civil cases the right of Trial by Jury shall remain inviolate."
Article I, Section 17 guarantees litigations a "procedural" right to have a jury rather than a judge decide those common-law claims and defenses that customarily were tried to a jury when Oregon adopted its constitution in 1857, as well as those claims and defenses that are "of like nature." *Horton v. OHSU*, 359 Or 168, 249 (2016). The legislature's decision to cap or limit damages does not violate that procedural right to a jury trial. *Id.*

C. Remedy Clause – Article I, Section 10

*Article I, Section 10 of the Oregon Constitution* provides:

"No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

In *Horton*, the Oregon Supreme Court "reexamined at length whether the remedy clause * * * provides a substantive guarantee of a remedy in certain cases." *Rains v. Stayton Builders Mart, Inc.*, 289 Or App 672, 677 (2018). The court answered that question affirmatively, concluding that the remedy clause "limits the legislature's substantive authority to alter or adjust a person's remedy for injuries to person, property, and reputation." *Horton*, 359 Or at 173.

In doing so, the court overruled *Smothers v. Gresham Transfer, Inc.*, 332 Or 83 (2001), and reinvigorated pre-*Smothers* cases that had applied Article I, section 10. *Horton*, 359 Or at 188, 197. The court also identified three general categories of legislation that it had previously considered in determining the limits that the remedy clause places on the legislature:

"(1) legislation that did not alter the common-law duty but denies or limits the remedy a person injured as a result of that breach of duty may recover;

"(2) legislation that sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others (a quid pro quo);

"(3) legislation that modified common-law duties or eliminated a common-law cause of action when the premises underlying those duties and causes of action have changed."


*Horton* specifically addressed liability limits under the Oregon Tort Claims Act (OTCA). The court determined that those limits were part of a statutory scheme intended to extend benefits to some persons while adjusting benefits to others. That is, the limits fell within the second category of legislation – a quid pro quo. Therefore, the statute did not violate the remedy clause. *Horton*, 359 Or at 225. Post-*Horton* cases involving the OTCA have followed *Horton* and found that in light of the *quid pro quo* there was no violation of the remedy clause. *See Ortega v. Martin*, 293 Or App 180, 195-196 (2018).
The Oregon appellate courts in post-*Horton* cases involving private entities and therefore not involving the OTCA have held that there is no quid pro quo and, in turn, have held that reductions in jury verdicts have violated the remedy clause when they have left the plaintiff with a "paltry fraction" of the damages that the plaintiff sustained. See, e.g., *Busch v. McInnis Waste Systems, Inc.*, 292 Or App 820, 824 (2018) (reduction from $10,500,000 to $500,000 in noneconomic damages left the plaintiff without a substantial remedy); *Rains v. Stayton Builders Mart, Inc.*, 289 Or App 672, 690 (2018) (reduction from $2,343,750 to $500,000 in noneconomic damages violated remedy clause); *Vasquez v. Double Press Mfg., Inc.*, 288 Or App 503, 525 (2017) (reducing noneconomic damages from $4,860,000 to $500,000 would have left the plaintiff with a remedy that is only a "paltry fraction" of the damages that he sustained).

IV. Punitive Damages

**Due Process Clause of the Fourteenth Amendment to the United States Constitution:**

Punitive damages awards must comport with due process concerns. Punitive damages violate the due process clause if they are "grossly excessive." *BMW of N. Am., Inc. v. Gore*, 517 US 559, 568 (1996). "Grossly excessive" punitive damages awards are awards that serve no legitimate state purpose and constitute an arbitrary deprivation of property. *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). In order to determine whether an award is "grossly excessive," courts are to consider three "guideposts."

"The first guidepost is the degree to which defendant's conduct is reprehensible. The second guidepost examines the disparity between the punitive and compensatory damages awards, usually in the form of a ratio. The third guidepost compares the punitive damages award to legislatively prescribed civil and criminal penalties for comparable misconduct."


The first guidepost – reprehensibility – is the most important in determining the reasonableness of a punitive damages award. *Id.* at 539. The court determines reprehensibility by the following factors:

“the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. **The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so
reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”

_Campbell_, 538 US at 419 (citations omitted).

The second guidepost – the "ratio," is of limited assistance when the compensatory damages award is small and does not already serve an admonitory function. _Hamlin_, 349 Or at 536-37; see also _Lithia Medford LM, Inc. v. Yovan_, 254 Or App 307, 329, 295 P3d 642, 653–54 (2012) (noting that "The problem with rigidly applying rules concerning ratios in small-damage cases is illustrated by this case: an incremental change in the amount of compensatory damages awarded in small-damage cases will result in a large change in the amount of permissible punitive damages."). Thus, the Oregon courts warn against rigidly adhering to a single digit ratio in small damages cases. See, e.g., _Hamlin_, 349 Or at 543 (ratio of 22:1 did not violate due process when compensatory damages were $6,000); _Lithia Medford LM, Inc._, 254 Or App at 329 (ratio of 200 to 1 between punitive damages and compensatory damages did not violate due process when compensatory damages were only $500).

The third guidepost – comparable sanctions requires three steps: courts must (1) identify comparable civil or criminal sanctions; (2) consider how serious the comparable sanctions are, relative to the universe of sanctions that the legislature authorizes to punish inappropriate conduct; and (3) evaluate the punitive damage award in light of the relative severity of the comparable sanctions. _Schwarz v. Philip Morris USA, Inc._, 272 Or App 268, 286 (2015), _rev den_, 358 Or 248 (2015). This guidepost "may militate against a significant punitive damages award if the state's comparable sanctions are mild, trivial, or nonexistent. However, the guidepost will support a more significant punitive damage award when the state's comparable sanctions are severe." _Id._ Courts must exercise care when relying on comparable criminal sanctions in considering this guidepost. _Id._
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR ______________________ COUNTY

__________________________________________  
Plaintiff,  

v.  

__________________________________________  
Defendant.  

CIVIL CASE NO. _________________  

STATEMENT FOR ATTORNEY FEES, COSTS, AND DISBURSEMENTS FOR (PLAINTIFF/DEFENDANT)

The undersigned attorney offers the following facts in support of an award of reasonable and necessary attorney fees, costs, and disbursements:

1. Plaintiff/Defendant is entitled to recover attorney fees, costs, and disbursements pursuant to the following facts, statute or rule:

2. Legal Fees including the number of hours and services provided in this matter by each attorney, clerk, and legal assistant and the hourly rates for each are set forth in detail in Exhibit 1. The total sum of these fees is $__________. Exhibit 1 is summarized as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Hourly Rate</th>
<th>Number of Hours</th>
<th>Fees</th>
</tr>
</thead>
</table>

(Revised 8-1-08)
3. The specific factors supporting an award and the amount of legal fees pursuant to ORS 20.075 or other statute or rule are set forth in Exhibit 2.

4. Litigation expenses billable directly to the client that are not overhead expenses already reflected in the hourly rate for legal services are set forth in detail in Exhibit 3. The total sum of these costs and disbursements is $__________.

5. Costs and disbursements supported by ORCP 68 A(2) or other statute or rule, including the prevailing party fee, are set forth in detail in Exhibit 4. The total sum of these costs and disbursements is $__________.

6. In anticipation of efforts that will be spent in postjudgment proceedings, plaintiff/defendant seeks the additional sum of $__________ as explained more fully in Exhibit 5.

7. In summary, plaintiff/defendant is entitled to an award of reasonable and necessary attorney fees in the sum of $__________, litigation expenses in the sum of $__________, costs and disbursements in the sum of $__________, and postjudgment work in the sum of $__________.

I hereby declare that the above statement, including the information contained in the exhibits to this statement, is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Date ___________________________ Signature ______________________________________

OSB# (if applicable) ______________ Type or print name ____________________________